INSTITUTE OF LAW RESEARCH AND REFORM

EDMONTON, ALBERTA

MATRIMONIAL PROPERTY:

DIVISION OF PENSION BENEFITS ON MARRIAGE BREAKDOWN

REPORT FOR DISCUSSION No. 2

May 1985

INSTITUTE OF LAW RESEARCH AND REFORM

The Institute of Law Research and Reform was established January 1, 1968, by the Government of Alberta, the University o Alberta and the Law Society of Alberta for the purposes, among others, of conducting legal research and recommending reforms i the law. Funding of the Institute's operations is provided by the Government of Alberta, the University of Alberta, and the Alberta Law Foundation.

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This Report for Discussion and the opinions and proposals contained in it are, however, the sole responsibility of the Institute.

INVITATION TO COMMENT

This Report for Discussion sets out the Institute's tentative views for discussion and comment. The Institute will reconsider its views and prepare its final report and recommendations in light of comments received. It would be helpful if comments would where possible refer to the page numbers of passages referred to, but commentators should feel free to make their comments as they see fit.

Comments should be in the Institute's hands by July 31, 1985. If more time is needed, please advise before July 31, 1985. Comments in writing are preferred. Oral comments may be made to W.H. Hurlburt, Director of the Institute.

It is possible that a bill on the subject of this Report for Discussion will be introduced and given first reading during the 1985 Spring Session of the Legislature. If so, commentators may wish either to comment to the Institute or through Government channels. It is expected that comments made either to the Government of to the Institute will receive proper consideration by both.

REPORT FOR DISCUSSION
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PART I

SUMMARY OF REPORT FOR DISCUSSION

The Attorney General asked the Institute to undertake a study of the division of pensions on marriage breakdown with a view to proposing statutory guidelines to be used by the Court. This Report for Discussion gives the Institute's tentative proposals. Following discussion and debate the Institute will make its final report.

The Institute's proposals relate to pension plans registered under the Pension Benefits Act (Alberta), a number of Alberta public sector pension plans, and non-Alberta pension plans under which Alberta law will be applied to Alberta employees.

Under Alberta law a pension benefit accumulated by either spouse during marriage is property and, along with other property of the spouses, can be divided between them on matrimonial breakdown. This basic law is satisfactory, but our recommendations would remove any doubt that it is the law of Alberta.

However, the special characteristics of pension benefits make them difficult to divide satisfactorily. The Institute's tentative proposals are intended to provide additional methods of division and to make existing methods less costly and more efficient while protecting the interests of others who have interests in a pension fund.

The following chart compares the Institute's tentative proposals with the present law.

To understand the chart the reader will need to understand three terms, which are dealt with at greater length in the report itself;

(1) A "defined benefit" pension plan is one which provides a pension the amount of which is defined by a formula under the plan which is usually based upon length of service and often takes into account the employee spouse's level of earnings at one time or another.

(2) By contrast, a "defined contribution" pension plan is one which defines what is to be paid into a pension fund by and for an employee's account. It provides as a pension the annuity which the amounts paid in plus investment earnings of those amounts will buy.

(3) The term "vesting" means the acquisition by an employee of a right to a pension or deferred annuity. The term is somewhat misleading as the employee may die before retirement and will not customary receive a pension, but it does signify that the employee no longer has a mere right to whatever benefit, if any, the pension plan provides upon termination of employment.

GENERAL PRINCIPLES

1. The property accumulated by a husband and wife during marriage should be divided between them in a just and equitable manner (equal division being just and equitable unless the Court finds to the contrary).

2. The property to be divided is the property which the spouses own at the time of the division, except

   a. property received by gift or inheritance, and

   b. the value at the time of the marriage of property owned by a spouse before marriage.

SPECIFIC CONSIDERATIONS

1. It is desirable to divide matrimonial property so that the business and financial affairs of the spouses will be separated.

2. It is desirable to encourage spouses to divide their matrimonial property by agreement.

3. It is desirable to minimize the cost of dividing matrimonial property.

4. It is desirable to take into account potential liability for income tax and to avoid attracting additional income tax.

5. The division of a pension between the two spouses should not prejudice the rights of third parties, namely, the employer and employees and others with an interest in the pension fund.

6. The policy behind pension legislation should not be subverted for the purpose of dividing matrimonial property.

METHODS OF DIVISION OF PENSION BENEFITS

INSTITUTE'S PROPOSALS	EXISTING LAW
1. The Court of Queen's Bench would have power to divide a pension benefit or its value in any of the following ways:	
a. Valuation and accounting.	
In effect, the Court orders an employee spouse to pay the non-employee spouse for the present value of the non-employee spouse's share.	The Court can order a valuation and accounting now.
The steps would be as follows: (a) All properties to be divided by this method, including the pension benefit, would be valued.	The steps are now the same. However each pension benefit must be valued in Court with expert evidence. The Institute proposes a standardized and simplified valuation procedure.
(b) The spouse with more than a fair share of the matrimonial property would make a balancing payment or transfer of property to the other spouse.	

INSTITUTE'S PROPOSALS	EXISTING LAW
b. Valuation and division. In effect, the pension plan would pay out the non-employee spouse's share of the value of the pension benefit. The steps would be as follows: (a) The pension benefit is valued. (b) The pension fund pays present value of non-employee spouse's share into an RRSP or other registered pension plan for non-employee spouse. (c) The employee spouse's pension entitlement under the pension plan is reduced accordingly.	The Court cannot order valuation and division because pension legislation protects pension benefits against court process.
c. Division of proceeds. Any money paid out by the pension fund, as and when paid, would be divided between the spouses.	The Court now has power to order division of proceeds, but only by employee spouse under court-imposed trust.
The Court could order the division to be made either: (a) by the pension plan administrator, or (b) by the employee spouse under a court-imposed trust.	The Court cannot order pension plan administrator to make division because pension legislation protects pension benefits against court process.

INSTITUTE'S PROPOSALS	EXISTING LAW
Elections (e.g., for early retirement or for annuity with guaranteed period) to be made only with approval of non-employee spouse or Court, but Court would not disapprove employee spouse's decision to work or not to work unless there is bad faith.	The Court has power, as part of court-imposed trust, to require employee spouse to obtain approval of elections by non-employee spouse or Court.
d. Method of valuation of pension for valuation and accounting and for valuation and division.	Pension benefits are now valued by the Court in every case in which valuation and accounting is required.
(a) value of pension benefit would never be less than employee spouse's contributions plus interest.	The Court must hear evidence and decide what the value of the pension benefit is.
(b) Value before vesting would be value of termination benefit to employee spouse upon termination of employment.	The valuation usually requires the evidence of actuaries and other experts who present valuations upon the basis of which the Court must decide.
(c) Value after vesting would be the greater of the employee spouse's contributions plus interest and the value of the normal deferred annuity under the pension plan.	Sometimes the values assigned by different actuaries are based upon different assumptions and are therefore different. The Court uses its own judgment and either chooses the valuation of one of the experts or a value of its own.
(d) Under a defined contribution pension plan the value of the deferred annuity would be the amount of the employer's and employee's contributions plus accumulated earnings.	

INSTITUTE'S PROPOSALS	EXISTING LAW
(e) Under a defined benefit pension plan the value of the deferred annuity would be the present value of the amount of money estimated to be needed at the employee spouse's normal retirement date to buy the retirement annuity.	
(f) The deferred annuity would be valued as it exists at the time of division. Actual or prospective future changes in the employee spouse's salary and actual or prospective changes in the pension plan would not be taken into consideration.	
(g) The value of the deferred annuity would not be discounted for the possibility that the employee spouse will die before the retirement annuity starts, and possible benefits other than the retirement annuity would not be taken into consideration.	
(h) If an employee spouse's employment service started before the marriage the value of the pension benefit would be pro-rated over the whole period.	It is common practice for the Court to pro-rate the value of a pension benefit over the whole period of the employment service.

INSTITUTE'S PROPOSALS	EXISTING LAW
(i) With respect to defined benefit plans, regulations would (i) prescribe the interest rates to be used in valuing deferred annuities, (ii) adopt tables showing present values, and (iii) require pension plan administrators to provide basic information for a valuation, including the value according to the regulations. (j) The value determined under the regulations would have the following effect: (i) Upon a valuation and accounting it would be admissible evidence of the facts and of the value of the deferred annuity. The Court would still be able to value the deferred annuity in the way described in the other column. (ii) Upon a valuation and division it would establish the value unless it could be shown that the facts on which it is based are wrong or that it was not arrived at in accordance with the regulations.	

PART II

REPORT FOR DISCUSSION

CHAPTER 1. INTRODUCTION

A. Inception of Project

(1) Attorney General's Request

On December 11th, 1984, the Attorney General asked the Institute to undertake a study of the division of pensions on marriage breakdown with a view to proposing statutory guidelines to be used by the Court. The Institute agreed to undertake the study and to deliver tentative proposals in May, 1985. This Report for Discussion contains our tentative proposals.

(2) Background to Attorney General's request

Before 1979, an Alberta husband owned his property and an Alberta wife owned her property. Upon separation or divorce each spouse retained the property which he or she owned. In 1979 the Matrimonial Property Act of 1978, substituted a different rule. Upon separation or divorce each spouse is entitled to receive a share of the property acquired by either of them during the marriage unless it was acquired by gift or inheritance. The shares are to be equal unless an equal division would not be just and equitable, in which case, the Court of Queen's Bench can divide the property to the spouses in unequal shares. The Court can also divide any amount by which the value of property which a spouse owned at marriage increased during the marriage.

The Matrimonial Property Act talks of the division of "property." It does not mention the rights which a spouse may have under a pension plan. However, the Alberta courts have decided that in Alberta a pension benefit which one spouse accumulates during a marriage is part of the matrimonial property which should be shared with the other spouse. Court decisions in Alberta and elsewhere, however, have disclosed the great problems which must be overcome if a pension benefit or its value is to be divided in a just and equitable way between the two spouses without hurting employers and other employees who are interested in the pension plan and the pension fund.

Courts across Canada are trying to grapple with the problems of division. So are the officials who administer pension legislation for the federal and provincial governments. In Alberta the Minister of Labour and the Superintendent of Pension Benefits have developed important and useful policies on the subject and the Chairman of the Alberta Government Pension Boards has done the same. This extensive and continuing activity shows that the Attorney General's request is timely, and the work already done provides a substantial foundation for our proposals.

(3) Time constraints

The time constraints which we accepted have prevented us from consulting as widely as we would otherwise have done. We think that the proposals which we will make in this report for discussion are sound, but we emphasize that they will remain tentative until we have had the benefit of further consultation and comment.

(4) Draft legislation

We attach as Part IV of this report for discussion a draft of amendments to the Matrimonial Property Act which, if adopted, would give effect to our tentative proposals.

B. Scope of project

(1) Basic law

The Attorney General's request assumes that a pension benefit which one spouse accumulates during a marriage should be divisible between the two spouses upon marriage breakdown. We will pause later to consider whether that should be the public policy of Alberta.

(2) Registered and statutory pension plans

The Attorney General's request asks us to make proposals about the division of "pensions." Our proposals do not deal with everything which might be called a pension. We have tried to identify those pension benefits which cause difficult problems of division and which can be reached by Alberta legislation. In so doing we think that we are carrying out his request in accordance with its terms.

The pension plans which cause the great problems of division have two characteristics. The first is that the plan gives an employee spouse contingent rights under a plan and against a fund in which an employer and other employees have rights which must be respected (though under some public sector pension plans the fund is the general revenue of the province or the funds of the employer). The second is that the pension benefit under the plan is protected by legislation which prohibits assignment of the pension and which provides that court orders and process cannot affect the benefit. Other things that can be called pensions (e.g., a registered retirement savings plan) do not have these characteristics and do not cause serious plans of division. Our proposals therefore deal only with pension plans which involve third party rights and which are protected against diversion of benefits.

Pension plan administrators and funds which are not under Alberta legislative jurisdiction cannot usually be reached by Alberta legislation or by Alberta court orders. However, reciprocal agreements between governments extend the effect of Alberta legislation to some pension plans which it would otherwise be unable to reach, and some federal legislation gives effect to Alberta court orders affecting some other pension plans. Alberta legislation should try to cover all pension plans which it can legally cover and should not go any further. Our proposals therefore deal, but deal only, with pension plans which we think can be reached by Alberta legislation and Alberta court orders.

The categories of pension plans which have the special characteristics which we have mentioned and which we think can be reached by Alberta legislation and Alberta court orders are as follows:

1. Public sector pension plans established by Alberta statutes. The statutes which we have in mind are: The Alberta Government Telephones Act, The Local Authorities Pension Act,The M.L.A. Pension Act, The Public Service Management Pension Act, The Public Service Pension Act, The Special Forces Pension Act, The Teachers' Retirement Fund Act, and the Universities Academic Pension Act.

2. Pension plans which are or ought to be registered under the Pension Benefits Act (Alberta). These include all registered pension plans in the private sector under which an employer makes contributions to employee's pensions.

3. Pension plans covered by reciprocal agreements under which the plans, insofar as they cover Alberta employees, are to be administered in accordance with Alberta law. These include pension plans registered under the Pension Benefits Standards Act (Canada) and under pension benefits legislation of Manitoba, Newfoundland, the Northwest Territories, Nova Scotia, Ontario, Quebec, Saskatchewan and the Yukon Territory. (It should be noted that the same reciprocal agreements make Alberta law inapplicable to extra-provincial employees under Alberta pension plans.)

4. Pension plans established or registered by or under statutes which recognize Alberta court orders. The only present example of which we know is section 13 of the Pension Benefits Standards Act (Canada) which allows provincial law to deal with payment of benefits unless it is inconsistent with the federal Act. The section applies to pension plans based upon employment in undertakings under federal jurisdiction, "including agents of Her Majesty" but not including civil servants.[1] We think that the proposed Alberta legislation should be broad enough to allow Alberta courts to make orders which would be recognized under that act and any future federal legislation which recognizes Alberta court orders. In particular, the amendments to the same Pension Benefits Standards Act (Canada) which were proposed by the Minister of Finance in 1984 would have

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[1] The section was applied to the pension plan of the Canadian National Railways in Greenwood v. Greenwood (1983) 35 RFL (2d) 313 (Sask. U.F.C.).

> given a court order, presumably including an Alberta court order, precedence over the Act's own scheme for the distribution of pension benefits upon marriage breakdown. Although these amendments were not proceeded with we understand that it is possible that similar amendments may be proposed in the future. We also note that the Garnishment, Attachment and Pension Diversion Act (Canada) allows court orders to attach federal pensions for financial support of spouses, and it seems at least possible that it might be extended to cover matrimonial property orders as well.

In this report we will consider and make proposals about the pension plans in these four categories. We think that the legislation and regulations which we will propose should apply to them.

<u>Tentative Recommendation No. 1</u>.

We tentatively recommend that the legislation proposed in this report apply to a pension benefit under any of the following:

(a) pension plans established by or under Alberta legislation, and in particular a pension plan established under The Alberta Government Telephones Act, The Local Authorities Pension Act, The M.L.A. Pension Act, The Public Service Management Pension Act, The Public Service Pension Act, The Special Forces Pension Act, The Teachers' Retirement Fund Act, and the Universities Academic Pension Act.

(b) pension plans which are or ought to be registered under the Pension Benefits Act (Alberta).

(c) pension plans which are covered by reciprocal intergovernmental agreements under which the plans, insofar as they cover Alberta employees, are to be administered in accordance with Alberta law.

(d) pension plans which are established or registered by or under statutes which recognize Alberta law or Alberta court orders.

(3) Subjects not dealt with in this report

(a) Relationships other than marriage

The Matrimonial Property Act deals only with the distribution of matrimonial property upon marriage breakdown. The Attorney General's request to us refers only to the division of pension benefits upon marriage breakdown. In this report we will not deal with the division of pension benefits upon the breakdown of other relationships. We expect to issue a later report about the legal consequences of living together without marriage, including the legal consequences of the breakdown of such a relationship.

