SPLITTING AND SHARING PENSION ASSETS ON MARRIAGE BREAKDOWN

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I. Introduction

Amendments to *The Pension Benefits Act*[1], which took effect January 1st, 1984, have substantially altered the law governing division of pension assets, and thus settlement of marital property on marriage breakdown. The new law raises many serious concerns for the family law practitioner. My purpose in this comment is to examine the scope and application of the new legislation, and highlight what are believed to be areas of concern.

The legislation and the regulations promulgated under its authority[2] make several changes in the overall scheme of asset sharing between spouses. By way of review, the law affecting pensions on separation was previously defined by the provisions of *The Marital Property Act*[3] and the traditional interpretation[4] of its provisions. Briefly, any rights under a pension plan, whether vested or contingent[5], are deemed to be family assets and sharable equally. Effective sharing may be deferred until the "pensioned" spouse actually retires and becomes a recipient of the benefits provided by the plan[6]. Several concerns remain under this regime, common to the way assets are divided under *The Marital Property Act* generally, and other concerns are raised by the scheme of sharing called for in *George* v. *George*[7]. The enactment now of a further set of rules governing the subject in *The Pension Benefits Act* has provided a stop-gap answer to some of the issues previously left unresolved, but has in turn converted the scheme of sharing pension assets into a two-track system characterized by loose language, uncertain intention and potentially interminable bureaucratic regulation.

What now exists are two separate schemes which overlap to some degree. The earlier, with which family lawyers are most familiar, is that found in *The Marital Property Act.* It applies universally in Manitoba to married spouses, unless they contract out of the applicability of that statute under section 5. It bestows a right to an equal share of the asset[8], and creates an accounting scheme to allow for flexibility in carrying out the division and

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1. S.M. 1975, c. 38, as am. by S.M. 1976, c. 42; S.M. 1977, c. 54; S.M. 1982-83-84, c. 79 (P32).
2. A Regulation Under *The Pension Benefits Act*, Man. Reg. 10/84 (hereinafter referred to as the regulations).
3. S.M. 1978, c. 24, as am. by S.M. 1980, c. 54, s. 11; S.M. 1980-81, c. 26, s. 21; S.M. 1982, c. 17; S.M. 1982-83-84, c. 53 (M45).
4. See for example, *Downey* v. *Downey* (1983), 24 Man. R. (2d) 269 (Q.B.) and *George* v. *George*, *infra* n. 6.
5. The expression "vested" as opposed to "contingent", requires some clarification. As used in *The Marital Property Act* cases, a pension is referred to as "contingent" until a post retirement annuity has commenced, when it is known as "vested". Under *The Pension Benefits Act* and in the language of the pension industry, "vested" has a significantly different meaning. It refers to the maturation of an employee's membership in a plan, and specifically to his attainment of standing to enjoy an inalienable right to the benefits under the plan which have been paid for by the employer (See *The Pension Benefits Act*, s. 21.). It is not unusual and is indeed normal for a working employee to have fully vested pension rights in *The Pension Benefits Act* sense, but not be vested in *The Marital Property Act* meaning of the term.
6. *George* v. *George* (1983), 23 Man. R. (2d) 89 (C.A.).
7. *Ibid.*
8. *The Marital Property Act*, s. 12.

sharing of assets. The pension asset, or any right under a pension plan, is by definition a family asset[9], and thus within the restricted scope of the judicial discretion to vary from the norm of equal sharing[10], although the share to be received may be deferred[11].

Section 3 of *The Pension Benefits Act* reads:

> In the event of conflict between any provision of this Act and any provision of any other Act, the provision of this Act prevails,

thus specifically enabling the sharing scheme of *The Pension Benefits Act* to override *The Marital Property Act* in respect to its application to pension assets. It would appear that the benefits accruing to an individual under any pension plan regulated by *The Pension Benefits Act,* if they are shared in accordance with the provisions of that statute, would fall within section 9 of *The Marital Property Act* as being an "asset that has already been shared equally between spouses" and thus exempt from any claim for further sharing under *The Marital Property Act.* Assuming that is correct, *The Marital Property Act* would then not apply to that particular asset, notwithstanding section 8.1 of that Statute[12]. This conclusion is the author's own hypothesis. The question whether section 9 of *The Marital Property Act* would apply in the manner suggested has yet to be judicially determined.

II. Background to *The Pension Benefits Act*

In its general thrust, *The Pension Benefits Act* is aimed at the regulation of a narrow aspect of employment relations. The statute creates a regulatory body, being the Pension Commission of Manitoba, and grants to it power to review, audit, inspect, and approve for registration pension plans created by employers (or union groups) of employees in Manitoba. The Act stipulates certain conditions and terms which must be included in every registrable pension plan, and establishes certain further incidents of pension plans to round out the scheme of protection of employees' interests in secure retirement planning. Of specific interest is section 27 forbidding assignment or alienation of monies payable under a pension plan and rendering void any such transaction "purporting to assign, charge, anticipate or give as security such moneys". Further reference to this section of the Act will be made below in considering the sharing scheme created by section 27(2) *et seq.*

Registration of a plan with the Pension Commission is mandatory under section 18, a provision which is enforced by, *inter alia,* an agreement with Revenue Canada that plan contributions will not qualify as deductions from taxable income unless the plan has first been registered with the provincial regulatory body.

Prior to Bill 95[13], the recent amending enactment, *The Pension Benefits Act* was largely of concern only to pension administrators, collective bar-

9. Sections 1(2), 8.1.
10. Section 13(1).
11. Section 16. See for example, *George* v. *George, supra* n. 6.
12. Which section was added in 1982 to bring pensions within the sharing scheme of the Act.
13. Now *An Act to Amend The Pension Benefits Act,* S.M. 1982-83-84, c. 79.

gaining units, employers, and insurers. A major purpose of Bill 95 has been to include rules for the sharing of pension benefits on separation or marriage breakdown, thus making the entire Act of concern to family practitioners who count few pension experts among their number.

III. Jurisdiction of *The Pension Benefits Act*

Unlike *The Marital Property Act* which is universally applicable to all Manitobans unless they contract out of it, *The Pension Benefits Act* has a more narrow jurisdiction. The Act applies only to pension plans created for the benefit of employees of provincially regulated industries. Generally speaking, this means that pension plans for employees, the nature of whose employment would fall within the jurisdiction of Parliament under section 91 of the *Constitution Act, 1867*[14], are not governed by the provincial legislation.

In addition, it must be noted that there are certain exceptional cases which may exempt a client's pension from the provisions of *The Pension Benefits Act*. Under section 2 of the Act, a person is "deemed to be employed in the province in which the establishment of his employer to which he reports for work is situated", and further where he does not have to report to an establishment of his employer, he is "deemed to be employed in the province in which the establishment of his employer from which his remuneration is paid is situated." In other words, residence in Manitoba alone is not determinative of whether the client's pension is governed by the provisions of this statute.