(b) Financial support

We will not in this report consider pension benefits as a possible source from which matrimonial and child support payments can be recovered. The subject was not included in the Attorney General's request. Discussion of it would raise additional problems.

(c) Time of division

We will not in this report consider whether matrimonial property should be divided between the spouses as of the date of separation, the date of divorce, or the date of the matrimonial property hearing. That is an important question. It is, however, one which affects all matrimonial property and one which the courts are accustomed to deal with. We will assume throughout this report that there is a "time for division" which is chosen by the spouses or decided upon by the Court.

CHAPTER 2. PRESENT LAW

A. Nature of pension benefits[2]

(1) Kinds of pension benefits

(a) "Money purchase" or "defined contribution" pension plans

The terms "money purchase" pension plan and "defined contribution" pension plan are used interchangeably. We will use the term "defined contribution". We are told that it is somewhat more precise, and it is useful to contrast it with the term "defined benefit". The retirement annuity which an employee will receive under a defined contribution plan is the annuity which can be bought by the money contributed for the employee's account under the pension plan plus the investment earnings of the contributions. The money contributed for the employee's account includes contributions by the employer and employee for the employee's account.

Occasionally the contributions under a defined contribution plan may be used from year to year to buy units of deferred annuity. More commonly they are left until the employee retires and are then used to buy or to provide a retirement annuity for him. The plan usually specifies the contributions which are to be made, but there are profit sharing pension plans under which the employer's contributions will vary with the employer's profits.

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[2] The description of the nature of pension benefits is based generally on the Mercer Handbook of Canadian Pensions, 8th ed.(1984). See also Appendix B and Appendix C.

(b) Defined benefit plans

The retirement annuity which an employee will receive under a "defined benefit" plan is an annuity the amount of which is defined by the pension plan itself and which is not determined by the amount of money held in an account for the employee. The pension plan determines the amount of the retirement pension by a formula. The formula usually takes into account the length of the employee's service and often takes into account the level of his earnings over a period of time.

We are told that there are some pension plans which are characterized as defined benefit plans but which are something of a hybrid. If the contributions made on behalf of the employee plus earnings would buy for the employee a retirement annuity greater than that which the defined benefit formula would provide, the employee will receive the higher one. Although this kind of plan may move from one category to the other from time to time we do not think that that circumstance will affect either the discussion or our proposals.

For the purpose of division of pension benefits between spouses there are significant differences between different kinds of defined benefit plans. It is therefore necessary to subdivide them into three categories.

(i) "Flat benefit" pension plans

A "flat benefit" pension plan provides a retirement pension which "is a specified number of dollars for each year of service, or in rare cases a fixed dollar pension for all employees who retire after completing some minimum period of service[3]." For example, a flat benefit pension plan might provide a retirement annuity of $12 per month for each year of service. An employee with twenty years of pensionable service would then be entitled to a retirement annuity of $2,880 per year or $240 per month.

(ii) "Career average" pension plans

A "career average" pension plan provides a retirement annuity which includes for each year of service a percentage of the employee's earnings for that year. For example, a career average pension plan might provide a retirement annuity of two per cent of the employee's earnings for each year of service. An employee with twenty years of service at a career average earnings of $20,000 would receive a retirement annuity of $8,000.

(iii) "Final earnings" and "best earnings" pension plans

The terms "final earnings" and "final average" are used interchangeably. So are the terms "highest average", "highest earnings" and "best earnings." We will use the terms "final earnings" and "best earnings."

A final earnings pension plan provides a retirement annuity the amount of which is the product of the length of an employee's service and the average of his salary over a stated period of time immediately before his retirement. For example, a final earnings pension plan might provide a retirement annuity of 1.5% of the employee's average salary over the five years immediately

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3 Mercer, p. 13.

before his retirement. An employee with twenty years of service and a final average salary of $20,000 would receive a retirement annuity of $6,000, being 1.5% of $20,000, or $300, multiplied by twenty. If his final average salary had been $25,000 instead of $20,000, his retirement annuity would be 25% greater, or $7500.

A best earnings pension plan provides a retirement annuity which is calculated in much the same way as that provided by a final earnings pension plan. The difference is that it is the employee's average salary during the period of time during which his salary was the highest that would be used in the formula. That period may be his last years of service, but it may also be an earlier period.

The characteristic of final and best earnings pension plans which is significant for this report is that an employee's retirement annuity varies directly with both his length of service and his final or best level of earnings. Because these numbers are multiplied together, a final or best earnings formula gives rise to an argument whether an increase in retirement annuity which results from a later increase in salary should be attributed in part to an earlier year. The argument does not arise under any other kind of pension plan. Even under a career average plan it is clear that each year's pension benefit is earned in that year and remains unchanged; using the average earnings over the employee's entire service is merely an arithmetical device which will produce the same arithmetical result as adding up the specified percentage of each year's salary individually.

(2) Rights and obligations under pension plans

(a) Contributions

Under every plan to which our proposals would apply the employer is obliged to make a contribution towards the purchase of retirement annuities for the employees covered by the plan. Under the private plans to which our proposals would apply the employer's contributions must be made under a funding formula which conforms to statute or regulation. Under the statutory public sector pension plans the employer may contribute to a pension fund. However it may instead make its contributions by paying retirement annuities from general revenues as the annuities fall due; in effect, the government's guarantee is a substitute for a pension fund and for funding arrangements.

The Pension Benefits Act (Alberta) and the regulations made under it impose funding requirements upon the private employers whose pension plans must be registered under the Act. These requirements are designed to ensure that a pension fund will always have enough assets to provide all retirement annuities which it is under obligation to provide. However, a pension fund may not have enough assets for that purpose if the pension plan is new, or if it has paid out unexpectedly large amounts of money for annuities or has earned unexpectedly little from investment of its assets. In either case the employer is required to give undertakings to make up the pension fund over a period of time and employers customarily do so. However, if a pension plan is terminated before the pension fund is made up the pension fund may not be large enough to provide all the retirement annuities to which employees are entitled. Such a failure is uncommon in

Alberta, but it has been known to happen.

Under most plans each employee must also make contributions. These are frequently a percentage of the employee's salary and are deducted by the employer.

Once made, all contributions are held subject to the terms of the pension plan and are paid out only in accordance with the plan.

(b) Retirement annuity

An employee's principal right under a pension plan is a contingent right to receive a lifetime retirement annuity at a time, or at one of a number of times, prescribed by the plan. He will, however, receive the annuity only if he lives until a permitted retirement date and retires then or earlier. Every pension plan provides a "normal" retirement annuity and a "normal" retirement date. Many pension plans allow the employee to elect for a different retirement date or for a different form of retirement annuity. Under a pension plan which allows different elections the word "normal", though it may designate the option which most employees accept, does not necessarily do so; the "normal" option is merely the one which applies if the employee does not choose another one from among those which the plan allows. Other options may include a lifetime annuity with payment guaranteed for a period of years whether or not the employee lives throughout the period or an annuity in one amount during the joint lives of the employee and his spouse and a different amount during the lifetime of the survivor. A pension plan may provide a "survivorship benefit," that is, an annuity for the employee's surviving spouse.

A pension plan may set a "normal" retirement age of 65 years or some other age. It may allow early retirement before the normal retirement age. It may allow postponement of retirement beyond the normal retirement age. To meet Income Tax rules the retirement annuity must start before the employee reaches 71 years of age.

The different elections may be designed to impose the same cost upon the pension fund. Sometimes, however, the calculated cost will be different. Uncertainty about which election an employee will make may add to the uncertainties about the value of pension benefits for purpose of dividing the benefit or its value at the time of marriage breakdown. The mere existence of elections also increases the difficulty of dividing proceeds of pension benefits equitably between spouses. Each spouse has an interest in the pension benefit which will be affected by the election which is made, and an election which will advance the interest of one may injure the other.

(c) Death benefit

Under most pension plans an employee who dies before retiring or before retirement age does not receive a retirement annuity. If he dies early, however, the pension plan must pay his estate or a beneficiary designated by him or by law an amount equal to his contributions to the pension plan; of course, if the plan is non-contributory this means nothing. Many plans will pay more, e.g., the employee's and employer's contributions plus interest, or twice the employee's contributions. Sometimes an employer will instead provide a group life insurance plan instead of or in addition to a death benefit under a pension plan.

(d) Withdrawal benefits

Few pension plans allow an employee who leaves his employment to transfer the employer's contributions to a new employer's pension plan or to a pension plan belonging to the employee. A pension plan will recognize the employee's right to a deferred retirement annuity which he has earned before leaving his employment, but he must often wait until retirement age before he gets it. "Portability" is an objective of the present movement towards pension reform. Already some pension plans will transfer the value of the pension benefits to some other plans with which they have reciprocal agreements. Some will transfer both employer's and employee's contributions to a registered retirement savings plan held by the employee. "Portability", however, is not yet common.

(e) Other benefits

Some pension plans provide a benefit for an employee who becomes disabled. The benefit may be an annuity, or it may be the keeping up of the employee's contributions so that the pension plan will provide him with a normal annuity at normal retirement age. Sometimes an employer will instead provide a group income maintenance plan to provide a disabled employee with income.

The benefits which we have listed appear to be the principal benefits which pension plans provide today. We do not know whether the list is exhaustive today. If it is, we do not know whether or not pension plans will provide different rights in the future. We hope, however, that our proposals will be suitable for pension plans as they are now and as they may become in the future.

(3) Legal nature of pension benefits

(a) Nature of employer's obligation

A private employer who creates a pension plan pays money into a pension fund for the benefit of his employees. The pension fund is really a trust fund. The employer is the "settlor" or creator of the trust and the employees are the beneficiaries of the trust. Under some of the public sector pension plans the employees' contributions are paid into the general revenue of the government and the government pays out the employees' retirement annuities as those annuities become due; there is not then a legal trust but there is a government promise to pay the retirement annuities from its general revenue. A Crown corporation may be put into much the same position as the government with respect to the corporation's employees.

(b) Nature of employee's rights

(i) Vesting and locking in

The Mercer handbook[4] has the following to say about "vesting" and "locking in":

> Every pension plan must define the benefits and rights of the employee upon termination of his services other than by death or retirement on pension. The employee may have the right to his own contributions

[4] At page 50.

> in cash, or to his own and the employer's contributions in cash, or to a deferred annuity, or to some combination of these.
>
> "Vesting" means the right of an employee to a benefit from the employer's contributions whether or not he terminates employment. The benefit is usually an immediate or deferred annuity and rarely cash. It is taken for granted that the employee has a vested right to his own contributions. "Contingent vesting" means that the employee must leave his own contributions in the fund and take a deferred annuity as a condition for vesting of the employer's contributions. "Locking in" means that the employee must leave his vested rights in the plan and may receive them only in the form of a pension at retirement."

We understand that in Alberta vesting and locking-in usually occur at the same time, but vesting may occur first. Before locking in, a pension plan may allow the employee to withdraw his own and his employer's contributions ("cash" or "absolute" vesting), or it may instead provide that he must leave his own contributions in the plan to obtain the benefit of the employer's contributions ("contingent" vesting).

(ii) Employee's rights at different stages

An employee's rights under a pension plan pass through three stages. During the first stage the employee does not have a vested right. During the second he does. During the third the retirement annuity is paid. Before vesting, a pension plan usually provides a termination benefit, that is, a money payment upon termination of the employee's employment. If an employee has not made contributions to the pension plan he or she may not have a right to a termination benefit. If he or she has made contributions the minimum termination benefit is to have them returned; as is noted above he or she has a vested right to them.

Some plans provide better termination benefits.

The employee may expect that his employment will continue, that the employer will not terminate the pension plan, and that he, the employee, will obtain a vested right to a deferred retirement annuity. Before vesting, however, he has no legal right to any of these things.

After vesting, as is noted above, the employee has a right to benefit from the employer's contributions. For our purpose, the benefit is a contingent right to receive a retirement annuity if he retires at or before a retirement age prescribed by the pension plan, or to receive a termination, death or (sometimes) disability benefit if termination, death or disability supervenes. When he reaches retirement age the employee will acquire an absolute right as against the pension fund to receive a retirement annuity, but if he dies sooner his right will be transmuted into a right to receive the death benefit provided by the pension plan.

(iii) Protection of employee's rights

Pension legislation customarily provides that pension benefits cannot be assigned and that they cannot be reached by any form of legal process. Once a benefit is locked in the legislation protects the employee against himself and also against everyone who has a claim against him. This protection is one of the things that make the division of pension benefits between spouses particularly difficult. It is, however, an integral part of public policy about pensions. Proposals for division of matrimonial property should conform to its spirit.

(4) Economic nature of pension benefits

It is an employee spouse's economic gain which should be divided between the spouses upon marriage breakdown. As we shall see, one way to divide an employee spouse's economic gain under a pension plan is to divide the employee spouse's legal rights under the plan. A legal right can be divided without an understanding of its economic value. However, we shall also see that another way to divide the economic gain is to value it and have it paid for. Dividing the economic gain in that way does require an understanding of its economic value to the employee spouse.

Before vesting, the employee spouse does not have an unconditional right to any specific amount of money. He can get the termination benefit only if his employment is terminated. After vesting the employee spouse still does not have an unconditional right to any specific amount of money. The retirement annuity is contingent upon the employee spouse living to retirement age. A death or disability benefit is contingent upon the employee spouse dying or becoming disabled. The employee spouse does, however, have the right to receive one or another of those benefits. The right to a retirement annuity can be valued. The other rights can also usually be valued.

After the commencement of the retirement annuity the employee spouse does have an unconditional right to the payment of periodic known sums of money for his or her lifetime and for such other periods (e.g., a guaranteed period of years, or the lifetime of his or her spouse) as the pension plan and the employee spouse's elections may determine. It is still not known how much money the employee spouse will receive because his or her life span, and that of his or her surviving spouse (if there is a spousal annuity), are not known.

A pension benefit will rarely, if ever, have a market value. For one thing, the various contingencies we have mentioned are likely to make it unmarketable at least until the commencement of the retirement annuity is imminent. Even then, although it is generally possible to buy and sell annuities, the laws which make a pension benefit non-assignable and non-attachable make it unmarketable. A proposal for the division of the economic gain represented by a pension benefit must cope with this lack of market value.

(5) Conclusions about pension benefits

This description has shown that rights and benefits under pension plans are very different from what is usually thought of as property. They are even different from other rights to receive money. That is because of their contingent nature, their interrelationship with the working careers of employees, their character as deferred compensation, their interrelationship with the rights of third parties, the locking in which social policy imposes, and their unmarketability. They can, however, be of great value; it is often said, and truly, that in many cases a pension benefit is one of the most important assets, if not the most important, which a married couple acquire during their married lives.

We shall see that the special characteristics of pension benefits make it impossible to divide them in any way which will achieve anything approaching perfect or abstract justice, whether the division involves payment for the share which the non-employee spouse should receive or whether it involves division of the right itself and of what is received in respect of that right.

B. Sharing of pension benefits

(1) Pension benefits as matrimonial property

Under Alberta law as it now stands, a pension benefit held by a husband or wife is part of the matrimonial property to be shared by the spouses upon marriage breakdown.

Alberta law about the division of matrimonial property upon matrimonial breakdown is found in the Matrimonial Property Act (Alberta) and in the judicial decisions which interpret the Act. The Matrimonial Property Act was enacted following our Report 18, Matrimonial Property, and is intended to achieve the purpose which our report recommended, namely, that a husband and wife should share the economic gains which they make during marriage: see Mazurenko v. Mazurenko (1981) 23 RFL (2d) 113, 120 (Alta. C.A.).

In Report 18 we recommended that the Matrimonial Property Act make specific reference to the division of pensions as matrimonial property. The Act does not do so. What it does do is to provide that the Court of Queen's Bench may "make a distribution between the spouses of all the property owned by both spouses and by each of them." The Court may make a distribution upon divorce or upon a number of other events. (We will use the term "marriage breakdown" to mean either divorce or any of these other events.)

The question whether or not a pension benefit is property which the court can distribute under the Matrimonial Property Act caused difficulty in the past. Some judges treated it as property. Others did not. Similar questions have troubled the trial and appellate courts of other provinces. The question was settled for the Alberta courts by the decisions of the Court of Appeal of Alberta in Herchuk v. Herchuk (1983) 35 R.F.L. (2d) 327 and in Moravcik v. Moravcik 37 R.F.L. (2d) 102. The Court of Appeal took the object of the Act from our Report 18 to be the sharing of economic gains and held that the accumulation of capital to provide for retirement or other future needs cannot be distinguished from the accumulation of pension credits. Pension credits are therefore divisible matrimonial property. That statement of the law is subject only to the qualification that a litigant in another case might appeal to the Supreme Court of Canada and that the Supreme Court of Canada might overrule the two decisions of the Alberta Court of Appeal. The possibility seems to us to be remote, but it cannot be said to be non-existent.

(2) Just and equitable sharing and the presumption of equality

Section 7(4) of the Matrimonial Property Act directs the court to distribute the property equally between the spouses unless it appears to the court that an equal distribution would not be just and equitable, taking into consideration certain matters which are listed in section 8. In Mazurenko v. Mazurenko (1981) 23 R.F.L. (2d) 113, the Alberta the Court of Appeal held that the Legislature had decided "that in ordinary cases equality is the rule", and had established a presumption that the distribution should be equal. The courts will usually distribute the matrimonial property equally between spouses, but if in a particular case equal distribution would be either unjust or inequitable, they will distribute the property in other proportions. Equal distribution is the usual but not the invariable rule.

(3) Exemption of property owned at time of marriage

Section 7(2) of the Matrimonial Property Act exempts certain property from distribution. The exemption of the market value of each spouse's property at the time of the marriage is important for this report. The Court of Queen's Bench has power to distribute the difference between that exempted value and the market value of the property at the time of the trial. If the matrimonial property being divided is a pension benefit and the employee spouse had been a member of the pension plan before marriage, the subsection appears to require the exemption of the "market value" at the date of the marriage. If that is so, the Court would have discretionary power to distribute between the spouses the market value of the pension benefit at the time of division and its market value at the date of marriage. The application of these ideas to pension benefits is difficult because pension benefits cannot be sold and usually have nothing that could reasonably be called "market value." What the courts have done is to pro-rate the current value of the pension benefit over all the employee spouse's years of service under the pension plan and to treat as divisible matrimonial property the resulting pro-rata share attributed to the married years.

(4) Present methods of division

(a) Powers of the Court

Under the present law the Court has several powers which it can exercise in order to effect a just and equitable division between the spouses of the matrimonial property owned by both of them. It can require one spouse to pay money or transfer property to the other. It can impose a trust upon one spouse in favour of another. It can declare that a spouse has an interest in property owned by the other. It can order that property be sold and the proceeds divided between the spouses.

Some of the Court's powers do not apply to the division of a pension benefit of the kinds which we are discussing. Under section 14 of the Pension Benefits Act (Alberta), money payable under a pension plan cannot be assigned, charged, attached, anticipated or given as security and is exempt from execution and seizure, and any transaction purporting to do any of these things is void. Similar provisions protect the public sector pension plans. (In the public sector pension plan legislation which is now at various stages of enactment there are provisions that the right of any person to receive a benefit is subject to the rights of a spouse or a former spouse arising under a matrimonial property order, but it is not entirely clear whether these provisions will enable the Court to make an order which will affect a pension benefit, and in any event the provisions are not yet in force.) Pension legislation elsewhere in Canada gives similar protection. Even if these barriers did not exist, the interrelationship of the rights and interests of the employee spouse with those of the employer and the other employees requires great caution in dividing a pension benefit; there is danger that a division which is in the interest of one or both spouses will have an adverse effect upon the interests of others.

Effectively, the Court can under the present law do one of two things to divide the value of a pension benefit upon marriage breakdown. It can direct a "valuation and accounting" or it can impose upon the employee spouse a trust in order to bring about a division of pension benefit and its proceeds. We will outline these two procedures.

(b) Valuation and Accounting

Under a valuation and accounting, some or all of the divisible matrimonial properties of the two spouses are valued. The values of the properties held by one spouse are added up, and the values of the properties held by the other spouse are added up. The Court then orders the spouse who has more than a just and equitable share of the properties to make a balancing payment in money or property to the spouse who has less than a just and equitable share. Under this procedure, in effect, the employee spouse buys out the non-employee spouse's share in the pension benefit. He or she pays by a money payment or a transfer of other property or by foregoing a payment or transfer from the other spouse.

An simplified example would be as follows:

Husband's properties

Half interest in house	25000
Bank account	25000
Value of pension	25000
Total husband's properties	55000

Wife's properties

Half interest in house	25000
Total wife's properties	25000

If there is to be an equal division the Court could order the husband either to transfer his share in the house to the wife or to pay the wife $25000. Each would then have property worth $50000.

Alberta courts have upon occasion followed the valuation and accounting procedure in dividing pension benefits. They have approached the subject of valuation in different ways. In Kopecky v. Kopecky (1983) 24 Alta. L.R. (2d) 79 (Q.B.), the husband, if he had left his employment, could have had the employer's contributions and his own contributions, plus interest, paid into a registered retirement savings plan. Mr. Justice Smith accepted the total of the contributions and interest as the value of the pension benefit, apparently without reduction for potential tax liability. In Shumyla v. Shumyla (Alta. Q.B., March 19, 1982) it appears that Mr. Justice Bracco determined the value of the pension by reference to the amount that the pensioner would have received upon termination of his employment at the time of the trial. In Kunysh v. Kunysh (Alta. Q.B., Edmonton, 8303-01344, April 25, 1984) Mr. Justice Sinclair appears to have used present value. In Howell v. Howell

(1984) 54 A.R. 134 (Q.B.), Mr. Justice McDonald adopted a value between the present value without deduction for tax liability and the present value after deduction for tax liability. The Court seems most likely to use a valuation and accounting when the prospective commencement of the employee spouse's retirement annuity is a long way into the future.

The courts have recognized that there are some cases in which a valuation and accounting would impose a hardship upon the employee spouse. If the value of the pension benefit is large the accounting may require the employee spouse to pay a large sum of money to the other spouse. He may not want to make the payment because of the contingent nature of the deferred annuity. More than that, he may not have outside resources which will enable him to make the payment without serious sacrifice. If a high valuation based upon actuarial forecasts and assumptions is used for the valuation, the results can be harsh.

(c) Division of the proceeds under trust

In <u>McAlister</u> v. <u>McAlister</u> (1982), 41 A.R. 277 (Q.B.), a case in which the marriage and the pension benefit were of long standing, Mr. Justice Dea devised a form of sharing of the proceeds of the deferred annuity by imposing a trust on the employee spouse to pay the appropriate share to the non-employee spouse as and when received. In <u>Moravcik</u> v. <u>Moravcik</u> (1983) 50 A.R. 180, the Alberta Court of Appeal approved Mr. Justice Dea's method and applied it to the case before them. This case also involved a marriage and a pension benefit of long standing.

C. Problems in the existing law

As we have said, the law of Alberta today is that pension benefits are matrimonial property which is divisible upon marriage breakdown under the Matrimonial Property Act. We believe that part of the law to be satisfactory. We do not think that by itself the risk that a case might be taken to the Supreme Court of Canada and that that Court might overrule the Alberta Court of Appeal is sufficiently great to require a present amendment to the Matrimonial Property Act to do away with the risk. However, we think that the recommendations which we will make later will perform the useful function of putting the legal situation beyond doubt.

The real problems of the present law lie in the methods and mechanisms which it makes available for the division of pension benefits. These are inadequate and unsatisfactory. Some of the difficulties stem inevitably from the nature of pension benefits. We think, however, that the law could do better. We will in the next chapter make recommendations for improvement.

CHAPTER 3. IMPROVING THE DIVISION OF PENSION BENEFITS

A. Should pension benefits be divided upon marriage breakdown?

We have already said that we think that the present law is satisfactory in that it makes pension benefits divisible upon marriage breakdown as part of couple's matrimonial property. In our Report 18 we recommended that this be the law, and we see no reason to change that opinion. The economic gains made during marriage should be divided between the spouses, and the acquisition of a pension benefit is an economic gain.

Later in this report we will point out that every form of division of pension benefits has great disadvantages. The valuation of pension benefits is uncertain and depends upon uncertain assumptions, so that a valuation and accounting or a valuation and division is likely to work out more to the advantage of one spouse than that of the other. Division of proceeds, at least before the retirement annuity commences, will entangle the affairs of the spouses and will leave them subject to the making of elections under the pension plan which may adversely affect their interests. The best that can be achieved by any form of division is very rough justice; certainly none of the proposals which we will make will result in anything approaching complete abstract justice.

Despite these difficulties we think the law would be clearly wrong and unjust if it did not provide for the division of pension benefits along with other matrimonial property. Rough justice arrived at by the application of just and equitable principles is better than no justice at all. Our criticisms of the various forms of division should not lead to the conclusion that pension benefits should not be divided. They should be divided.

Tentative Recommendation No. 2.

We tentatively recommend that upon the breakdown of marriage pension benefits be divisible between the spouses as property covered by the Matrimonial Property Act.

B. Guiding Principles

The principles underlying the Matrimonial Property Act apply to the division of pension benefits on marriage breakdown. They are as follows:

(1) The economic gains which a husband and wife make during their marriage should be shared between them upon the breakdown of their marriage.

(2) The sharing of the economic gains of the husband and wife should be effected by dividing between them their matrimonial property, that is, the property which they acquired during their marriage other than by gift or inheritance, including any increase during the marriage in the value of property acquired before marriage.

(3) The matrimonial property should be divided between the spouses in shares which are just and equitable. In the usual case equal division is just and equitable. If the Court is satisfied that equal division would not be just and equitable it may divide the matrimonial property into unequal shares.

(4) The matrimonial property which should be divided is the matrimonial property which the spouses have at the time of the division.

We think that in giving effect to the underlying principle of justice and equity there are some additional subsidiary considerations which should be borne in mind:

(1) In the absence of good reason to the contrary, it is desirable to divide matrimonial property in a way which will avoid or minimize future financial and business relationships between the spouses.

(2) It is desirable to facilitate and encourage settlements between spouses. In addition to the usual reasons for such a policy, a negotiated agreement about matrimonial property is likely to allow the spouses to part with less bitterness, and there are cases in which the spouses or their advisers can by agreement distribute matrimonial property in a way which will minimize the financial difficulties which often flow from marriage breakdown.

(3) It is desirable to minimize the cost of dividing matrimonial property.

(4) Income tax consequences of the division of matrimonial property should be taken into account, and, in the absence of good reason to the contrary, attracting income tax which would not otherwise be payable should be avoided.

We think that there are two additional principles which, because of peculiar characteristics of pension benefits, apply to the division of this kind of matrimonial property:

(1) The division of a pension benefit between spouses should not prejudice third parties. In particular, it should not prejudice the interests of the employer and of other employees who contribute to a pension fund and are entitled to receive retirement annuities from it.

(2) The division of a pension benefit should not contravene the policy behind pension legislation by diverting to other purposes money which has been contributed to pension funds for retirement annuities. This policy is outside our mandate to consider and we accept it for this report as a given.

None of these principles and considerations can be applied in absolute terms. Between the spouses the overriding principle is justice and equity; but the method of division which is the most just and equitable between the spouses might greatly prejudice the third parties interested in a pension plan. Third parties must be not be prejudiced; but the importance of doing justice and equity between spouses is so great that third parties may have to accept some inconvenience. Abstract justice and equity between spouses may not be justice and equity at all if achieving it saddles them with undue financial and emotional costs. What is to be achieved is the best balance of the interests and principles involved.

<u>Tentative</u> <u>Recommendation</u> <u>No.</u> <u>3</u>.

We tentatively recommend:

(1) that upon marriage breakdown the economic gain represented by the acquisition or an increase in value during marriage of a pension benefit should be divisible between the spouses under and in accordance

with the principles of the Matrimonial Property Act and in particular the principle of just and equitable division.

(2) that in giving effect to those principles the following subsidiary consideration should be borne in mind:

(a) that it is desirable to avoid or to minimize future financial and business relationships between the spouses.

(b) that it is desirable to facilitate and encourage settlements.

(c) that it is desirable to minimize the financial and emotional costs of the division.

(d) that income tax consequences of the division of matrimonial property should be taken into account and that it is desirable to avoid attracting income tax which would not otherwise be payable.

(3) that the rights of third parties should not be prejudiced by the division of a pension benefit between the spouses.

(4) that the division of a pension benefit should not contravene the policy behind pension legislation by diverting to other purposes money which has been contributed to pension funds for retirement annuities.

C. Methods of division of pension benefits

(1) Methods which should be considered

We think that, having regard to the principles and considerations which we have outlined, there are three methods of division which should be used to divide pension benefits upon marriage breakdown. Which should be used in a particular case will depend upon the circumstances of the case. These three methods are:

(a) Valuation and accounting

We have already described valuation and accounting.[5] In effect, the employee spouse buys the non-employee spouse's share with money or other property. The Court has power to adopt this method.

(b) Valuation and division

We will describe valuation and division later.[6] Under this procedure, in effect, the pension plan administrator would pay the non-employee spouse the value of the non-employee spouse's share in the pension benefit and would charge it to the employee spouse's pension account. The Court does not have power to adopt this method.

(c) Division of proceeds

We will describe the division of proceeds later.[7] Under this procedure every dollar which becomes payable to the employee spouse under a pension plan would be shared between the two spouses. The Court has power to adopt this method but only by requiring the employee spouse to divide the proceeds.

We will give our reasons later in this report for recommending that these methods be available and the circumstances in which each should be available.

Tentative Recommendation 4.

We tentatively recommend that the following methods of

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[5] See page 33.

[6] See page 81 and following.

[7] See page 87 and following.

division of a pension benefit be used:

(1) a valuation and accounting, under which the employee spouse would retain the pension benefit and compensate the non-employee spouse for the appropriate share of the pension benefit.

(2) a valuation and division, under which the pension plan administrator would

(a) pay for the benefit of the non-employee spouse the present value of the share in the pension benefit which the non-employee spouse is entitled to receive, and

(b) reduce the employee spouse's pension benefit to reflect the payment.

(3) a division of the proceeds of a pension benefit.

(2) A method which we have rejected

There is a fourth method of distribution which we have considered. Under it, the pension plan administrator would at the time of the division of matrimonial property divide the employee spouse's pension benefit into two accounts under the pension plan. The employee spouse's share of the pension benefit would remain in one account and the non-employee spouse's share would be reflected in the other. The non-employee spouse would then become entitled to a pension benefit and ultimately a retirement annuity which would be entirely separate from that of the employee spouse. The retirement annuity would commence upon the non-employee spouse's retirement age and would continue during the non-employee spouse's lifetime instead of the employee spouse's lifetime.

Under that procedure, the non-employee spouse would not be affected by irrelevant considerations such as the age and lifetime of the employee spouse. There would be a complete separation of the affairs of the two spouses. These are desirable results.

We have, however, concluded that the provision of a different pension would too often prejudice the interests of third parties. The pension fund could become responsible for a retirement annuity quite different from the employee spouse's retirement annuity. The life expectancies of the two spouses might be considerably different. The continued administration of two accounts would itself be a burden, and difficult questions could arise from subsequent changes made in the pension plan either by agreement between the employer and employees or by law. Pension plan sponsors provide pension benefits for reasons which have nothing to do with the ex-spouses of employees, and they should not have their legal obligations significantly changed in order to promote the interests of divorcing or separating spouses. The burdens upon third parties would simply be too great.