However, employees who are resident in Manitoba will have their pensions governed by the legislation in this province even though they may be a small minority of employees of a major inter-provincial company, the plurality of whose employees or whose head office is located in another province. Section 10(2) of the Act provides the Pension Commission with power to enter into reciprocal agreements with what are known as designated provinces, or with the federal government to provide for reciprocal registration and inspection of pension plans. In practice, and in accordance with section 19 of the regulations under the Act, the pension plan is registered with the governing authority in the jurisdiction where the plurality of employees live and work. If that jurisdiction is a designated province under the Act, the pension plan will be registered in that other province and will be administered by the authority in that other province, but each such province will regulate the plan and require that it be administered in accordance with the legislation in the province of employment. Under section 23 of the regulations, in addition to the federal government, all provinces and territories are designated, with the exception of British Columbia, Newfoundland, New Brunswick and Prince Edward Island.

Furthermore, under section 11 of *The Pension Benefits Act*, the Commission has the power to vary the requirements of the statute or the regulations in respect of the pension plan where the Commission is satisfied

14. *Constitution Act* (formerly *B.N.A. Act*), 1867, 30 & 31 Vict. c. 3, s. 91 (U.K.).

that such a variation is in the best interests of the employees or annuitants participating in the plan. This power is presumably to provide for an interim period of adjustment to the new rules in general and might not result in any variations being granted which would effect rights of a spouse to share in the benefit. However, it is important to recognize the power does exist and may have been used in respect to a particular plan as a result of which some provisions of the statute may not be in force in respect to a particular client's pension plan.

Finally, there is the question of whether an individual employee is a participant in the pension plan established by his employer or collective bargaining unit. There are new rules in the amended statute requiring that all employees of a particular class of employee be members of the pension plan where one exists for that class of employee[15]. However, there are certain allowable exemptions provided for in what is now section 21(6.6) of the Act with four specific classes being exempt: religious objectors, full-time students, previous full-time employees who were not pension plan members before January 1st, 1984, previous part-time or temporary employees whose part-time or temporary employment is interrupted by only temporary suspensions of employment.

To determine whether or not a client or their spouse has a pension plan governed by *The Pension Benefits Act* requires a series of inquiries in the following order:

a) is the employer within general federal or provincial legislative jurisdiction?

b) does the employee report to, or are they paid from an establishment of the employer in Manitoba?

c) is there a pension plan established for the class of employee in which your client falls?

d) is your client/spouse exempt from membership under section 21(6.6)?

e) has a Variation Order been granted for this plan, and if so, is it still in force, and what is its effect?

If it is determined that a particular person has an interest in a pension plan that is subject to provincial regulation under *The Pension Benefits Act*, the final jurisdictional question of concern is whether the Act applies retroactively and/or retrospectively to spouses who separated prior to January 1st, 1984. It is suggested that while not retroactive, the Act has retrospective effect to some separated couples. Because of the complexity of this issue and the need to determine it in the context of section 27(2), it will be discussed more fully below. At this point, it should simply be borne in mind that a particular client or spouse may be exempt from the sharing provisions of the Act by virtue of their having attained a certain status prior to the coming into force of the amended legislation.

15. *The Pension Benefits Act*, s. 21(6.5).

Should that narrowing process eliminate the client, or their spouse, *The Pension Benefits Act* and its sharing rules are of no application and the case falls back on the more familiar ground of *The Marital Property Act*. At this point, it is apparent that cases will arise where one spouse is governed by *The Pension Benefits Act* sharing rules, while the other is not, and *The Marital Property Act* applies. Practitioners of family law can anticipate not only difficulty explaining the effect of these different schemes to their clients within the context of their affairs, but can expect a great deal of frustration with the existence of two different schemes, where one may be contracted out of and the other may not, thus placing the matter beyond the power of the parties to agree on a common method of sharing these assets.

IV. Specific Provisions of *The Pension Benefits Act* Relating to Family Law

A. Common-Law Relationships

For the first time, the Act requires that pension plans provide benefits for individuals who are the common-law partners of a pensioned employee[16]. Accordingly, the definition section of the Act was amended to include subsection a.1 and a.2 to section 1(1):

> (a.1) "common-law relationship" means the relationship between a man and a woman who are common-law spouses;
>
> (a.2) "common-law spouse" means a person publicly represented by another person as the spouse of that other person
>
> (i) where either of the persons is prevented by law from marrying the other, for a period of not less than 3 years, or
>
> (ii) where neither of them is prevented by law from marrying the other, for a period of not less than one year;.

This somewhat ambiguous definition is further complicated by new section 1(2) of the Act which reads:

> 1(2) For the purposes of applying this Act and the regulations to a pension plan or a member of a pension plan, the period during which a member of a pension plan shall be considered a party to a common-law relationship commences on the day on which the administrator of the pension plan receives a declaration in the form prescribed in the regulations declaring that the member is a party to a common-law relationship with another person identified in the declaration and ending on the day the member notifies the plan administrator in writing that the existence of the common-law relationship has been terminated.

Two observations seem appropriate. First of all, the distinction set out in section 1(1)(a.2) defies all attempts at rationalization. There appears no good reason for treating persons who do not marry due to a legal prohibition in a separate or less advantageous manner than those who simply choose not to marry. Furthermore, notwithstanding the existence of a legal impediment, the parties may simply have chosen not to marry. The wording of section 1(1)(a.2) forces all people under legal impediment into the less advantageous class with complete disregard for their motives and intentions.

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16. *The Pension Benefits Act*, ss. 21(12), 21.2(5), 27(2)(c).

The drafters of section 1(1)(a.2) appear to have intended to serve notice to those who are legally prohibited (essentially though not exclusively, people awaiting the dissolution of a former marriage)[17], that new relationships prior to legal eligibility to marry are frowned upon. Had the rule been exactly reversed, it would have been somewhat more understandable. There may be some reason for treating those who simply choose to ignore the option of marriage less well than those who would marry if and when the law permits them to. However, either way, the distinction may very well violate the section 15 (of the *Canadian Charter of Rights and Freedoms*)[18] guarantee of equal benefit of the law without discrimination, in this case the discrimination being rooted in the circumstance which creates the legal prohibition to marry. It may certainly be anticipated that this argument will be advanced after section 15 takes effect in April 1985.

Secondly, the rules in section 1 of *The Pension Benefits Act* are confusing in their application. The clarification found in Section 1(2) suggests that time is measured from the day on which the administrator of a pension plan receives a declaration in prescribed form. The form prescribed in the regulations[19] is a simple statement and does not indicate whether one is claiming to be a party to a common-law relationship under the 1-year or 3-year rule. It is not at all clear when the time under these two rules will begin to run, or when a determination will have to be made as to which of the categories a common-law spouse might have fallen into.