D. Division of a pension benefit which has not vested

Before vesting an employee has only a right to the termination benefit which the pension plan provides and which may be only a right to receive back the contributions which he has made under the plan. We think that the only appropriate method of division of the pension benefit at the pre-vesting stage is valuation and accounting. Valuation and division would not be appropriate because there is no deferred annuity the benefit of which can be valued and divided. The division of proceeds would not be appropriate because the employee spouse has no right to a deferred retirement annuity; there are no proceeds to divide other than the termination benefit. We think also that the only appropriate valuation is the amount of the termination benefit. As the non-employee spouse would receive tax-free money while the benefit if received by the employee would constitute taxable income in his hands, an adjustment for the effect of income tax might have to be made. In the result, the employee spouse should be charged in the accounting with the amount of the retirement benefit, subject to any necessary adjustment for potential income tax liability.

This valuation and accounting might be thought unfair to the non-employee spouse. The employee spouse has a possibility, which may be a strong probability, of remaining in his employment and obtaining a vested deferred annuity. The valuation and accounting would not share the value of this prospect. However, the prospect is not a legal right, and there is nothing to share. On the other hand, the valuation and accounting might be thought unfair to the employee spouse, because it will require him or her to pay for an asset which can be cashed only if the employment is terminated. However, termination of employment is likely to be the event which is the least favourable to the employee spouse and it does not seem unfair to value the pension benefit at the amount which it will yield in that event. We think that a valuation and accounting on the basis of the termination benefit with income tax adjustment will do substantial justice to both spouses.

<u>Tentative Recommendation No. 5</u>.

We tentatively recommend that before vesting a pension benefit

(a) be divided by valuation and accounting, and

(b) subject to any necessary adjustment for

> potential income tax liability, be valued at the amount of any benefit to which the employee spouse would at the time of division be entitled to receive if his employment were terminated at that time.

E. Division after commencement of a retirement annuity

We turn next to the division of a pension benefit after the payment of the retirement annuity has started. An employee's pension rights crystallize when the retirement annuity starts. The employee will have made any necessary elections. The amount of the retirement annuity will be known. Unless the retirement annuity is paid from general government revenues, the pension fund will either have bought the retirement annuity or arranged its affairs to meet the obligation to pay it. It is true that it is not known how much cash any one employee will receive, because the length of the lifetime or lifetimes involved in one retirement annuity is not known, but that uncertainty does not detract from the certainty of the legal situation.

We think that it will sometimes be appropriate to divide payment of a retirement annuity which has already started by a valuation and accounting. A valuation and accounting will separate the affairs of the spouses. It will give the non-employee spouse cash or property which can be dealt with without restriction and which is not dependent upon the employee spouse continuing to live. It will leave the employee spouse with the whole of his or her retirement annuity. The valuation of a current annuity does not present the vexing problems which the valuation of a deferred annuity presents. The way to value a lifetime annuity is to use the annuitant's normal lifetime as determined by mortality tables worked out on actuarial principles. This is tantamount to assuming that the annuitant will live for the period of that life expectancy. The assumption is virtually certain to be wrong for the individual, but it is based upon statistical probabilities and its use is generally considered fair to everyone whose interests are affected by it. We think that it is fair enough to use it here. We do not think that the valuation can take into account a prospect of discretionary indexing and if that is likely the non-employee spouse may prefer to take the chance of the contingencies involved in a sharing of the proceeds.

We think that a division of the proceeds will also sometimes be appropriate. Division of proceeds of an annuity which has started is a division of the actual proceeds of a crystallized legal right and is therefore a just and equitable form of distribution. It may avoid the need for the employee spouse to find a large sum of money to pay for an asset which, because his or her death occurs unexpectedly early, may not yield as much as it was expected to yield.

We think that it should be open to the Court to provide for the division of the proceeds by the pension plan administrator. In practice this would require the administrator to maintain two files and to issue two cheques and it would therefore impose some burden upon third parties. We think, however, that the administrative burden would not be great and that it could be compensated for by reasonable charges to defray the actual cost of the additional procedures, which should be shared by the spouses. We think that it should also be open to the Court to provide for the division of the proceeds by the employee spouse, supported by the imposition of a trust. We think that this would rarely, if ever, be more suitable than the division of the proceeds by the pension plan administrator, but we see no reason to preclude it.[8]

Valuation and division would not be a suitable means of dividing a retirement annuity the payment of which has already started. It would require a change in the contractual obligations of the pension fund, and in some cases would require a change in an annuity bought from an independent annuity issuer. The possible prejudice to third parties would be too great, and the benefit to the spouses is not likely to be substantial.

Tentative Recommendation No. 6.

We tentatively recommend that if payments have started under a retirement annuity the pension benefit should:

(a) be divided either by

(i) valuation and accounting, or

(ii) division of proceeds either by the pension plan administrator or by the employee spouse, and

(b) be valued for a valuation and accounting on actuarial principles using normal lifetimes as determined by mortality tables.

F. Division of a vested pension benefit

(1) Introduction

It is the division of a vested pension benefit before the commencement of the retirement annuity which causes serious

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8 We will discuss the disadvantages of the division of proceeds by the employee spouse at greater length below under the heading "Division of proceeds" in connection with the division of pension benefits.

problems. We will first address some specific questions that must be answered. We will then discuss the division of the various kinds of non-vested pension benefits by valuation and accounting, valuation and division, and division of proceeds.

(2) Some specific problems

(a) Changes in pension benefit resulting from changes in salary after division of matrimonial property

(i) Statement of the issue

A final or best earnings pension plan gives an employee an amount of retirement annuity which is a fraction of the product of two numbers. One number is the amount of the employee's final or best earnings. The other is the number of years of the employee's pensionable service. To repeat the example which we gave at page 34, an employee with 20 years of service and, final average earnings of $20,000 might receive 1.5 x 20 x $20,000 = $6,000.

The fact that a final or best earnings pension plan usually uses length of service as a multiplier creates a difficult and controversial issue: whether an employee spouse's final or best earnings to be used in valuing or dividing his pension benefit should be his or her final or best earnings at the time of the division of the matrimonial property or whether they should be his or her actual or prospective final or best earnings at the time of his or her actual or prospective retirement.

An employee spouse's earnings may not change much between the time of division of the matrimonial property and the time of retirement. The issue then will not be important. In other cases they may increase very substantially. If they double, or are expected to double, in the time between the time of the division of the matrimonial property and the time of the employee spouse's retirement, the use of the employee's final or best retirement earnings will give the pension benefit earned during the time of the marriage twice the value which the use of the final or best earnings at the time of division will give.

Sometimes the employee spouse's earnings will decrease between the time of division and the time of retirement. In times of economic difficulty such as the present that may come to happen more frequently. Under a final earnings plan (though not under a best earnings plan), the use in such a case of the employee spouse's actual or forecast retirement final earnings would give a lesser value to the pension benefit earned during the time of the marriage than would the use of his or her final earnings at the time of division.

It still seems reasonable to assume that the earnings of most long-term employees will rise during their working lives to compensate for decrease in the value of money and to share the benefit of increases in individual and general productivity. If so, valuing or dividing pension benefits on the basis of employee spouses' retirement final or best earnings pension benefits would in the great majority of the cases result in higher awards to non-employee spouses. The issue is, however, one of principle.

(ii) Arguments for using retirement final or best earnings

The argument for basing a valuation or division of a pension benefit upon the employee spouse's actual or prospective retirement final or best earnings may be simply stated. A final or best earnings pension plan provides an amount of retirement annuity for each year of the employee spouse's pensionable service. The amount attributable to each year is the benefit which the employee spouse earned in that year. The amount earned in a year is ultimately determined by the employee's final or best earnings.

The argument was accepted recently in a decision of the New Zealand Court of Appeal, Haldane v. Haldane [1981] NZLR 554. The case dealt with a final earnings plan. The New Zealand statute provided for the division of a pension benefit to which an employee spouse "is entitled or may become entitled ... if the entitlement is derived, wholly or in part, from contributions made to the scheme after the marriage or from employment or office held since the marriage ..." It is not entirely clear whether the Court would have reached the same conclusions if the statute had not included the words "may become entitled" and "derived, wholly or in part." The Court did, however, talk in terms of principle as well as in terms of statutory interpretation.

One judge recognized that "one spouse should not benefit from the post-separation efforts of the other." But he went on to put the argument this way:

> "as against that, the pre-separation years of service will have a continuing effect in augmenting the amount of superannuation. In that sense the member will continue after the marriage has ended to benefit from the other spouse's help during the marriage. So here the husband has made impressive progress in his career and financial position since the separation; but the wife's years of contribution to the marriage partnership are

> still there in the multiplier, potent in enabling him to reap benefit from that progress."

In the result, the Court of Appeal included in its award to the non-employee spouse an allowance for the value of the increase in the employee spouse's pre-separation benefit which might be expected to occur after separation (much of which had already occurred in the six years which had elapsed between the separation and the trial).

The issue was addressed by the Manitoba Court of Appeal in George v. George (1983) 35 R.F.L. (2d) 225, 242. Mr. Justice O'Sullivan there thought it inappropriate to attach a present value to the employee spouse's pension benefit and directed that the proceeds of the pension benefit be shared. One reason for his conclusion was that the benefits would be paid on a final average basis. He said that the "husband's first ten years of contribution are of equal importance with the later years of contribution in the calculation of benefits finally payable." In Herchuk v. Herchuk (No. 2) (1983) 54 A.R. 24 (Q.B.), Mr. Justice Legg referred to this remark and appeared to apply it.

In effect, the formula applied by Mr. Justice Dea in McAlister v. McAlister (1982) 41 A.R. 277 (Q.B.), by Mr. Justice Legg in Herchuk v. Herchuk (above), by the Alberta Court of Appeal in Moravcik v. Moravcik (1984) 37 R.F.L. (2d) 102 and by Mr. Justice Dechene in Chaisson v. Chaisson (April 4, 1985, Q.B. Edmonton, No. 45318) uses the employee spouse's actual retirement final or best earnings. Under the formula, the award to the non-employee spouse is that amount of the actual proceeds of the pension benefit which bears the same proportion to the whole of the proceeds that the length of the employee spouse's pensionable service during the time of the marriage bears to the whole length of his or her pensionable service. If the employee spouse lives until retirement age, the actual proceeds of the pension benefit will be the actual retirement annuity, which will be based upon the employee spouse's actual retirement final or best earnings. However, except for the reference by Mr. Justice Legg to Mr. Justice O'Sullivan's remarks in George v. George which we have mentioned above, the Alberta judgments do not expressly raise the question whether or not post-division changes in the employee spouse's salary should be taken into account, and it is only indirectly that they dispose of it. Since there is nothing to suggest that the point was present to the minds of the Court of Appeal in Moravcik v. Moravcik, where the employee spouse was well advanced in his career and there was nothing said about the prospects of later salary increases, we do not think that the authority of the Court of Appeal is behind the use of retirement final or best earnings.

The arguments for taking into account post-division changes in the employee spouse appears formidable. There is judicial authority for their acceptance. However, we think that other considerations not brought to the attention of the courts in any of the cases which we have seen are decisive to the contrary. We will now outline them.

(iii) Arguments for using final or best earnings at the time of division

We think that the guiding principle here is that the matrimonial property should be divided is that which the spouses have at the time of the division. What then does the employee spouse have?

We do not think that it can be said that at any given time an employee spouse with a vested pension benefit has a right to receive an increase in his or her deferred annuity consequent upon a future increase in earnings or that he or she is subject to a liability to suffer a decrease in his or her deferred annuity consequent upon a future decrease in earnings. Events then in the future may or may not give the employee spouse an additional right or detract from his or her present right. Until those future events occur no such augmentation or derogation will accrue. If nothing further happens that is relevant, that is, if the employee spouse does not make further contributions or (usually) does not continue to serve, his or her deferred annuity will remain unchanged. The employee spouse will not usually have a right to insist upon remaining in the employment and making contributions, nor will the employer have any obligation to keep the pension plan going to provide a deferred annuity greater than that which the plan has already provided for, namely, a deferred annuity based upon the employee spouse's current final or best earnings.

We think that the basic purpose of the Matrimonial Property Act is to provide for the division between spouses of the economic gain achieved by both of them during the time of their marriage. If the employee spouse has achieved an economic gain during marriage, it should be divided. But we think that an economic gain during marriage has to be reflected in an increase either in property or in legal rights which at the time of division someone is obliged to recognize. The pension plan must at any time recognize an employee's right to a deferred annuity based upon the his or her final or best earnings which are current at the time of division. It does not have to recognize any right to a later increase in the deferred annuity.

There is usually, however, a possibility at the time of division that the employee spouse will continue in his employment and that a change in his earnings will bring about a change in the amount of his deferred annuity. In a specific case that possibility may be great enough to be called a probability. It may be a strong probability. Is not that possibility or probability an economic gain the value of which the employee spouse should share with the non-employee spouse?

We think that the answer is no. The employee spouse may have a favourable employment opportunity, but a favourable employment opportunity has not yet been regarded as divisible property under the Matrimonial Property Act and we do not think that it can or should be so regarded. The opportunity to receive a higher or lower salary in the future is part of the employee spouse's employment opportunity, and the opportunity to obtain a larger or lesser deferred annuity arising out of those same salary increases is another part of the employee spouse's employment opportunity.

In the words which we have already quoted, "the [other spouse's] years of contribution to the marriage partnership are still there in the multiplier, potent in enabling [the employee spouse] to reap benefit from [the progress which he makes in his career]." There is no doubt that the multiplier which determines the retirement annuity under a final or best earnings pension plan always includes those years. We do not think, however, that it follows that a change in the multiplicand, the final or best earnings, is given or received as an addition to or a deduction from the compensation given for the employee spouse's service during past years. Instead, a current salary increase is given for current service and a consequent current increase in a final earnings pension benefit is also given for current service. An employee does not usually have a right to receive a salary increase or a consequent pension benefit increase; it is current factors and not past entitlements that cause his employer to confer both upon him.

The employee spouse, then, has at the time of division only what the pension plan then gives him. Later increases in pension benefit are earned later (and later losses are suffered later). Later increases are paid for later, and are paid for by an employer and employees who have no interest in providing an additional benefit for the former spouse of one employee. An employee with longer past service is for pension purposes treated better than one with shorter past service, but for current and not for past reasons.

<u>Tentative Recommendation No. 7</u>.

> We tentatively recommend that in dividing a pension benefit no account be taken of an actual or prospective change in an employee spouse's salary after the division unless at the time of the division the employee spouse has a right to an increase in salary or the employer has a right to reduce the salary.

(b) Improvements in pension plan following division of matrimonial property

It is quite common for pension plans to be amended to provide improved benefits. The improvements may well be applied to past service. However an employee spouse does not usually have a right to have the pension plan improved in the future. If he or she does not, we do not think that actual or prospective future improvements are matrimonial property to be shared. They are generally made for present employees for current reasons.

Tentative Recommendation No. 8.

We recommend that in dividing a pension benefit no account be taken of an actual or prospective improvement in the pension plan after the division unless at the time of the division the employee spouse has a right to have the improvement made.

(c) Valuation[9]

(i) Contributions as a measure of value

We have suggested that a pension benefit be divisible in any of three ways. Two of them - valuation and accounting and valuation and division - require that the pension benefit be valued. We will now address the difficult questions raised by the need for valuation. What should be the measure of value of a pension benefit? An employee spouse's contributions to the pension plan, with or without interest, might be used as the measure. The Saskatchewan Law Reform Commission in its 1984 Tentative Proposals for Reform of the Matrimonial Property Act

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[9] In Appendices A and B the reader will find helpful analytical material on the subject of valuation and will find the analysis applied to an example which will clarify the subject.

tentatively recommended that the principal measure of value be the employee contributions with interest. That is a measure which is simple, workable and predictable. It reflects the one certainty about pensions, which is that the employee spouse's contributions have been taken out of the family's finances and set apart; any other result flowing from the contributions is based upon contingencies. In the Commission's view certain offsets make it appropriate to exclude the employer's contributions from the valuation. One is that the proceeds of the pension will be taxable in the hands of the employee spouse. The second is that the employee may forfeit all or part of the benefit of the employer's contributions upon the termination of his employment whether before or after the vesting of the pension benefit. A third is that a non-employee spouse who is paid out receives a cash asset rather than a deferred benefit.

The Commission recognized that the employee contributions may not be an adequate measure of value if there are no employee contributions. It accordingly tentatively recommended that the court should have power to attribute up to one-half of the employer's actual or notional contributions to the employee spouse if they "substantially exceed" the employee spouse's contributions.

The Commission's views are forceful. We agree with their view that an actuarial approach to valuation "cannot hope to achieve prevision in individual cases, and lacks the simplicity of the employee contribution approach." Like the Commission, we will propose that a number of balances be struck between abstract fairness and practicality. However, we think it better to accept some additional complexity in the search for fairness. We hope that our proposals will advance fairness while keeping complexity down to acceptable levels. We have, however, with the Commission's kind permission, reproduced its proposed legislation as Appendix A so that it will be available for comparison with our proposals.

(ii) Defined contribution pension plans

Under a defined contribution pension plan an employee spouse is entitled to receive at retirement age the amount of retirement annuity which the contributions made by or for his or her account, plus interest, will provide or buy. The amount of the retirement annuity cannot be known at the time of the division of the employee spouse's matrimonial property.

However, we think that at any given time the pension benefit should be valued at the amount credited to the employee spouse's account. That includes employer's contributions, employee's contributions, and credited investment earnings to that time. That amount will accumulate until the employee spouse's retirement age whether or not further contributions are made. It is the present value of the annuity which it plus its accumulations will buy.

Tentative Recommendation No. 9.

We tentatively recommend that under a defined contribution pension plan the value of an employee spouse's pension benefit be the amount of contributions and interest held for the employee spouse's account.

(iii) Defined benefit pension plans

During an employee's early years under a final or best earnings pension plan the contributions which he or she makes are usually greater than the present value of his deferred annuity. The cross-over point at which the value of the deferred annuity exceeds the cumulative contributions may not occur until the employee is into his or her forties. A division of the pension benefit based upon the value of the deferred annuity during this period would not give the non-employee spouse credit even for the amount of money which had been drained from the funds of the two spouses during the time of the marriage.

It seems to us fair as between the spouses that the pension benefit under any kind of defined benefit pension plan should always be treated as having a value at least equal to the contributions which the employee spouse has made to it plus such interest as is provided for in the pension plan. The amount of the contributions would otherwise have been available to the couple for living or for the acquisition of property. In the event it has gone entirely for the employee spouse's benefit in a way which the employee spouse has chosen or agreed to, and he or she should be charged with it. Upon death or termination of employment the contributions plus interest will be returned, and if employment is not terminated the contributions plus interest will purchase something better, namely a retirement annuity. In a valuation and accounting the minimum value included on the employee spouse's side of the accounting should be the amount of his or her contributions plus such interest as the pension plan provides, subject to any necessary allowance for prospective income tax liability.

It also seems to us fair as against the pension fund that the pension benefit should have the same minimum value upon valuation and division. That minimum now applies to death benefits. It applies now where a departing employee's pension benefit can be transferred. We understand that it is generally approved as a minimum to be applied when general portability of pensions is achieved. We think it fair enough that the pension fund be required as a minimum to pay back what it has received plus interest as provided in the pension plan; insofar as the non-employee spouse's share is concerned the pension fund will be discharged of the obligation for the funding of which it has received the contributions.

However, we think that if the present value of an employee spouse's deferred annuity exceeds the amount of employee contributions plus interest it should establish the value of the pension benefit. We will first discuss the valuation of a deferred annuity as if there were no doubt that the employee will receive it. We will later discuss contingencies and adjustments.

The valuation of a deferred annuity under a defined benefit plan requires the following steps:

1. the amount of the retirement annuity must be computed,

2. the value which the retirement annuity will have on its commencement date must be estimated, and

3. the present value of the amount determined in step 2 must be ascertained.

For example, for a division of matrimonial property as of June 1, 1985, it may be determined under step 1 that an employee spouse will retire on January 1, 1995, and will receive a retirement annuity of $10,000 for his lifetime. Under step 2 it would then be necessary to determine the value which that retirement annuity will have on January 1, 1995. Then under step 3, it would be necessary to determine the value as at June 1, 1985 of an amount equal to the value which the retirement annuity will have on January 1, 1995.

Step 1 does not present serious problems. Under a defined benefit plan the amount of the deferred annuity is determined by a formula. At any given time the numbers used in the formula are known. Therefore at any given time the annual amount of the annuity which an employee has earned can be determined by arithmetic. Then we think it fair to apply a life expectancy as shown on mortality tables prepared on actuarial principles. There is an assumption involved but it is a fair assumption.

Step 2 does present a serious problem. In our example, it would be necessary today to determine the 1995 value of a series of payments which are expected to begin in 1995. But that can be done only by using 1995 interest rates, and we do not today know what interest rates will prevail in 1995.

Step 3 also presents a serious problem, though a somewhat lesser one. In our example, it would be necessary to discount back to today the amount of the 1995 value. The question is: what discount rate should be used? The obvious answer is today's prevailing interest rate. There is, however, one difficulty with that answer. It is that in a period of fluctuating interest rates it may be unfair to use today's very high or very low rate to discount the long-term value of an asset which will not be realized for a long period of time, and it may be unfair to estimate the earnings which a present amount, if invested, would yield. It is true that there are markets which customarily discount future payments. It may may be thought unfair, however, to expose anyone to the risk that his interests will be prejudiced by very high or very low interest rates momentarily established by wildly fluctuating markets. We think that it is better to make estimates of future interest rates based upon long experience. Such an estimate will result in an assumption which is likely to be wrong for the specific case. However, we think this to be the fairest way to arrive at a value for present purposes.

We have so far spoken as if the terms of the retirement annuity which the employee spouse will receive are prescribed. So they are. But many plans give an employee spouse an election among a number of annuities permitted by the pension plan. In such a case an employee must make choices.

The choices which the employee spouse must make fall into two categories. In one category are choices among times to start the retirement pension. The pension plan may prescribe a "normal" retirement age but may allow the employee spouse to elect to retire earlier or later. In the second category are choices among different kinds of annuities. The pension plan will prescribe a "normal" retirement annuity but may allow the employee spouse to elect to take one of a number of others. The "normal" annuity is likely to be an annuity for the employee spouse's life. The plan may allow the employee spouse to elect instead to take a lifetime annuity guaranteed for a term of years or one which will be payable to a surviving spouse.

Many pension plans are designed so that the expected cost of each retirement annuity which the employee may take will be the same. However, some are not. How can a pension benefit be valued today if an employee spouse will at a future time be able to choose among different retirement annuities with different present values?

One way would be to value each retirement annuity which the employee spouse might elect to take. Then it would be necessary to decide whether to take the highest value, the lowest value, or some other value. It would greatly complicate the valuation process to value all the possible annuities which an employee spouse might elect to receive. It would also raise difficult questions of principle. A hypothetical early retirement might give the employee spouse a retirement annuity with a higher present value, but is it right to charge him with that higher value when he would have to forego future salary to get it? If the pension plan provides a benefit for an employee's spouse, should it or should it not be assumed that the employee spouse will remarry and be survived by the later spouse? Indeed, there is a very difficult philosophical question: should the employee spouse be charged with the value of a spousal benefit?

We do not think that it would be in anyone's interest to answer these questions. The complexity and cost of litigation and valuation would be greatly increased with little or no gain in abstract justice. We think that everyone's interest would be served by valuing the "normal" retirement annuity which the employee would receive at the "normal" retirement age as those terms are used in the pension plan. We do not suggest that either the "normal" retirement annuity or the "normal" retirement age under the plan is "normal" in the sense that it is what normal people will choose, but we do think that the interests of justice and the parties will best be served by making a choice and that the choice might as well be made on the basis of what the pension plan will provide if no other choice is made.

(iv) Contingencies: death

An employee spouse will receive his retirement annuity only if he lives to retirement age. A deferred annuity which is contingent upon survival would generally be regarded as being worth less than one which is not. On the other hand, many pension plans provide for a "death benefit", that is, something which the pension fund will pay to the employee's estate or to his beneficiaries if he should die before his retirement annuity has started.

Abstract principle suggests that the present value of an employee spouse's deferred annuity should be discounted to allow for the possibility that the employee spouse may die before the retirement annuity commences. If the discount is not made the deferred annuity will be over-valued and the non-employee spouse will receive too much. However, even if the pension plan provides no death benefit, we think that the benefit of a slightly greater conformity to abstract principle does not justify incurring the cost of deciding what discount to apply to the present value. We are advised that the difference which a discount for the contingency of death is not large enough to justify the extra cost and complication which would be introduced into the valuation process by making the discount. We think the appearance of greater justice which allowing for it would give would be delusive.

Abstract principle also suggests that if (contrary to what we have said) the value of the employee spouse's deferred annuity is discounted to allow for the possibility that he or she will not live to receive it, the contingent present value of a death benefit which would necessarily be paid would have to be added to the value of the pension benefit, or at least set off against the discount. This would again add greatly to the complexity of the problem. A death benefit may be cash. It may be an annuity for the employee spouse's surviving spouse or child. Under the new public sector pension legislation which is at different stages of enactment the death benefit may be payable to the employee spouse's surviving spouse and not to the employee spouse's estate or designated beneficiary. It is not worthwhile to solve all these problems in order to effect a marginal or even imaginary improvement in justice.

For these reasons we do not think that as a general rule the present value of an employee spouse's deferred annuity should be discounted because of the possibility that the employee spouse will not live to receive it. However, in the case of a valuation and accounting we think that the Court should have power to make an adjustment if the general rule would cause a result which is not just and equitable.

Tentative Recommendation No. 10.

We recommend that no allowance shall be made for the possibility that the employee spouse will not live until the commencement of a retirement annuity unless, in the case of a valuation and accounting, a valuation without such an allowance would not be just and equitable.

(v) Contingencies: failure of the pension fund to pay a retirement annuity

To say that an employee spouse has a vested right to a deferred annuity is to say that he or she has a right to have the pension fund pay a retirement annuity when it falls due. The actual receipt of the annuity is dependent upon the pension fund being able to pay it.

Under some of the Alberta public sector pension plans the "pension fund" is the general revenue of the province. Under the Alberta Government Telephones Act it is the revenues of Alberta Government Telephones. The obligations of other pension plans are guaranteed by the province. While there might be circumstances under which a government would refuse to honour its obligation to pay or to ensure the payment of a vested deferred annuity, we do not think that the risk that it might do so is great enough to consider in the valuation of a pension benefit.

Private pension plans are not quite as secure. A great objective of the regulation of private pension plans is to ensure that their pension funds will be able to pay vested deferred annuities when they fall due. However, a balance has had to be struck between achieving that objective and achieving the objective of encouraging the growth of private pension plans without undue cost to business. Pension regulation does not give an absolute guarantee that deferred annuities will be paid.

A defined contribution plan is always by definition fully funded. That is because the deferred annuity to which an employee is entitled is that annuity which the money on hand will buy. The pension fund is liable only for what is in it. The only risks of failure are theft and the failure of a financial institution, though the amount of the retirement annuities which it provides is also dependent upon the rate of its investment earnings or losses.

A defined benefit plan can never in absolute terms be said to be fully funded. No one can know what the ultimate cost of the deferred annuities outstanding at any time will be or at what precise times money will be required. No one can know precisely what the assets in the pension fund will earn or even that assets will not be lost through unlucky investments. Even if the employer undertakes to pay a stated interest rate on the assets in a pension fund no one can be sure that the employer will not go bankrupt. The most that regulators can do is to is to prescribe reasonable funding practices and see that pension fund administrators adhere to them. Present regulation of private defined benefit pension plans requires that an actuary review every defined benefit pension plan and pension fund regularly and make a report showing whether or not the fund is adequate to meet its estimated obligations. The employer is obliged to make up within fifteen years the initial funding and within five years any later deficiency in funding which results from claims or investment experience which is less favourable than was expected.

If the pension plan is terminated, it is only the pension fund as it then exists plus any amount which is overdue from the employer which is available to pay employees' deferred annuities as they fall due; the employer is not obliged to make up any initial or experience deficiency which would fall due after the pension plan is terminated. There is a high but not absolute degree of protection of pension funds. Pension fund failures are infrequent but not unknown.

Should the valuation of a pension benefit take into account the possibility that the pension fund might not be able to pay the employee spouse a retirement annuity when it falls due? A non-employee spouse who receives money for a share in the employee spouse's pension benefit does not bear any risk of the failure of the pension fund. An employee spouse who pays out the non-employee spouse under a valuation and accounting retains all or part of the risk. Abstract principle suggests that an allowance should be made for the possible failure of the pension fund. However, even under a private defined benefit plan the risk is not great and under a defined benefit or public sector pension plan it is close to negligible. As a general rule, an allowance for the possibility would give only a delusive appearance of justice and would add undue complexity to the process. We do not think that it should be made, unless, in the case of a valuation and accounting there are in a specific case circumstances in which a valuation without it would not be just and equitable.

<u>Tentative</u> <u>Recommendation</u> <u>No.</u> <u>11</u>.

We tentatively recommend that no allowance shall be made for the possibility that the pension fund may not

> be sufficient to pay all annuities unless, in the case of a valuation and accounting, a valuation without such an allowance would not be just and equitable.

(vi) Liability for income tax

If a pension benefit is divided by the valuation and division procedure each spouse will have a tax-sheltered account and the proceeds of which will be taxable income in the hands of the recipient. It would be too fanciful to suggest that some allowance should be made for the likelihood that the spouses will pay different amounts of income tax because they will have different taxable income and may receive the proceeds at different times. No allowance for potential income tax should be made upon a valuation and division.

If a pension benefit is divided by the valuation and accounting procedure different considerations apply. On the one hand, an employee spouse will not be able to turn his remaining pension benefit to account without including its proceeds in his taxable income. On the other hand, the non-employee spouse would receive money which is not subject to any tax liability. Fairness requires that the employee spouse's potential income tax liability be taken into consideration.

We do not think that the law can usefully prescribe an allowanoe for potential income tax liability or even a procedure for arriving at the allowance. The employee spouse may receive a death benefit or a retirement annuity, and there is no way of forecasting what his taxable income will be at the time or what rate of income tax which will apply to him or her. We think that the spouses or the Court will have to decide in each case the need for and the amount of the allowance. This is the way in which the question is disposed of now in the division of matrimonial property and in other cases as well.

<u>Tentative Recommendation No. 12</u>.

> We tentatively recommend that upon a valuation and accounting an allowance may be made for the potential effect of income tax.

(vii) Valuation procedure

We turn now to consider whether a simplified procedure could be provided for valuing a deferred annuity. A simplified procedure is especially desirable under a defined benefit pension plan but it would also be useful under a defined contribution pension plan.

At present, spouses who want to agree upon a division of a pension benefit by valuation and accounting must obtain expert advice about the value of a deferred annuity under a defined benefit pension plan. If one spouse asks the Court to divide their matrimonial property both must present to the Court the expert evidence of actuaries and possibly of economists and accountants so that the Court can decide what value to ascribe to the deferred annuity.

Experts who value a deferred annuity are likely to make different assumptions about such things as current and future interest rates and mortality rates. If they do they will ascribe different values to the deferred annuity. If the spouses do not agree on the value, the Court must hear the evidence and cross-examination of the experts and must decide upon a value.

The process is costly in money, court time, and acrimony between the spouses.

We do not think that it is necessary to go through this procedure in every case. The assumptions which experts make about interest rates and mortality are based upon approaches and inferences which are as likely to be as valid for the valuation of one deferred annuity as they are for another in the same general time and place. The specific facts about the pension plan which provides the deferred annuity and about the employee spouse are rarely open to dispute and can be provided from the records of the pension plan administrator. If the assumptions and the specific facts can be provided by a simplified procedure, the costs involved in valuation of the deferred annuity can be minimized without injustice to the spouses.