To further complicate this, no provisions were made to enable people claiming a common-law relationship to bring themselves within the scope of the Act by virtue of the existence of that relationship prior to January 1st, 1984. Inasmuch as the prescribed form did not exist prior to the date the regulations were promulgated on February 4th, 1984, it is technically impossible for anyone to satisfy the requirements of section 1(2) until one or three years after that date, depending which of the two classes they claim to fall within. In practice, the date on which a common-law relationship might be said to start running will actually be somewhat later inasmuch as it will take some time for pension administrators to notify their plan members of the new rules, and make the forms available to them for registering the existence of such a relationship. Those who separate in the interim, even though after January 1st, 1984, may be denied the benefit of pension sharing, notwithstanding the move by the legislature to treat them as if they were married, and equally notwithstanding the fact that there may be ample evidence to establish the existence and long-term duration of their relationship.

It is not clear if a determination as to which class applies in a specific case is to be made when:

(1) the common-law relationship begins, or

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17. It could also include persons too young to marry, those unable to give valid consent to marriage, or those too close in affinity or consanguinity among others.

18. *Constitution Act*, 1982, s. 15 being Schedule B to *Canada Act 1982*, c. 11 (U.K.).

19. Per section 26 of the regulations.

(2) when the prescribed form is filed with the pension administrator, or

(3) when the relationship has ended and eligibility for a share of the pension is claimed.

If either the second or third alternative represents the correct determination date, then a further question arises as to whether the factor qualifying for membership in one or the other of the groups is to be viewed in any retrospective way, i.e. is it relevant whether there was a legal prohibition to marriage at some time during the relationship, which has since fallen away. For example:

> Smith and Jones, a married woman, begin a relationship on January 1st, 1984. They file a prescribed form on January 1st, 1985 and Jones' husband divorces her on December 31st, 1986. Jones and Smith separate in June 1987, each claiming a share of the other's pension.

> Only 2½ years have elapsed since the declaration was signed, so under section 1(2), *The Pension Benefits Act* is inapplicable unless they fall within the one year category. Of the options applicable to a determination discussed above, the following results obtained:
>
> (a) if (1) is correct, Smith and Jones are not covered under the Act, as Jones was legally prohibited from marrying when the cohabitation began, and they have not cohabited together for three years between the date of filing their notice and the date of separation.
>
> (b) if (2) is correct, Smith and Jones are not covered as Jones was legally prohibited from marrying when the notice and prescribed form was filed, and they had not cohabited for three years between the date of filing the notice and the date of separation.
>
> (c) if (3) is correct, Smith and Jones are covered since they are not legally prohibited from marrying at the time that the determination is made, and they have cohabited in excess of one year from the date of filing their notice to the date of separation. However, if there is a retrospective view to the determination, then it may be said that although Smith and Jones are not legally prohibited from marrying at the time the determination is made, they were legally prohibited from marrying at some time and therefore the three-year rule might still apply.

> In general, it appears that, only if a determination is to be made when the relationship has ended, and eligibility for a share of the pension claimed is the correct rule, would the Act apply in this situation, and then only so long as there is no retrospective view to the determination. In other words, in this fact situation, the benefits to a common-law relationship would only flow if the words of section 1(1)(a.2) are read disjunctively, that is:

>> Neither is prevented by law from marrying (at the date of determination) *and* the parties have lived together for one year since filing the declaration in the prescribed form.

It is suggested that had the legislature intended that there be a retrospective view of the situation to determine whether the parties were at any time legally prohibited from marrying, section 1(1)(a.2) would have had to be drafted differently, using words such as "where either of the spouses has

at any time been prevented by law from marrying the other . . .". The use of the word "is" in both subsections (i) and (ii) suggests that the legal status to marry is to be determined at the time one is considering whether the party falls into the one-year or three-year rule, and is to be made without reference to their prior status.

However, all of the effort in attempting to analyze and understand the inclusion of common-law spouses in the Act may be an effort in futility. The benefits bestowed on common-law spouses may be illusory, particularly as concerns their rights on marriage breakdown. As will be discussed in the next section of the paper, it is probable that rights on the breakdown of a relationship only come into play on the happening of certain triggering events[20], which events are most unlikely to occur when a common-law relationship terminates. Specifically, it is doubtful that so-called common-law spouses will enter into an agreement to divide their common or "family assets" unless the overall regime of marital property is amended to create community of property between common-law spouses. Failing entering into such an agreement, the benefits granted in section 27(2) will not be triggered and the common-law spouses, even if they satisfy the rest of eligibility may not be entitled to enjoy any of the benefits which the legislature has purported to bestow upon them.

We will presumably have to wait until there has been some judicial interpretation of these sections before having a clear idea of the circumstances in which one can be certain that the extension of benefits to a common-law relationship are effective.

B. Division of Benefits on Marriage Breakdown

Sections 27(2) and 27(3) of *The Pension Benefits Act* read:

27(2) Where

(a) pursuant to an order of the Court of Queen's Bench made under *The Marital Property Act*, family assets of a person are required to be divided; or

(b) pursuant to an agreement between spouses, family assets of the spouses are divided between the spouses; or

(c) pursuant to an agreement between 2 persons who have been parties to a common-law relationship and who have terminated the relationship, assets which, if the parties had been spouses, would have been family assets of the parties, are divided between the parties;

notwithstanding the order of the court, or the agreement, as the case may be, the pension benefit credit of the spouses or the parties, as the case may be, in a pension plan or any payments due to them shall be divided between the spouses affected by the order or the parties to the agreement, as the case may be, in the manner prescribed in the regulations.

27(3) Where under an order or agreement of the kind mentioned in subsection (2), a person who is not a member or former member of a pension plan becomes entitled to a portion of the pension benefit credit of a member or former member of the pension plan, the person is only entitled, notwithstanding any other provision of this Act or of the pension plan, to receive a portion of the payments payable under the pension plan or to transfer the portion of the pension benefit credit to which the person is entitled

20. *The Pension Benefits Act*, s. 27(2).

(a) to another pension plan in which the person is a member or former member, if that is permitted by the terms of that other pension plan; or

(b) to a retirement benefit plan of a type prescribed in the regulations.

These new sections must be read in context. As previously noted, the Act formerly had an absolute prohibition on alienation or anticipation of pension plan monies[21]. That prohibition operated as the basis of the Manitoba Court of Appeal decision in *Isbister* v. *Isbister*[22], holding that pensions as an asset had no value prior to retirement as they could not be sold or assigned, etc.

It is suggested that section 27(2) *et seq* must be viewed as a partial relaxation of this absolute prohibition (section 27(1)), the more so since section 27(1) was amended by the addition of the following words, "Subject to subsection (2)", suggesting the legislature intended the prohibition to still exist except as it has been relaxed by the new subsection (2).