We think that a governmental agency or agencies should assume the responsibility for determining annually the interest rate assumptions which should be made in determining the value of deferred annuities under defined benefit pension plans for the purpose of the division of matrimonial property. The agency should do this annually. It should act upon the best expert advice available, probably in the form of an advisory committee which might include of a Fellow of the Canadian Institute of Actuaries, an economist and another person from a relevant discipline as well as a pension plan sponsor or administrator. The result should be put into the form of ministerial regulations under the Pension Benefits Act and under the statutes which govern the public sector pensions. It would be highly desirable that the regulations under all the statutes be identical, subject to any differences needed to fit them into the pattern of the different statutes, and we think that one advisory committee could advise the responsible Ministers. If so, the advisory committee should also include the Chairman of the Alberta Government Pension Boards and the Superintendent of Pensions or officials who from time to time perform their present functions. The responsible agency would be the Ministers who supervise the administration of the statutes.

We think that the result of the interest rate assumptions should be embodied in tables of values which would also be prescribed by regulation. These tables could be prepared by the government officials involved but upon the advice of the same advisory committee. They could be embodied in the regulations.

What we are suggesting would impose some burden upon government. We do not think that it would be a great burden. An advisory committee would involve some expense but not much. Its work could be done in a few meetings each year. The computations could be made as part of the ordinary work of the departments involved and would not require additional staff or equipment.

The Saskatchewan government annually issues annuity value tables for the purposes of the Pension Benefits Act (Saskatchewan). These are prescribed by regulation. They are based upon prescribed interest rates which are applicable for the calendar year. These tables provide a precedent for what we are suggesting. If the Alberta government's view is that it should not assume the burden of promulgating similar tables annually, it would be possible to adopt the Saskatchewan tables. Our preference would be to have Alberta regulations directed towards the division of matrimonial property, but we think that if necessary use of the Saskatchewan tables would result in a procedure which would be more efficient than one which requires a separate decision in every case on specially prepared expert reports and testimony. We think that in abstract terms it would be as fair and we think that by saving cost and complexity it would do better justice.

We think also that a standard procedure for presenting the specific facts about the pension plan and about the employee spouse would help to minimize the costs of valuation. This is true for defined contribution plans as well as defined benefit palns. The obvious source for those facts is the pension plan administrator and we think that spouses who are in the process of dividing their matrimonial property should be able to obtain the facts from the administrator. We think that a systematic procedure for the production of the facts can be designed and that it will not impose an undue administrative burden upon pension plan administrators.

We think that ministerial regulations should prescribe forms for completion by pension plan administrators upon proper requisition on behalf of spouses. A form under a defined benefit plan would set out the formula which determines the amount of the deferred annuity, the employee spouse's length of service, his or her normal retirement date, the amount of his or her vested deferred annuity, death benefits provided by the pension plan and any other information which is relevant to the making of the valuation. The form would also show the current interest rate assumptions prescribed by current regulations and would show the value which the prescribed tables would give to the deferred annuity. The pension plan administrator would not have to conduct elaborate investigations or to perform elaborate computations. We are advised that the administrators of the larger pension plans could devise standardized and largely computerized procedures which would keep down the administrative burden.

Our conclusion is that under a valuation and accounting the information provided by the pension plan administrator, including the prescribed assumptions, should be evidence and that under a valuation and division the Court should be limited to making an order in accordance with its terms.

We think that either spouse should be able to requisition the prescribed information in the prescribed form from the pension plan administrator. However, we think that a spouse who puts in a requisition should be required to satisfy the pension plan administrator either that an action has been commenced for the division of matrimonial property or that the spouses are negotiating a division. The Court should have power in a matrimonial property action to order a pension plan administrator to provide the information.

We think also that where a money purchase plan is involved the pension plan administrator should be required to provide the factual information about the pension plan and about the employee spouse. Instead of the formula which determines the amount of the employee spouse's deferred annuity the pension plan administrator should be required to show the amount to the credit of the account from which the employee's deferred annuity will be bought.

<u>Tentative Recommendation No. 13</u>.

We tentatively recommend:

(1) that regulations be promulgated under the Pension Benefits Act and under the public sector pension statutes:

(a) adopting annually interest and discount rates to be used in valuing vested deferred annuities under defined benefit pension plans and providing tables of values for such deferred annuities.

(b) requiring a pension plan administrator, upon requisition by a spouse involved in negotiating or litigating the division of matrimonial property upon marriage breakdown, or upon an order of the Court, to provide in prescribed form the information necessary to determine the present value of the employee's normal retirement annuity, which would be admissible in evidence upon a valuation and accounting.

(2) that the regulations be promulgated by the responsible Ministers after receiving the advice of an advisory committee which should include the officials charged with the administration of the pension legislation and persons expert in the disciplines involved in the valuation of deferred annuities.

(viii) Effect of portability

There are strong pressures towards making pension benefits "portable." We understand that there is a probability that portability will be achieved soon. If it is achieved it may solve the problems of valuation.

One way to make a pension benefit "portable" would be to allow an employee who leaves his or her employment to have the value of the pension benefit transferred to a new employer's pension plan or to a registered retirement savings plan. Another way would be to allow the employee to transfer contributions and interest. Either would establish a dollar amount which an employee spouse could realize, and we think that a valuation in that amount would be a fair valuation for the purpose of the division of the pension benefit upon marriage breakdown. The amount which an employee could take away is a strong component of the value to him or her for any purpose. Even if the employee spouse could not use the money except for investment in a pension it seems fair to allow it to be determinative of the value to him for the purpose of division of a pension benefit between spouses.

Some pension benefits are already "portable" in some circumstances. The "portability" of such benefits, however, depends upon reciprocal agreements among groups of pension plans. The amounts of money which the plans agree to pay upon transfer are not necessarily intended to reflect the values of pension benefits, and "portability" is limited to the plans covered by an agreement. We do not think that they should be used as the basis of valuation for the division of pension benefits between spouses.

Tentative Recommendation No. 14.

> We tentatively recommend that, if the law is changed to provide that upon termination of employment an employee is by law entitled to have an amount of money representing his pension benefit transferred to another pension vehicle, a pension benefit shall be valued at that amount for the purposes of division upon marriage breakdown.

(d) Valuation and accounting

We have described the procedure of valuation and accounting earlier in this report.[10] In effect, the employee spouse buys for money or other property the pension benefit share which the non-employee spouse would otherwise receive.

The spouses may effect a valuation and accounting by agreement. If the spouses do not agree, the Court may direct that it be effected and may order one spouse to make the necessary balancing payment of money or transfer of property. Section 9(2)(a) of the Matrimonial Property Act gives the Court these powers. The value of a pension benefit can be and sometimes is divided by this method. If our proposals are adopted, the valuation will be made, or at least assisted, by the valuation procedure which we have proposed in Tentative Recommendation no. 13.

Strictly speaking, a valuation and accounting does not divide property. It divides the benefit. A spouse who owns a property keeps it and gives the other spouse something else instead, that is, money or other property. In the case of a pension benefit it gives the non-employee spouse cash and leaves the employee spouse with a contingent locked-in asset. What the employee spouse actually receives under the pension benefit will in the great majority of cases be more or less than the present value of what he will actually receive. It might seem on the fact of it that it is unfair to require one spouse to give and the other spouse to accept a credit which is very likely to be wrong. Nevertheless we think that valuation and accounting is a

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[10] See pages 33 and following.

procedure which should be followed when it is practicable.

A valuation and accounting effects a settlement of the affairs of the couple. It leaves each spouse free to manage his or her affairs without regard to the interests of the other and, in the case of the non-employee spouse, without regard to the birth and death dates of the employee spouse. It leaves the non-employee spouse with cash or property to be disposed as the interests of the non-employee spouse suggest. It leaves the employee spouse with his full entitlement to a retirement pension.

Valuation and accounting have the usual virtues of a settlement of any conflict between the interests of individuals. In any settlement which is based upon imperfect information about the future, it is quite likely that either party or both will obtain a greater or lesser benefit in the future than that party had expected. The justice received by each party is rough justice. However, we think that upon the division of matrimonial property each spouse has a strong interest in effecting a final settlement, and that a division of property which is based upon the best attempt that can be made to assess the future is fair and equitable to both sides.

The valuation and accounting procedure has a further merit. It interferes as little as possible with the administration of the pension plan and with the rights of the employer and the other employees. It makes no financial demand upon the pension fund and the only administrative demand it would make under our proposals is the provision of information which we do not think it unreasonable to ask the pension plan administrator to provide.

At present the valuation of a defined benefit deferred annuity is costly in money and time. We hope that our proposals for a valuation procedure will do away with most of the cost. Those proposals would leave it open to a spouse to contest the information provided under the regulations which we propose, but we hope that not too many would do so. Indeed, once the valuation procedure is clarified in the way we propose we think that it will in most cases be fairly obvious what the value should be, and we hope that it would not often be in a spouse's interest to engage in a contest over amounts. Under a defined contribution plan, apart from any question about a discount for the contingency of death we do not think that valuation causes a problem anyway.

There is one circumstance which can make the valuation and accounting procedure unfair. In a case in which the present value of an employee spouse's pension benefit is very great in comparison with the employee spouse's other resources it would be unfair to require him or her to find the money or transfer property to make up the non-employee spouse's distributive share. This is most likely to happen if the employee spouse's normal retirement date is not too far off and if a large vested deferred annuity under a pension plan is the principal asset of the couple. If the court is of the view that it would be unfair to require the employee spouse to make up the amount out of his other resources, valuation and accounting should not be used.

This problem has arisen and continues to arise. In <u>Moravcik</u> v. <u>Moravcik</u> (1984) 37 R.F.L. (2d) 102 an employee spouse in his late fifties appealed on the grounds that he ought not to be required to pay a large capital sum under a valuation and accounting. The Alberta Court of Appeal agreed and ordered that the proceeds of the pension benefit be divided. The same thing happened recently in the British Columbia case of Strahl v. Strahl (January 31, 1985) and the British Columbia Court of Appeal made a similar order. There may be other circumstances (for example, that the employee spouse is about to die or has died) in which a valuation and accounting would not be just and equitable. We think that they will be rare. If the Court finds that they exist, a valuation and accounting should not be ordered.

Tentative Recommendation No. 15.

We tentatively recommend that valuation and accounting not be made if it would not be just and equitable.

(e) Valuation and division

The steps taken upon a valuation and division would be as follows:

(1) the employee spouse's pension benefit would be valued in accordance with our proposals.[11] However, no allowance for potential income tax liability would be made because each spouse's share of the pension benefit would receive similar income tax treatment.

(2) the value of the non-employee spouse's share of the pension benefit would be determined, being the fraction of the value of the employee spouse's pension benefit which the non-employee spouse is to receive by

[11] See Tentative Recommendation No. 13.

agreement or under an order of the Court.

(3) the pension plan administrator would pay out an amount equal to the value of the non-employee spouse's share. The payment, would be made to another pension plan or to a registered retirement savings plan in the name of the non-employee spouse.

(4) the pension plan administrator would make the appropriate charge against the employee spouse's pension benefit.

A valuation and division cannot now be effected. Pension legislation precludes the assignment of pension benefits and makes them immune to court process. Although some unproclaimed Alberta public sector pension plan statutes now refer to matrimonial property orders and others are being amended to do the same it is far from clear that the amendments will authorize valuation and division.

The effect of a valuation and division as we have described it would be as follows:

(1) the non-employee spouse would have a non-contingent cash payment but the pension legislation or administration would require it and its investment earnings to remain locked in to provide the non-employee spouse with a retirement annuity.

(2) the employee spouse would retain the balance of his or her pension benefit which would remain subject to the pre-existing contingencies.

(3) the pension fund's obligation to provide a deferred annuity and other benefits to the employee spouse would be appropriately reduced.

For the spouses, a valuation and division would have the same great advantage as does a valuation and accounting. It would effect a final settlement of this part of the spouses' affairs, and it would do so on principles that would be just and equitable. The non-employee spouse would not have a cashable asset, but would have a tax-sheltered asset which, together with its earnings, would accumulate to provide retirement income. The employee spouse would have a reduced pension benefit but would not have to find cash or other property for the non-employee spouse. We think that under the circumstances in which it would not be fair to require the employee spouse to find outside resources to pay for the non-employee spouse's share of the pension benefit it would be fair to have the value of that share transferred to the non-employee spouse. We think that it will usually be fair to require a pension fund to pay out either the value of a pension benefit based upon actuarial principles or to pay out the appropriate share of the employee spouse's contributions plus interest. We therefore think that valuation and division should be available to the spouses and to the Court.

However, valuation and division has one great difference from valuation and accounting. The difference is that it would affect the interests of third parties. The employer and the other employees have interests in the pension fund and a payment of money from the pension fund might prejudice those interests. A settlement of the private affairs of an employee spouse and a non-employee spouse ought not to be allowed to have that effect. This consideration leads us to recommend three protections for pension plans and pension funds under a valuation and division.

First we think that a valuation and division should be made only by an order of the Court which gives the pension plan administrator clear instructions. A pension plan administrator should not be compelled, upon penalty of legal liability for an error, to interpret an agreement between spouses or to assure himself about the identity of the non-employee spouse.

Second, we think that the Court should be able to order a valuation and division only on the basis of a valuation made under the regulations which we propose, that is, a valuation made under Tentative Recommendation no. 13. A valuation made in proceedings between spouses should not be binding upon a pension fund and pension plan administrators should not be compelled to undertake the trouble and cost of being brought into litigation over a valuation made for the purposes of the spouses. The only question which a spouse should be able to raise is whether the valuation is properly made under the regulations which we propose in Tentative Recommendation no. 13.

Third, there may be a few cases in which the funding of a pension plan would be prejudiced if the value of a non-employee spouse's share is taken out. This will usually happen only if the pension plan is new or if it covers only a few employees. If the pension plan administrator satisfies the Court that there would be prejudice, a valuation and division should not be made.

One point must be addressed. Under a valuation and division the pension plan administrator will pay out for the benefit of the non-employee spouse an amount of money which should in some way be deducted from the value of the employee spouse's pension benefit. But under a defined benefit plan the employee spouse's pension benefit is not money. How can an amount of money be deducted from something which is not money and is not for other purposes valued in money terms?

One answer would be to deduct employment service instead of money. If an employee spouse had ten years of service at the time of the division and the non-employee spouse's share of the pension benefit was one quarter, it would be possible to reduce the employee spouse's benefit by 2 1/2 years, leaving him or her with 7 1/2 years' service. That answer appears fair. However, it would have two undesirable consequences. One is that in some cases a long term employee would be able to make up the lost years and achieve the maximum pension under the pension plan despite the reduction; the total burden on the pension fund would then be greater than the total burden which the pension fund is designed for. The second is that in other cases the pension fund would never have to pay that portion of the employee spouse's retirement annuity which would result from multiplying the employee spouse's increased salary by the number of the lost years; the pension benefit would enjoy a windfall and the employee spouse would not receive the increased retirement annuity which in fairness he or she should be treated as having earned during the post-division years.

We think that another answer is better. It is that any benefit the employee spouse receives under the pension plan, whether as retirement annuity, death benefit or otherwise, should at the time of payment be reduced on actuarial principles to reflect the payment of money on the employee spouse's behalf to the non-employee spouse. We are advised that in the case of a retirement annuity a "pension equivalent" can be computed by an actuary and that in the case of any other benefit a proper reduction can also be computed. We think that the way to ensure that the reduction which is made is fair both to the pension fund and to the employee spouse is to provide by regulation that the reduction should be made by the pension plan administrator upon the advice of an actuary.

Tentative Recommendation No. 16.

We tentatively recommend that a valuation and division

(a) be made only by order of the Court,

(b) be made only on the basis of a valuation made under Tentative Recommendation no. 13, and

(c) not be made if it would not be just and equitable.

Tentative Recommendation No. 17.

We tentatively recommend

(a) that upon a valuation and division the amount paid out for the non-employee spouse's benefit be charged against the employee spouse's pension benefit,

(b) that upon a benefit becoming payable to the employee spouse under the pension plan the pension plan administrator upon the advice of an actuary shall make an appropriate adjustment to the amount paid out, and

(c) that regulations under the pension legislation provide for the making of the reduction in this way.

(f) Division of Proceeds

The steps taken upon a division of the proceeds of a pension benefit would be as follows:

(1) the Court would determine the share of the pension benefit which the non-employee spouse should receive.

(2) the Court would then make an order designed to ensure that the non-employee would receive that share of any money which is afterwards paid out of the pension fund.

(3) in order to ensure payment the Court in its order would either

(a) order the pension plan administrator to pay the non-employee spouse's share of every payment to the non-employee spouse, or

(b) order the employee spouse to make the payments and (probably) impose upon him or her a trust of the non-employee's share.

When the proceeds of a pension benefit are to be divided it is necessary for the Court to say what share of the various possible benefits the non-employee spouse should receive. The share, stated as a fraction or percentage, constantly changes from the time of division to the time when a benefit becomes payable, whether the payment is a retirement annuity or a death benefit. That is because part of the pension benefit is attributable to the married years, which at the time of division is a fixed number, and because part is attributable to the post-division years, which is a constantly changing number.

Under final and best earnings pension plans the courts usually define the non-employee spouse's share by a formula. One way of stating the result of the formula[12] is that the part of the payment in which the non-employee spouse is entitled to share is a fraction the numerator of which is the number of the married years and the denominator is the number of the employee spouse's years of service. If at the time the benefit is payable the employee spouse has twenty years of service and if the marriage has lasted ten years of the twenty, the non-employee spouse is entitled to share in half of the pension benefit. To this is applied the share of the matrimonial property which the non-employee spouse is entitled to receive. If this is one half, the non-employee spouse in the example would be entitled to receive one quarter of the pension benefit, being one half of the part of the payment in which the non-employee spouse is entitled to share.

Under a formula of that kind, it is the employee spouse's retirement final or best earnings which determine the amount of the retirement annuity which is paid to the employee spouse and which therefore also determine the amount of the non-employee spouse's share. We have already recommended[13] that no account should be taken of post-division changes in the division of pension benefits. Under a formula of the kind we are discussing, it is the pension plan at the date of the payment of the benefit which determines the amount of the non-employee spouse's share. We have already recommended also[14] that post-division

[12] For other ways see Appendix B, page 4.

[13] See Tentative Recommendation No. 7.

[14] See Tentative Recommendation No. 8.

improvements should not be taken into account. That kind of formula therefore would be inconsistent with our recommendations.

If our tentative recommendations are adopted, a court which divides the proceeds of a final or best earnings pension benefit would ascertain the amount of the deferred annuity to which the employee spouse is entitled at the time of the division and which is to be treated as being accumulated during the marriage. It would then determine the fraction or percentage of the matrimonial property to which the non-employee spouse is entitled and would apply that to the amount of the earned deferred annuity. In the example given above, if the employee spouse was at the time of division entitled to a deferred annuity of $10,000, the non-employee spouse's share would be fixed at $2,500. If a death or other benefit were to become payable, the non-employee spouse's share would be one quarter of the amount of that benefit as it would have stood at the time of the division.

Although division of proceeds focuses upon the proceeds of the pension benefit it is tantamount to the division of the pension benefit itself as differentiated from providing compensation for the non-employee spouse's share. It is a procedure which the courts now follow, particularly in cases in which the value of a deferred annuity is high and the retirement age of the employee spouse is fairly near. Under present law the Court can divide the proceeds only by ordering the employee spouse to pay the non-employee spouse's share. This is because pension legislation prohibits the assignment of pension benefits and makes them immune to court process. Legislation currently enacted or being enacted may have the effect of allowing the

Court to order the pension plan administrator to divide the proceeds, but that is not yet clear. If the proceeds of a pension benefit are to be divided by the pension plan administrator amending legislation would be necessary to ensure that the Court can order the administrator to make the division.

The effect of the division of the proceeds of a pension benefit would be as follows:

(1) the pension fund would pay the same amounts as if the proceeds were not divided. Its obligations would be unchanged (except that it the administrator could be obliged to issue two cheques instead of one).

(2) the employee spouse would receive and retain the proceeds of the pension benefit less the non-employee spouse's share. He or she would not have to find any cash or other property to pay for it.

(3) the non-employee spouse would at the time of the division of the matrimonial property receive a right to a share of a deferred annuity payable in the amounts, at the times, in the various forms, and subject to the various contingencies provided for in the pension plan. He or she would be dependent upon the continued life and retirement date of the employee spouse and upon elections about the kind of annuity which will be paid.

The great advantage of the distribution of proceeds of a pension benefit is that it provides an arithmetically accurate method of dividing the economic benefit which the employee spouse has. "I see no reason," said the Alberta Court of Appeal,[15] "why the parties should be visited with the fruits of uncertainty when it is within the capacity of a court to ensure that the property is, with certainty, equally divided." The division of proceeds, however, may cause some problems which have not yet been worked out by the courts and which we think cannot be satisfactorily worked out. We think that these problems are so serious that the proceeds of a pension benefit should not be divided unless both a valuation and an accounting and a valuation and division would be unfair to one or both spouses or to the others who have interests in the pension plan and pension fund. In that context, we note that even in the later stages of an employee spouse's employment career valuation and division should work well. The present value of the retirement annuity can be ascertained easily. If transferred to a pension vehicle for the non-employee spouse it will yield enough to buy the non-employee spouse a retirement annuity in the proper amount. The employee spouse will retain his or her proper benefit. The affairs of the spouses will be separated and none of the problems which we describe below will arise.

However, we think that the division of proceeds should be available to the Court to use in a case in which neither of the other two methods would give a satisfactory result. We also think that it should be available upon the consent of both spouses, as the problems which it causes could be resolved by negotiation.

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[15] <u>Moravcik</u> v. <u>Moravcik</u> (1984) 37 RFL (2d) 102.

The great disadvantages of a court-imposed division of the proceeds of a vested pension benefit arise because the interests of the spouses, which are sometimes in conflict, are entangled in a structure of rights which is quite unsuited to accommodating the interests of a non-employee spouse and which is quite unsuited to the resolution of conflicting interests. The courts have made efforts to resolve the difficulties and will no doubt continue to do so but the problems appear to us to be intractable and to be acceptable only if there is no alternative way of dividing the pension benefit.

The first of these difficulties affects only the non-employee spouse. It is that the rights of the non-employee spouse will be left dependent upon the continued life of the employee spouse. It might be thought that there is nothing wrong with this situation, as what the employee spouse has is a right which is dependent upon his or her survival and that is what is being divided. However, it means that there is no asset which the non-employee spouse can use to live with or plan with or work into a general arrangement for financial management. The commencement and duration of the non-employee spouse's income stream will be quite fortuitous insofar as the non-employee spouse is concerned and will not relate to other financial events or milestones in the non-employee spouse's life. If this result can be avoided it should be avoided. There is no way in which it can be avoided under any method of dividing the proceeds of the pension benefit because it is in the very nature of the benefit.

A cluster of difficulties arise because the pension plan provides different benefits depending upon a number of choices made by the employer and by the employee spouse. Either the employer or the employee spouse may bring the employee spouse's employment to an end. The employee spouse may or may not be able to transfer his pension benefit to another pension plan. If he can transfer his pension benefit he will receive a different pension benefit which may be better or worse. The employee spouse may have the right to retire earlier or later than the normal retirement date provided by the pension plan. The deferred annuity which results from one employment choice may or may not have a different actuarial value or yield a different amount to the non-employee spouse than the deferred annuity which would have resulted from another choice. The employee spouse may have the right to elect for something other than the pension plan's "normal annuity", for example, as an annuity for life with a guaranteed period of years or an annuity for the joint lives of the employee spouse and his or her then spouse and for the life of the survivor. In any of these cases any choice may at once be favourable to the interests of one of the separated or divorced spouses and prejudicial to the interests of the other. The employee spouse's bundle of rights under the pension plan is, however, one and indivisible. There is no way in which one choice can be made for the employee spouse's interest in the pension benefit and another choice for the non-employee spouse's interests without risk of prejudice to the rights of others.

What could the law do to resolve these problems in ways which are fair to the two spouses? The legislation could try to lay down rules setting out the rights of the spouses in each of these cases. That would be impracticable and undesirable. We think that there are only three practicable ways in which the law could deal with the problem of elections if the Court imposes a division of proceeds against the will of either spouse. The first is to leave the election to the employee spouse. The second is the same but to require the non-employee spouse to pay the non-employee spouse some form of compensation for making a choice which is adverse to the non-employee spouse's interests. The third is to require the employee spouse to obtain either the consent of the non-employee spouse or the approval of the Court.

In <u>McAlister</u> v. <u>McAlister</u> (1982) 41 AR 277 (Q.B.), which because of its later acceptance may be considered as the seminal Alberta decision, Mr. Justice Dea grappled with the problem in two ways. Effectively he left decisions about retirement to the employee spouse; whenever the employee spouse retired he would be obliged to share with the non-employee spouse the payments received on account of the retirement annuity which would become payable. However, he directed the employee spouse to name the non-employee spouse as the employee spouse's beneficiary with the pension plan administrator and enjoined the employee spouse "not to exercise any rights given to him by the plan, nor to make designations, nor to excercise options except with agreement by the wife and, failing agreement, by order of the court." In <u>Moravcik</u> v. <u>Moravcik</u> (1984) 37 RFL (2d) 102, the Court of Appeal took much the same approach, but the injunction was against "naming any beneficiary to the plan other than the wife or his estate, without leave of the court, and ...,without leave, from anticipating the pension benefits so as to reduce or otherwise adversely affect the wife's entitlement." The consent of the non-employee spouse would make a court order unnecessary. It may be that this language would prevent the early retirement of the employee spouse, or at least prevent him or her taking an early pension.

In the leading British Columbia case of Rutherford v. Rutherford (1981) 6 WWR 485 the British Columbia Court of Appeal suggested that the employee spouse might be ordered to take all necessary steps to protect the non-employee spouse's share of the proceeds and in particular, to designate the non-employee spouse as a beneficiary of the appropriate share of the death benefits and to elect benefits only with the approval of the non-employee spouse.

The British Columbia Court of Appeal went on to deal with the possibility that the employee spouse might postpone his retirement. In that event the non-employee spouse should not, as the trial judge had held, "... be driven to seek maintenance. She may choose to wait until Mr. Rutherford retires. But she is not obliged to wait. She can choose to draw her share of the pension starting at his age 55. Mr. Rutherford can be required to pay compensation if he has not retired." The Court of Appeal agreed with a California court which reasoned that an employee spouse who, if he continued to work, must reimburse the non-employee spouse "for the share of the community property that she loses as a reult of the decision." If the postponement of retirement would increase the retirement annuity when it commenced, presumably the court would have to sort out the resulting situation when that occurred. In Hierlihy v. Hierlihy (1984) 48 Nfld. & P.E.I.R. 142, the Newfoundland Court of Appeal ordered that the proceeds of a pension benefit be divided and that a trust be imposed upon the employee spouse. The employee spouse would have been entitled to a full pension upon achieving 55 years of age and 35 years of service, and the Court of Appeal went on to say:

> "In the event that the husband did not elect to retire when qualified to do so, the wife is still entitled to receive her percentage of the pension as of the qualifying retirement date as though he had in fact retired."

The trial judge, to whom the Court of Appeal referred the matter back for disposition, proceeded to order an unequal division of the matrimonial property which precisely offset not only the payments after the employee spouse's notional retirement but also the payments made to date after his actual retirement and before the second trial. However, it appears that he did so because the employee spouse had made maintenance payments in approximately the same amount as well as making payments for utilities and allowing the non-employee spouse to remain in the matrimonial home.

The British Columbia and Newfoundland decisions penalized employee spouses who continued to work. We do not think that that is fair. No one would, we think, suggest that the law should, for the benefit of a former spouse, coerce anyone either to work or to stop working. But these decisions in effect did that. Because the employee spouse in each case continued to work when it would have been to the advantage of the non-employee to stop working he had to make substantial payments to the non-employee spouse. If the employee spouse had changed jobs he would not have had to pay the non-employee spouse anything but because he continued in the same job he did have to pay. This is financial coercion. The purpose of the Matrimonial Property Act is to divide between the spouses the economic gains made by both of them during marriage. We do not think that the logic of the Act leads to the conclusion that after division one spouse must for the benefit of the other either forego an opportunity to earn a salary or pay to the other a share of a retirement annuity which has not been paid. If it does, we think that that is carrying logic too far. We think that the law should not exert compulsion about employment choices unless it is shown that an employee spouse's employment choice is made in bad faith.

Different considerations apply to the making of an election which does not affect a spouse's employment. Then it is only the economic interests of the two spouses, and possibly of a later spouse of the employee spouse, which may come into conflict. The choice of the way in which the law should deal with the problem is difficult. We think that the starting point must be that each spouse has an interest in the rights conferred by the pension plan which is of the same kind and stands on the same footing, though one interest be greater in quantity than the other. One of those rights is a contingent right to receive the "normal" retirement annuity under the pension plan. Another of those rights may be a right at the proper time to elect to receive a different retirement annuity, sometimes including an annuity for the employee spouse's current spouse. The right to elect is included in the pension benefit which is to be divided upon marriage breakdown. It is a right the exercise of which affects both the interest which the non-employee spouse receives and the interest which the employee spouse retains.

To leave the election to the employee spouse alone would, we think, be unfair. It would allow a decision about the non-employee spouse's legal rights to be made by someone else whose financial interests may conflict with those of the non-employee spouse and who may also be vindictive. We do not think that the decision should be made without the non-employee spouse being heard. We are driven to the conclusion that the decision should be made by agreement and that failing agreement it should be made by the Court. We do not like a solution which may require the spouses to incur the trouble and expense of an application to the Court. We do not like a solution which leaves to the Court a choice to be made between conflicting interests without any guiding principles, but we think that it is the only solution possible. Further, we think that the Court will often be able to work out terms which will adjust the conflicting interests and that the prospect of a Court application will often cause the spouses themselves to work out a compromise.

If the proceeds of a pension benefit are to be divided, we think that so far as possible all the proceeds should be divided. The proceeds include the retirement annuity if one is paid. They include any termination benefit which is paid to the spouse.

In principle, we think that the divisible proceeds of a pension benefit include a benefit payable on the employee spouse's death. The death benefit is usually payable to the employee spouse's estate or designated beneficiary. We see no difficulty in saying that in those cases the death benefit is divisible and that the appropriate share should be paid to the non-employee spouse. Under the public sector penion plans, however, there is a difficulty which we must address.

The combined effect of sections in the Public Service Pension Plan Act 1984 S.A. c. P-35.1 (which is not yet proclaimed) is that, if an employee dies leaving a "spouse" as defined in the statute, a death benefit of twice the employee's contributions plus interest will be payable to the spouse. While they remain in this form we think that the two sections will put the death benefit beyond the reach of a court order which divides the proceeds; the death benefit is the spouse's property, and "spouse" does not usually include a divorced or separated spouse. Other public sector pension plan statutes which are in the process of enactment contain similar provisions.

These sections are newly enacted and presumably reflect a social policy of protecting the employee's current spouse or unmarried consort. We do not take issue with that policy. It does seem to us, however, that the reasons behind that policy apply in favour of a former spouse during whose marriage part of the asset, that is, the right to a death benefit, was accumulated. It seems to us that it would be fair to both former and current spouse to give the Court power to direct either the pension plan administrator or the spouse who receives the death benefit to pay to the former spouse a share of the death benefit equal to the former spouse's share of the death benefit.