The second general comment arising from the form of the legislation is that the legislature, having relaxed the prohibition in section 27(1), went one step further to stipulate exactly how the now permissible alienation of benefits of pension monies are to take place. This stipulation, too, is consistent with the overall protective purpose of section 27.

That being so, it is probable that the enactment is not, and cannot be construed as being, retroactive, since there are no words in the enactment to suggest an intention that the sharing scheme found there was meant to apply to circumstances which arose prior to January 1st, 1984, when alienation of the type envisioned in section 27(2) was absolutely forbidden. To suggest retroactivity is to impute to the legislature an intent that what was specifically forbidden and unlawful prior to January 1st, 1984 is now not only lawful but mandatory. It is suggested that Canadian jurisprudence does not support that interpretation without a clear enunciation of legislative intent to that effect.

There may be, however, a certain class of individuals who separated prior to January 1st, 1984 who are caught by the legislation because it has a retrospective effect given the way it is worded. Specifically, those persons who separated prior to that date but who found themselves on January 1st, 1984 without either a Court Order dividing family assets or a separation agreement dividing family assets, and who subsequently come within either circumstance will find their pensions subject to the sharing scheme. This is because, the whole of section 27(2) is triggered only on the happening of one of the events listed as (a), (b) or (c) therein (see above). The rule contained in the last clause of the section requiring the pension to be divided in the manner prescribed in the regulations, would only apply once there has been either an order of the Court, a separation agreement between spouses, or separation agreement between common-law spouses, as the case may be. Prior to the happening of one of those events, any alienation or

21. *The Pension Benefits Act*, S.M. 1975, c. 38, s. 27, now am. by S.M. 1982-83-84, c. 79, s. 19 (P32).

22. (1981), 11 Man. R. (2d) 353 (C.A.).

assignment of pension benefits is forbidden under section 27(1). However, on or after January 1st, 1984, whenever one of those triggering events occurs, the disposition, if any, of the pension asset found in the order or agreement, is overriden and the pension benefit will be divided in accordance with the regulations.

This may create a further jurisdictional basis to limit the scope of the legislation, if a method can be developed for settling the couple's affairs without entering into an agreement dividing "family assets of the spouses".[23] Presumably, if there is a sufficiently large pension fund with assets approximately equal to the total family assets of the spouses, the parties might enter into an agreement which effectively offsets the right of the pensioned spouse to claim an accounting for family assets against the right of the non-pensioned spouse to claim a share of the pension; in short, an agreement not to share assets or pensions.

Failing the development of such an arrangement, it may not be possible to operate outside this legislation at all, and the ability to negotiate and offset one asset against another by agreement between spouses may be severely restricted. There is, however, one further possibility for dealing with assets outside the scope of this legislation. If the parties are going to enter into a separation agreement dealing with other assets, a clause may be inserted to the effect that each of the husband and wife acknowledges the existence of the other's pension fund and entitlement to benefit, and each agrees not to claim any benefit or transfer of benefit to which they may be entitled under *The Pension Benefits Act*. Such an agreement would, of course, stand only on the honour of the parties as it can easily be legally overridden under the provisions of section 27(2)(b), or (c).

Therefore, it would be necessary to go beyond simply a moral undertaking and add to this provision of the agreement a further clause to the effect that should either party renege on the agreement and make a claim against the pension plan of the other, such an action would trigger a right of the "pensioned" spouse to sue on the covenant and obtain a judgment in a predetermined amount equal to the commuted value of the benefits claimed or transferred out of the pension plan. Approaching the problem in this way may well provide the ability to reach settlements outside the scope of this legislation, but for just that reason, such a clause may very well be void as against public policy. Despite the fact that it may be desirable for both parties, it is apparently contrary to the legislative intention.

It is suggested that the drafters of the legislation felt that section 27(2) would impose the sharing scheme on all separating couples where either of them is entitled to pension benefits, and that section 27(3) was designed to force the non-pensioned spouse to receive the credit to which they become entitled either by way of a deferred annuity or immediate annuity as the case may be, paid by the pension plan administrator, or alternatively by way of a transfer of credit into another pension plan or retirement benefit plan as prescribed by the regulations.

23. *The Pension Benefits Act*, s. 27(2)(b).

Section 27(3) presents some confusion because of the way it is drafted. In particular, the expression in the second clause of the section "... a person who is not a member or former member of a pension plan ..." is rather confusing. Again, two possible interpretations may be correct:

(a) the words may be interpreted to mean that the person referred to is not a member of any pension plan, or

(b) the meaning may be that the person referred to is not a member or former member of the pension plan in which their spouse is a participant.

The only logical way to interpret this entire section is if those words are construed, as in example (b) above, meaning that the person is not a member or former member of a particular pension plan under which their spouse is entitled to benefits, a portion of which they have now become entitled to pursuant to section 27(2). The alternative construction of the clause in question, which could be paraphrased as referring to a person not having been a member or former member of any pension plan, would lead to the logical absurdity that the legislature was instructing such a person to receive the benefit to which they have now become entitled by transfer under subsection 27(3)(a) to another pension plan in which the person is a member or former member. That clearly would be a contradiction in terms.

Taken together then, the scheme of sections 27(2) and (3) is that the pension of either spouse must be divided between the spouses. Where the recipient spouse is a member of the pension plan out of which the payment is to be received, or alternatively is a former member of that plan, the plan administrator will have to transfer the appropriate share of the benefits from the account of the pensioned spouse to that of the recipient spouse. Section 27(3) takes the matter a step further to deal with the situation where the spouses are not common members of the same pension plan, in which case there are three options:

(i) the plan administrator can set up an account in the name of the recipient spouse and make payments thereunder;

(ii) the benefits may be transferred to a pension plan in which the recipient spouse is a member if their plan permits such incoming transfers;

(iii) a transfer may be made to a "retirement benefit plan" as provided in 27(3)(b), that is a "locked in" R.R.S.P.[24]

It is clear, however, that the intention of the Act is that the division of the pension benefit is to take place at the time of the marriage or relationship breakdown as opposed to at some later date when the "pensioned" employee actually retires. Although the sharing takes place at the time of breakdown of the relationship, the benefits under the plan are not received by either spouse until that spouse attains retirement age. In this respect,

24. Per sections 16, 22(3) of the regulations.

the scheme created by the legislation is very different from that created by the *George* v. *George*[25] approach.

The Act itself does not prescribe the benefit to which the recipient spouse is entitled. Section 22(1) of the regulations introduces the following rule:

> 22(1) For the purpose of subsection 27(2) of the Act, pension benefit credit means the commuted value of the benefits payable from the plan which have accrued during the period of the marriage or common-law relationship calculated on the basis that the member had terminated employment as of the date of the termination of the marriage or common-law relationship.

This wording presents two serious problems.

Firstly, the regulation is *prima facie* inconsistent with the Act itself. As noted, section 27(2) is applicable once an order under *The Marital Property Act* is made, or when an agreement is entered into dividing assets. Those events may occur concurrent with divorce proceedings, but it is equally likely that they may occur years before the parties divorce. For that matter, the parties might never divorce. Hence the problem. Section 27(2) provides for the transfer of pension benefit credit "in the manner prescribed in the regulations", and section 22(1) of the regulations prescribes the benefit calculated "on the basis that the member had terminated employment as of the *date of the termination of the marriage* . . ." [Emphasis added.]

Since, apart from death, marriage is only terminated by divorce, it is technically impossible to calculate the value of a pension benefit credit until the parties divorce. What has been achieved is a legislative and regulatory scheme which creates a right on separation, but renders that right impossible of valuation prior to divorce.

A further effect of the time lapse thus created, is to bestow on the recipient spouse the additional benefits of contributions to, and increases in, the value of the pension which occurred during the period of separation prior to divorce. That would appear to be contrary to the intention of section 27(2), and is a complete reversal of the policy found in *The Marital Property Act*[26], requiring valuation of assets as at the date of separation.

This is not an insignificant point. Given the rule that the benefit is to be calculated "on the basis that the member *had terminated employment* . . ."[27] [emphasis added] as of the critical date, a huge increase in the value of the pension benefit credit may occur between the date of separation and the date of termination of marriage. The benefits on termination of employment will vary widely depending whether or not an employee enjoys fully or partially vested rights to the employer's contributions. Under the rules found in section 21(1) of the Act, an employee is fully vested after 10 years of service (length of time in the pension plan is irrelevant). Individual plans may (see section 21(3)(a)), and often do provide for earlier vesting.

25. *Supra* n. 6.
26. *The Marital Property Act*, s. 15.
27. Per section 22(1) of the regulations.

Suppose then, a couple separate at January 1st, 1985 when the husband has 8 years of service with his employer. By the end of the year, they have resolved all *Marital Property Act* issues and sign an agreement settling their affairs. That agreement triggers section 27(2) of *The Pension Benefits Act*. If the pension benefit credit, then, is calculated at that time, the recipient spouse would lose the benefit of their share of the employer's contributions, since the employed spouse would not have satisfied the vesting requirements and would not be entitled to them had he terminated employment at that time. If, however, the calculation is to be taken as of the date the marriage terminates, the whole exercise may be deferrable until divorce proceedings are completed. If that is the case, prudent counsel will need to know the vesting rules of the pension plan before advising a client whether or not to petition for/or contest a divorce. In this case, delay of one more year in bringing about the divorce might result in effectively doubling the recipient spouse's pension benefit credit. Prudent counsel for the pensioned spouse, of course, would want to bring the divorce on as quickly as possible in this case so as to minimize the amount of pension benefit credit to be transferred to the recipient spouse.

Since the pension benefit credit is defined as meaning the commuted value of the benefit, one must refer to section 12 of the regulations where the rules for calculating such commuted values are set out in brief. Generally speaking, the regulations simply require that the calculation be done in a manner acceptable to the Pension Commission, with certain particular rules provided for specific situations. There is no guidance to assist in determining the method by which such a calculation will be made, and it may be that an actuarial calculation will be required in each case.

Under section 22(2) of the regulations, the non-pensioned spouse is entitled to an equal portion, or in other words, half, of the pension benefit credits so calculated.

Unfortunately, there are no provisions in *The Pension Benefits Act* or the regulations establishing the procedure to be followed where a share of the pension is sought. In the absence of any specific procedure to the contrary, it is suggested that counsel for a recipient spouse would initiate such a claim by advising the pensioned spouse or their solicitor that a claim is being made against the pension fund and request information as to the plan and in particular as to the identity of the plan administrator. The second step would be to submit to the plan administrator a written claim which would include proof of marriage (a departmental marriage certificate would be preferable), proof of separation and the date of separation, a formal claim for a transfer of benefits including a statement as to the details of the recipient's plan to which the benefits are to be transferred. The claim should also ask for a preliminary estimate of the commuted value to be transferred. When this is received, consideration will have to be given as to whether it represents, in the opinion of the recipient spouse, a fair value. If not, a second opinion may have to be sought from an actuary as to the commuted value that should be received in the circumstances.

If voluntary compliance is not forthcoming, the recipient spouse would presumably have to commence action by statement of claim, most likely against both the pensioned spouse and the plan administrator.

The omission in the Act and regulations of any rules of procedure is regrettable, although it is possible that the litigated resolution of pension claims is now within the jurisdiction of the Family Division by virtue of the enactment of 52(2)(o) of the *Queens Bench Act* as recently amended. It is to be hoped that this view is correct, because in most cases the pension sharing would be sought in conjunction with an overall settlement of marital property and/or maintenance rights, which matters would be consolidated in a single action under the rules of the Family Division.

There is also a potential evidentiary problem to be considered if claims have to be litigated under *The Pension Benefits Act*. Where a claim is made, it would appear that the claimant spouse will have to establish both their right to a share in the pension, the calculation of the commuted value sought to be transferred, and the fact that the calculation meets the approval of the Pension Commission.[28] To date there is no system or provision by regulation for the Commission to provide evidence of their satisfaction. The Act or regulations would be most helpful if there were a provision for the issuance of certificates of satisfaction by the Commission so as to avoid the possible spectre of having to lead actuarial evidence as to what does and does not meet the Commission's standards.

The next point of critical importance to recognize is that *The Pension Benefits Act* does not create an accounting scheme, nor does it integrate itself with the accounting mechanisms created by *The Marital Property Act*. One unfortunate result of this is that it will not be possible to value the pensions of both spouses and simply transfer half of the net difference from the more valuable to the less valuable plan. Because *The Pension Benefits Act* requires an actual *in specie* transfer in respect to each plan[29], the parties will be put to the unnecessary administrative effort of certain nominal exercises to satisfy the requirements of the statute.

Consider, for example, a husband and wife both employed for several years as teachers, having had equal earnings throughout their respective careers and enjoying equal pension rights. Ludicrous as it is, section 27(2) requires that each of them must transfer to the other half of their (identical) pension rights. It is no answer that they may agree to not pursue their rights as section 27(2) overrides that agreement.

Similarly, there will be the problem referred to earlier where one spouse has a pension plan sharable under *The Pension Benefits Act*, and the other sharable under *The Marital Property Act*. Under this circumstance, unless the spouse who is subject to the accounting system of *The Marital Property Act* shares their pension assets along the lines of the *George* v. *George*[30] formula, they may have to, in effect, "buy back" their pension rights from the other spouse at the cost of a significant transfer of current assets at the date of the separation.

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28. Per section 12(1) of the regulations.
29. *The Pension Benefits Act*, ss. 27(2), (3).
30. *Supra* n. 6.

Perhaps the most draconian and paternalistic aspect of this legislation is the requirement that the recipient spouse receive the benefits in a locked-in form unavailable to them until they reach retirement age. The effect of section 27(3) and the applicable provisions of the regulations, notably section 16, are to force the receiving spouse to take the transfer of pension credit, either into a registered pension plan, in which case it will be subject to the locking-in provisions of this statute, or alternatively, into an R.R.S.P., in which case both the recipient spouse and the issuer of the R.R.S.P. must file with the Pension Commission an undertaking that the monies transferred will not be alienated or received in any way prior to the spouse's actual retirement. In other words, the intent of the legislation is to create a scheme whereby the non-pensioned spouse obtains a pension equal to half of what was accrued to the benefit of her spouse during the marriage, and she will take that credit as a benefit payable on actual retirement regardless of any wishes she may have to the contrary. The unfortunate aspect of this is that on marriage breakdown, often decades prior to any retirement, the typical non-pensioned spouse is frequently in need of whatever capital sums of money may be available. Funds are needed to enable her to make the economic and social adjustments implicit in separation, and frequently to fund a period of re-education and job training which will be necessary before she can become self-supporting. The effect of this statute is to render inaccessible one often large pool of such capital which might have provided precisely the interim financial security so desperately required. For a woman or a man who find themselves in this difficult period of economic adjustment, it is little benefit to know that 20 or 30 years later they will, of course, be able to retire with some security.

The Pension Commission of Manitoba, in correspondence[31] circulated with other information regarding the recent amendments to the Act, suggested that in the mind of the Commission at least, the legislation is retroactive.[32] There is a complete absence in the enacting legislation of any indication that the legislature intended section 27 to have retroactive effect, unless one reads the not-withstanding clause in section 27(2) as meaning that the Act overrides any past Order of the Court or separation agreement. It is not an overstatement to assert that if the Pension Commission is correct in their view that this legislation is retroactive, the result would be chaotic. What this would necessitate would be nothing less than a complete review of all past Court Orders dealing with marital property, and all separation agreements in which either party enjoyed rights under a pension plan. In every such case, presumably long settled agreements are subject to being reopened and claims made against pension plans, even if consideration was given in some other form at the time of the agreement in exchange for a release of any claim on the pension. If indeed this legislation is retroactive, it is unfortunate that there is no procedure by which a party who entered into such agreement and paid consideration for such a release, might be able to seek some relief from the provisions of section 27. Again, it may be necessary to await a possible test case and judicial interpretation of the

31. Letter to the Pension Industry from Mr. Aiden O'Brien, (then) Superintendent of Pensions, October 1983.

32. But see *Taggart* v. *Taggart* (1984), 30 Man. R. (2d) 1 (Q.B.).

various clauses in section 27(2) before determination is reached as to whether the sharing provisions are retroactive, although it is the view of the author that the legislation is not worded in such a way as to support the conclusion that it is to have retroactive effect. It may very well, however, be of retrospective effect, i.e. applicable to spouses who separated prior to January 1st, 1984 but did not enter into any *Marital Property Act* agreements nor commenced *Marital Property Act* proceedings prior to that date.

C. Sharing Non-Regulated Pensions

It is important to note that the fairly large number of employees who are not governed by the rules enacted in this legislation or the regulations under it, remain subject to the sharing provisions of *The Marital Property Act* as interpreted in the various cases, including notably *George* v. *George*[33]. Interestingly, the *George* result, which does not purport to be binding on all cases but only on the parties involved in that case, comes to a remarkably similar result to that obtained under the new legislation. In the result, under either system, the pension credit accumulated during the marriage is to be divided and not received by the recipient spouse until some future date. Under *George*, the value of the recipient spouse's pension is held in trust by the employed spouse while under the statutory scheme created by *The Pension Benefits Act*, the value of the recipient spouse's benefit is held by the pension administrator directly, but in a separate account in the name of the recipient spouse, and transferrable only subject to administrative safeguards.

The system created by *George*, arguably at least, has the advantage that it can be contracted out of, and that the recipient spouse may choose whether to pursue a guarantee of future retirement benefits, or a lump sum settlement at the time of separation.

There are certain problems accepting the *George* formula and sharing scheme at its face value. First, many pension plans call for a period of employment prior to allowing participation in the plan, but will ultimately base the pension credits on the full number of years of service. Under the newly enacted section 21(6.5) of *The Pension Benefits Act*, this can only involve an extra two years, although in respect of all those people who served their probationary period of employment prior to January 1st, 1985, the number of years could be substantially greater than two, and as a rule would probably be nearer five. If those years were served during the course of the marriage, the effect of *George* would be to deprive the non-pensioned spouse of half of the pension credit in respect of those years, because the *George* formula for sharing is based only on the number of years that the "pensioned" spouse made contributions to the plan; that is, it ignores pre-contributory years of service notwithstanding the fact that they may be a factor in determination of the actual benefit to be paid to the pensioned employee.

On the other hand, the *George* scheme can have the effect of granting to the recipient spouse an unduly large share of the pension. Many pension

33. *Supra* n. 6 (hereinafter referred to as *George*).

plans base the ultimate retirement income on a formula calculated by multiplying the average final annual earnings of the employee by the number of years of service by some percentage, (often 2%). Assuming a marriage breakdown some 15 years prior to retirement, it stands to reason that the employed spouse's income will appreciate over the years between marriage breakdown and retirement. That appreciation in income affects the ultimate retirement benefit paid, and under the *George* formula, that appreciation flows through to the recipient spouse. It might be conceded that this is not necessarily an unfair result, so long as the appreciation in earnings is essentially inflationary or only marginally greater than inflation. However, there will be specific cases where the pensioned spouse may, through their own effort after the marriage breakdown, or through sheer good luck, or through taking advantage of unique unforeseen opportunities, enjoy considerable or extraordinary increases in income. There does not appear to be any particular reason justifying the passing on of the benefit of those increases to the recipient spouse. Indeed, it might be said to be unjust, especially where the pensioned spouse has a subsequent spouse sharing an interest in the accrued benefits of those later years. In further refining the scheme represented by the *George* case, it would be desirable to identify the cases in which the ultimate pension benefit is based on a formula plan, and in those cases, tie the amount of the benefit to be paid out to the recipient spouse to a calculation based on the income in the last year of the marriage.

Thirdly, the *George* plan creates a further problem for the recipient spouse inasmuch as they receive only a trust of some share of the pension ultimately paid out to the pensioned spouse, and therefore have no control over the form of pension elected by the pensioned spouse. Given that this discussion concerns pension plans other than those regulated by the current legislation, the pensioned spouse would have a right of several different options as to the form of pension they wish to take, and would receive an actuarily determined larger or smaller monthly income, depending on the form of annuity which they elect. Particularly in cases where the pensioned spouse has not remarried, the natural act of self-interest would be to select an annuity payable for life only. It follows then that the recipient spouse would find herself collecting part of an actuarially enriched benefit which is tied to the life of the pensioned spouse. If the pensioned spouse were to die very shortly after retirement, the recipient spouse could find themselves in a matter of a very few months or years, with no pension income at all. This problem persists, even where the pensioned spouse has remarried or has a dependent in whose favour he takes a joint and last survivor pension. There, the former spouse is still merely the beneficiary of a trust, the corpus of which is a stream of monthly payments, the continuity of which is contingent on some other person's longevity. It is rather like renting an apartment as life tenant from a landlord who holds the property by way of an estate *pur autre vie*. Somewhere, beyond the control of the life tenant, is a person whose death is going to result in the tenant being dispossessed. Further, given the nature of joint and last survivor pensions to reduce on the death of the first of the two contingent lives, the analogy to being a tenant of property can be taken a step further in that not only does one stand the risk of being dispossessed, but part way through the tenancy they might lose the use of the kitchen. To borrow a phrase from Monnin, J.A. (as he then

was) in the *Isbister* case, "Who in his right mind, would want to purchase such an asset?"[34] And yet it is just such an asset of questionable value that the *George* case imposes on the recipient spouse. It is the respectful view of this author that counsel should be reluctant to recommend a sharing formula based on *George*. At the very least, when arranging for the sharing of a pension along the lines of *George*, it would be important to insist that the pensioned spouse select a joint and last survivor option at the time of retirement, with the former spouse named as last survivor with respect to that part of the benefit to which they are entitled.

D. Joint Pensions

In the past, an employee could elect, at his retirement date, to take his pension benefit in any of several forms: payable for the duration of his life, or payable for the joint lives of himself and another person, normally the spouse, or payable for his own life with a minimum number of years to be paid in any event, and so on. The pension plan typically would designate a "normal form of pension" and plan benefits and costs would be actuarially determined with reference to that normal form. A retiree electing a "different form" would receive an enhanced or reduced monthly income depending on their choice of option. In general, a pension for life is the least expensive option, and joint and last survivor pensions are the most expensive. Thus a person who is single at retirement will normally elect a "life only" pension and get a larger monthly income than the "normal form" would have provided. A married retiree, to ensure an income to both spouses for life would accept the reduction in monthly income associated with the joint and last survivor option. Under the new rules in section 21.2 of *The Pension Benefits Act*, the pension plan must provide that the normal form of pension in respect to a person *who is married at the time the pension payments begin*, shall be a joint pension payable during the lives of the member and the spouse. It is allowable for there to be an actuarial reduction on the death of the first of the spouses, in an amount not to exceed 1/3 of the annuity. There are several important subsidiary rules under this heading.

First, there are specific definitions applicable and set out in section 21.2(5). For the purpose of this section, the expression "married" includes parties to a common-law relationship. However, under section 21.2(4), the Act conclusively deems people not to be married to one another if they were living separate and apart on January 1st, 1984, pursuant to a Court Order or separation agreement. In other words, the requirement to take a joint and last survivor pension does not apply to anyone who retires after January 1st, 1984 if they were living separate and apart pusuant to Court Order or separation agreement on that date. However, parties who separated prior to January 1st, 1984 but whose Court Order or separation agreement postdates that date, are apparently bound to take a joint and last survivor pension, as are those who separate after that date, regardless of how many years elapse from the date of separation until the date they actually begin to receive pension payments.

34. *Supra* n. 22 at 359.

Again, the effect of this section defies rationalization. There cannot be a justifiable reason for treating people who are living separate and apart prior to the effective date of the legislation in different classes, depending on whether they had gotten their legal affairs to a particular state by the effective date. For that matter, neither is there any reason for treating people who separate after that date in a different category. Furthermore, unless the parties are divorced prior to reaching retirement, persons in these classes must not only share the pension on separation, but must also take a joint and last survivor pension in favour of their estranged spouse, who will have already had her share of the pension transferred to her in accordance with section 27(2). Furthermore, since the section recognizes both married and unmarried partners as spouses, it is entirely possible to reach retirement age having two spouses within the meaning of the rule, and therefore being required to take some hybrid "double" joint and last survivor option in favor of both of them. It would have been simpler for the legislation simply to provide that where the pension plan member was married at the time the payments begin that the payments would be in a joint and last survivor form unless a section 27(2) division had taken place prior to retirement. The introduction of a test of whether the parties are married or not in the Act confuses the issue, when other parts of the same legislation have dealt with division of the assets on the basis of whether the parties have separated. On the other hand, it may be possible for a non-pensioned spouse to receive neither a division of the pension benefits under section 27, nor joint pension as provided for under section 21.2(1) if the parties simply separate and obtain a divorce without any other legal proceedings occurring, since, as discussed above, the section 27 division of benefits only comes into force on the happening of either of the three events set out in section 27(2).

Thirdly, the pension plan may provide for the employee and his spouse to opt out of the rule requiring joint pensions. Under section 21.2(3), they would be required to file a written direction in a form approved by the Commission and filed with the administrator of the pension plan, and pursuant to section 25 of the regulations, such a waiver must be signed by the spouse of the retiring employee in the presence of a witness, and apart from the retiring employee, and it must be signed not more than 15 days after receipt of a statement advising the spouse of their retirement income rights under the pension plan. The waiver must further contain a statement indicating that the spouse of the retiring employee is aware of their rights and intent to waive them, and the waiver must be signed both by the non-pensioned spouse and the retiring plan member. Given the potential "double benefit" discussed above, counsel for "pensioned" spouses ought probably to insist on the waiver being provided at the time of separation, just in case the parties do not divorce prior to retirement. It is, of course, an undetermined question whether such a release of the rights of the spouse can be signed at any date significantly prior to the retirement date.

In the past, many pension plans have included a clause analagous to a *dum casta* clause, to the effect that should the spouse of a retired plan member remarry after being widowed, the benefits paid under any joint and last survivor option would terminate. Section 21.3 of the Act outlaws such provisions, thus protecting the beneficiaries of a joint and last survivor

pension. Interestingly, this section does not deal with the question of whether the same protection would exist in the event of marriage breakdown after pension payments begin, and it would appear that such a clause, if it appeared in a pension contract, would be valid and enforceable against the non-pensioned spouse.

E. Prohibition of Discrimination Based on Sex

Prior to the new legislation, insurance companies used separate rates for the purchase of annuities, and for the calculation of benefits and commuted values of benefits, depending on the sex of the plan member. The reason for the use of differential rates is grounded in the different longevity patterns of men and women at all ages and in particularly after normal retirement ages. The argument in favour of differential rates was that it was unfair to charge a male employee the same price for a unit of monthly income to be received by way of annuity as that charged to a female employee when, on the basis of statistical averages, the male employee simply would not live as long as would the female employee. Since longevity forms a fundamental factor in the calculation of insurance and annuity rates, it is probably understandable that the practice of differential rates arose. Under the new section 21(6.4)[35], a unisex rate for the purchase of annuities, pensions, or benefits must apply, and there may no longer be different rates or amounts of contribution based on gender differences, nor may different options be made available to members of the plan on the basis of differences in sex. To some degree, this may only codify in this statute more clearly and satisfactorily rules which might have applied anyway by virtue of *The Human Rights Act*[36], although there is little doubt that it constitutes a collective subsidy by retiring men in favour of retiring women.[37]

F. Rights to a Share of Benefits on Death prior to Retirement

One of the major revisions of *The Pension Benefits Act* was to shorten the period of time an employee must participate in a pension plan or in the service of his employer before being eligible to receive benefits from the plan. In addition to shortening this period, known as the "vesting period", the legislation also provides for what is known in the pension industry as "compulsory locking in" of benefits. That is to say that under the vesting rules, there is created what is known as a "deferred life annuity right", and under the new locking-in rules, in sections 21(2)(a) and (b) of the Act, the deferred life annuity may not be surrendered or commuted by the employee subject to certain minimum requirements. It may, however, by express exception, create a right which can be surrendered in accordance with sections 27(2) and (3) which are the sections providing for a division of the benefit on marriage breakup.

Under these rules, an employee who terminates employment subject to the locking-in rules, does not at that time receive any cash benefits out of

35. In force January 1, 1985.

36. *The Human Rights Act*, S.M. 1974, c. 65, s. 7 as am. by S.M. 1977, c. 46, s. 2; S.M. 1982, c. 23, s. 20 (H175). However the exceptions in subsection 7(2) may have allowed differential rates.

37. For the contrary view, and an informative, concise review of the issue, see L. Delude, Canadian Advisory Council on the Status of Women, *Pension Reform With Women in Mind* (1981) 56 *et seq.*

their pension plan, but receives instead a right to an annuity after they reach the stipulated retirement age. Of course, sometimes people die before they ever reach that age, and section 21(12) was added to the legislation to deal with that contingency. Under this section, on the death of anyone who is entitled to such a deferred life annuity, the plan administrator must pay out a benefit, the value of which is equal to the commuted value at the time of death of the deferred life annuity to which the member was entitled. That benefit may be paid out either by way of a lump sum to the estate of the deceased plan member, or alternatively by way of life annuities to the surviving spouse (including common-law spouse) of the deceased plan member. Again, because of the reference to the surviving spouse of the annuitant or plan member, it is possible for a "double benefit" to be bestowed if a separation of the plan has taken place on marriage breakdown but the parties have not divorced. Again, given the wording of the Act, the problem of having two eligible spouses has been created. It is possible to die leaving a legal and a commonlaw spouse each entitled to claim the lump sum payment to the estate or the life annuity. It is important to note that although alternative benefits are allowed, there is no stipulation as to which has preference. The regulations do not add any further requirements governing this point. In dealing with any marriage breakdown, it would be important to discuss with the client whether their spouse was ever a member of a pension plan at a previous place of employment, and to determine whether that spouse is entitled to any such deferred life annuities. If they are, it would be important to deal with the issue of death benefits. From the point of view of the pensioned spouse, there would be a natural interest in stipulating that any such benefits would be paid as a lump sum to the estate. From the point of view of the non-pensioned spouse, it would be important to stipulate that any such benefits would be paid by way of life annuities to the surviving spouse, at least until the marriage is ended by divorce. Alternatively, the non-pensioned spouse might agree to waive any rights to such death benefits in exchange for a transfer out under section 27(3) of any benefits to which the pensioned spouse may be entitled arising from such participation in a pension plan of a previous employer.

G. Information to Plan Members and Spouses

Section 21 of the regulations sets out lengthy requirements as to the disclosure of information by pension administrators and employers. There are two classes of information dealt with. Some information is required to be provided by the employer or administrator on the happening of certain events. Spouses have no rights to actually receive such automatic mandated information. The second class of information is that which must be provided on receipt of a written request. Two sections allow for provision of such information to spouses. Section 21(2) requires an employer to provide basic information as to the design and operation of the plan as a whole to an employee's spouse subject to payment of a reasonable fee to cover administrative expenses. The specific information which can be requested is under ten separate heads, and the regulation should be referred to if any request is anticipated. Section 21(6) requires an employer to provide to any spouse of an active member who requests the information, a copy of the detailed information as to the particular employee's participation in the pension plan

which information is made available to the employee within 6 months of the end of the plan year. Apparently no fee can be charged for providing this information. The specific information which can be requested again falls into a large number of categories and reference should be made to the particular section.

In addition, under section 21(8) of the regulations, information to be provided to a member who becomes entitled to receive a retirement pension must be specifically designed in the event that the retiring member has a spouse, but there is no obligation to provide a copy of that information to the spouse. Of course, as discussed above, if the spouse is going to waive the joint and last survivor requirement of section 21.2(1) of the Act, it will be necessary that they be shown a copy of this statement.

Finally, under section 21(10) of the regulations, the employer must provide to the legally authorized representative of the plan member certain statements within 30 days of proper notification of the death of the member. In some cases, the spouse may fall into that category.

V. Conclusion

The lawmakers of this province have travelled a long and torturous path in search of a fair and equitable solution to the "Gordian Knot" presented by the existence of pensions as a major asset accumulated by married people. The goal of sharing the pension asset is a commendable one, which is congruent with the mainstream of pension theory which holds that pension plans do not represent a form of gift to retiring employees from their employer, but represent a form of deferred compensation earned by the employee over the years of their working life. If at any time during that working life the employee was married, such compensation, though deferred, was nonetheless earned and represents part of the income to the marital community. With the advent of the marital property law which we now have, it is accepted that, to some degree, marriage is an economic union in addition to whatever else it may represent. As such, the legislature has said that the parties to the marriage are equally entitled to the economic benefits accrued during the marriage. The current legislation under review in this article goes a long way to securing that principle. However, it suffers from a degree of ambiguity on certain important points, and a measure of inflexibility on others.

It can only be hoped that having come this far in creating a fair scheme for the sharing of these particular intangible assets, that the professions involved, and the lawmakers will exhibit the willingness to complete the task and make the necessary further changes to correct the flaws in the present system. Failure to do so may lead to the result that this legislation becomes either a draconian taskmaster or the object of lawyers' devices and

judicial interpretation designed to so limit its effect that it becomes of negligible value. Although it is too early to say which may happen, either result is as predictable as it would be regrettable.