Should the divisible proceeds include a benefit paid upon the disability of the employee spouse? If the benefit is received under a right which the employee spouse had at the time of the division we think that it should be included. If it is paid as a matter of discretion, the question is more difficult.

It may be said that the payment is earned during the time of the marriage. We do not, however, think that the argument is correct. By definition the pension plan sponsor would at the time of division be under no legal obligation to award the benefit and the employee spouse would not at the time of the division of the matrimonial property have any legal right to receive it; indeed he or she would have no right to the benefit until it is received. Further, the intention of the pension plan sponsor would normally be to provide the employee spouse with the benefit and not a former spouse.

There may be doubtful cases. Although the pension plan sponsor may have a discretion to allow or refuse an early retirement on grounds of disability and a discretion to award an annuity upon such an early retirement, it may be that the sponsor and the employees have a fairly confident expectation that upon a serious disability occurring both discretions will be exercised in favour of the employee; that is, that the employee spouse had a fairly confident expectation at the time of the division of the matrimonial property that if he or she were to become disabled the pension sponsor or administrator would provide an annuity. Further, if the annuity which he is awarded upon disability is transmuted into a normal retirement annuity at retirement age it would be difficult to separate the two. We think that the doubtful cases should be left to the Court which can decide when a fairly confident expectation should be treated as being tantamount to a legal right.

Now, or in the future, pension plans may confer upon employees benefits of kinds not envisaged in this report. We think that the general rule should be that if at the time of the division of matrimonial property the employee spouse has a contingent right to receive a benefit under circumstances which may arise in the future, the benefit should be shared when it is received.

<u>Tentative Recommendation No. 18</u>.

We tentatively recommend that upon a division of proceeds

(a) elections should be made only with the agreement of the non-employee spouse or the approval of the Court, but if the election involves the employee spouse's employment the Court should not withhold its approval unless it is satisfied that the election is not made in good faith,

(b) a death benefit should be divided, and the new public sector pension legislation should be amended to allow the Court to order the division of a death benefit,

(c) a disability benefit or other contingent benefit should be divisible only if the employee spouse had at the time of the division a right to a benefit upon disability or other event.

We noted earlier that the Court has power to order an employee spouse to divide the proceeds of a pension benefit and that it has power to impose a trust upon him to do so. We noted also that the Court does not have the power to order a pension plan administrator to divide the proceeds.

Requiring the employee spouse to divide the proceeds causes serious problems for both spouses. First, an employee spouse may well resent having to send a cheque every month to someone towards whom he has bitter feelings, particularly if the employee spouse himself is not affluent. Second, the employee spouse is likely to have difficulty with the Department of National Revenue. The pension plan administrator will issue a statement each year that it has paid the whole amount of the retirement annuity to the employee spouse. The Department will want the employee spouse to include the whole amount in his taxable income. We think that the employee spouse will be able to satisfy the Department that the part of the annuity which he has paid over to the non-employee spouse was not his money and should not be included in his taxable income. However, we may be wrong on that point, and we note that in Moravcik v. Moravcik (1984) 38 R.F.L. 102, the Court of Appeal was sufficiently uncertain that it reserved to the employee spouse in cases of need the right to apply for an order to ensure that each party bore his appropriate share of any tax liability. Even if the trust arrangement did not render the employee spouse liable for income tax on the non-employee spouse's share it would expose him to a good deal of administrative inconvenience.

However, the non-employee spouse is likely to experience a much greater problem from being dependent upon the division of proceeds by the employee spouse. The problem is that of collection. Even if the employee spouse acts in good faith there may be delays in payment. The employee spouse may, however, drag his feet because he sees no need to move quickly or even because he would like to embarrass the non-employee spouse. He may simply refuse to pay. He may leave Alberta and the non-employee spouse may find it difficult to follow him to collect the money. Or the non-employee spouse may leave Alberta and find it difficult and expensive to take legal steps in Alberta to collect the money. Outside Alberta we are advised that the non-employee spouse may have little more security than a personal right against the employee spouse.

If the pension plan administrator were to pay the non-employee spouse's share of the proceeds to the non-employee spouse these difficulties would not arise. The pension plan administrator would give each spouse a statement for income tax purposes showing the amounts received by each. The non-employee spouse's money would not reach the employee spouse's hands and there would be no collection problem. It would be in the interests of both spouses for the pension administrator to divide the proceeds.

In order to divide the proceeds the pension plan administrator would have to keep track of two payees instead of one. Sometimes he might have to do so for many years, though we hope that the division of proceeds would be used rarely and usually when the employee spouse is nearing retirement. He would have to set up an administrative procedure to identify at the time of each payment all accounts which require the additional cheque. He would have to apply the appropriate percentages to each payment and compute the actual amounts payable to each spouse. He would have to issue and mail an additional cheque for each payment.

Dividing proceeds would obviously impose an administrative burden upon a pension plan administrator. We doubt, however, that the burden would be unduly onerous, and we expect that it could be compensated for by reasonable administrative charges to the two parties.

We think, however, that it should only be the Court which has the power to order a pension plan administrator to divide the proceeds of a pension benefit, though it might do so with the consent of the two spouses. We think that the pension plan administrator should not be put to the trouble and risk of identifying people, determining whether a party to a contract is an employee's spouse, interpreting contracts, and so on. There should be an order of the Court and it should give precise instructions to the pension plan administrator. These should include the precise amount of the proceeds to which the employee spouse is entitled or will be entitled at any time when payments are to be made, or a precise fraction or formula. The pension plan administrator should have the right to apply to the Court for directions, though we hope that any such right would have to be exercised only on the rarest of occasions; a pension plan administrator should not be subjected to the cost and trouble of litigation and we do not think that the legislation which we propose will do so.

There is another way to avoid requiring the employee spouse to divide the proceeds. That is to appoint a receiver of the pension proceeds as an Ontario Divisional Court did in _Simon_ v. _Simon_ (1984) 2 Ont. App. Cases 40. However, if the pension plan administrator pays the non-employee spouse's share directly to the non-employee spouse, the intervention of a receiver is not necessary.

Tentative Recommendation No. 19.

We recommend that in order to effect a division of the proceeds of a pension benefit the Court

(a) be given power to order a pension plan administrator to effect the division and pay to a non-employee spouse such portion of a payment of proceeds as the Court may determine, and

(b) retain its existing power to order an

> employee spouse to pay to the non-employee spouse a share of the proceeds and to impose upon the employee spouse such trusts as are necessary to give effect to the order.

G. Exempted Property

What is to be divided between spouses upon marriage breakdown is the property which they have accumulated during their marriage. To give effect to this principle section 7(2) of the Matrimonial Property Act exempts from division under the act "property acquired by a spouse before the marriage". Section 7(3), however, requires the Court to distribute the difference between the "exempted value of property described in subsection (2)" and "the market value at the time of the trial" of the original property. (The presumption that equal division is just and equitable does not apply here.) But the notion of "market value" is not appropriate to a pension benefit. Because of its nature a pension benefit would rarely if ever be saleable in a market, and the legislation which prohibits the assignment or attachment of money payable under a pension plan makes it legally unmarketable. How then can the value of the part of the pension benefit which accrued during the marriage be determined? How can the part in which the non-employee spouse is entitled to share be separated from the pre-marriage part?

For either valuation and accounting or valuation and division the answer which would fit best with abstract principle is to go back to the date of the marriage, work out the value of the pension benefit at that date, and subtract that value from the present value. The difference would be the value of the benefit which accrued during the marriage. Essentially the same answer would apply to a division of proceeds. It would, however, create difficulties in either case. Sometimes old records will not be available. Even if our proposals for simplifying the valuation procedure are helpful for current valuations they will do nothing for past ones. Valuation of the pension benefit at the time of the division of property causes enough difficulties. To add to that a valuation in the past would complicate the process unbearably.

The courts have adopted a more sensible answer. In essence, that answer is to pro-rate the accrual of the pension benefit equally over the whole period of its accrual. One way of stating the result of the pro-rating formula is that the part of the payment in which the non-employee spouse is entitled to share is a fraction the numerator of which is the number of the married years and the denominator is the number of the employee spouse's years of service.[16] If the employee spouse has been a member of the pension plan for twenty years and married for ten of those twenty years the part attributable to the married years is one half.

It should be noted that the application of this formula is likely to overvalue the pension benefit which the employee spouse had at the time of the marriage and thus to undervalue the pension benefit which has accrued during the marriage. In the earlier stages of his employment career an employee's salary and contributions are likely to have been less than in the later stages so that his accumulation of pension benefit is also likely

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[16] The same formula is referred to for a different purpose at page 87. See also Appendix B, page 4, for different statements of the formula.

to have been less. However, we do not think that justice would be served by the imposition upon the spouses and the pension plan administrator of the costs of valuation at two different times; we think that pro-rating will serve the interests of the spouses better.

We think that the Matrimonial Property Act should be amended to permit the pro-rating of the pension benefit over the pre-married and married years. The wording of section 7(3) might be construed to require both an incoming valuation and a present valuation, and we think that an amendment should confirm the legality of pro-rating.

Tentative Recommendation No. 20.

> We tentatively recommend that the Matrimonial Property Act be amended to confirm that an employee spouse's pension benefit which began to accrue before the marriage can be pro-rated over the pre-marriage and marriage years.

H. Income Tax ramifications of dividing pension benefits

Upon a division of matrimonial property it is desirable to avoid attracting tax which would not otherwise be paid. We stop here to consider whether our proposals would attract income tax.

Our proposals would not change the substantive law about division of a pension benefit by valuation and accounting, nor would they change the income tax consequences. Neither spouse would suffer any tax liability as a result of a valuation and accounting. The employee spouse would, as now, include in his taxable income all proceeds of the pension plan when he receives them.

Our proposals would not change the substantive law about division of a pension benefit by division of the proceeds, and we do not think that they would change the income tax consequences. If the pension plan administrator divides the proceeds, however, we think that it will be clearer that the non-employee spouse's share in the non-employee spouse's income and not the employee spouse's income, and some procedural and administrative difficulties should be avoided. If the employee spouse moves to another jurisdiction, division of the proceeds by the pension plan administrator may save a great deal of income tax difficulty here and there and may save some tax.

Our proposals for valuation and division would be a new departure. If the non-employee spouse's share of the value of the pension benefit were to be paid directly to the non-employee spouse we would expect that the amount would be included in the non-employee spouse's income under section 56(1)(a)(i) of the Income Tax Act. We are advised that if the non-employee spouse's share is paid into another registered pension plan or into a registered retirement savings plan the tax situation is not beyond doubt and that it is conceivable that Revenue Canada could take the position that the share would be taxable income in the hands of the non-employee spouse. However, section 60(j) of the Income Tax Act, if read in conjunction with section 56(1)(a)(i) and section 248, appears to provide a basis for a deduction of the amount included under section 56(1)(a)(i), and we understand that Revenue Canada is prepared to allow such a deduction. We propose to ask for a formal ruling which, while it would not provide legal bedrock for the indefinite future, would, we think, give sufficient protection in any specific case.

There is a related problem. Alberta pension plans do not now provide for payments to spouses or former spouses of employees. If a pension fund makes a payment which is not authorized by the plan Revenue Canada might well refuse to continue the registration of the plan. It follows that Alberta pension plans would have to be amended to provide for valuation and division and for the division of proceeds by the pension plan administrator. So would non-Alberta pension plans covered by reciprocal agreements. We understand that Revenue Canada would accept such amendments, and will ask for a ruling to that effect. We think that the proposed legislation should provide for such amendments.

Tentative Recommendation No. 21

We tentatively recommend that the proposed legislation provide for the amendment of all pension plans to provide for the division of pension benefits in accordance with the Matrimonial Property Act.

I. Conclusion

We have in this report discussed a subject which is extremely complex. We hope that if our proposals are adopted they will make it easier for the courts and for divorcing and separating couples to deal with it. They would provide an easy and inexpensive source of valuation information and would give the Court an important new method of dividing a pension benefit under the procedure which we have called valuation and division. If the Court has to fall back upon the division of proceeds, or if the spouses agree to it, our proposals would avoid the collection problems which are likely to arise if employee spouses are required to effect the division. We do hope very much, however, that everyone with an interest in the subject will analyse our proposals and give us and the Government of Alberta the benefit of their analysis, comments, and proposals.

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C.W. DALTON	D.B. MASON
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May 1985

PART III

LIST OF TENTATIVE RECOMMENDATIONS

Tentative Recommendation No. 1.

We tentatively recommend that the legislation proposed in this report apply to a pension benefit under any of the following:

(a) pension plans established by or under Alberta legislation, and in particular a pension plan established under The Alberta Government Telephones Act, The Local Authorities Pension Act, The M.L.A. Pension Act, The Public Service Management Pension Act, The Public Service Pension Act, The Special Forces Pension Act, The Teachers' Retirement Fund Act, and the Universities Academic Pension Act.

(b) pension plans which are or ought to be registered under the Pension Benefits Act (Alberta).

(c) pension plans which are covered by reciprocal intergovernmental agreements under which the plans, insofar as they cover Alberta employees, are to be administered in accordance with Alberta law.

(d) pension plans which are established or registered by or under statutes which recognize Alberta law or Alberta court orders.

[Page 14.]

Tentative Recommendation No. 2.

We tentatively recommend that upon the breakdown of marriage pension benefits be divisible between the spouses as property covered by the Matrimonial Property Act.

[Page 38.]

Tentative Recommendation No. 3.

We tentatively recommend:

(1) that upon marriage breakdown the economic gain represented by the acquisition or an increase in value during marriage of a pension benefit should be divisible between the spouses under and in accordance

with the principles of the Matrimonial Property Act and in particular the principle of just and equitable division.

(2) that in giving effect to those principles the following subsidiary consideration should be borne in mind:

(a) that it is desirable to avoid or to minimize future financial and business relationships between the spouses.

(b) that it is desirable to facilitate and encourage settlements.

(c) that it is desirable to minimize the financial and emotional costs of the division.

(d) that income tax consequences of the division of matrimonial property should be taken into account and that it is desirable to avoid attracting income tax which would not otherwise be payable.

(3) that the rights of third parties should not be prejudiced by the division of a pension benefit between the spouses.

(4) that the division of a pension benefit should not contravene the policy behind pension legislation by diverting to other purposes money which has been contributed to pension funds for retirement annuities.

[Pages 40-41.]

<u>Tentative Recommendation 4</u>.

We tentatively recommend that the following methods of division of a pension benefit be used:

(1) a valuation and accounting, under which the employee spouse would retain the pension benefit and compensate the non-employee spouse for the appropriate share of the pension benefit.

(2) a valuation and division, under which the pension plan administrator would

(a) pay for the benefit of the non-employee spouse the present value of the share in the pension benefit which the non-employee spouse is entitled to receive, and

(b) reduce the employee spouse's pension benefit to reflect the payment.

(3) a division of the proceeds of a pension benefit.

[Pages 42-43.]

<u>Tentative Recommendation No. 5</u>.

We tentatively recommend that before vesting a pension benefit

(a) be divided by valuation and accounting, and

(b) subject to any necessary adjustment for potential income tax liability, be valued at the amount of any benefit to which the employee spouse would at the time of division be entitled to receive if his employment were terminated at that time.

[Pages 45-46.]

<u>Tentative Recommendation No. 6</u>.

We tentatively recommend that if payments have started under a retirement annuity the pension benefit should:

(a) be divided either by

(i) valuation and accounting, or

(ii) division of proceeds either by the pension plan administrator or by the employee spouse, and

(b) be valued for a valuation and accounting on actuarial principles using normal lifetimes as determined by mortality tables.

[Page 48.]

<u>Tentative Recommendation No. 7</u>.

We tentatively recommend that in dividing a pension benefit no account be taken of an actual or prospective change in an employee spouse's salary after the division unless at the time of the division the employee spouse has a right to an increase in salary or the employer has a right to reduce the salary.

[Page 56.]

<u>Tentative Recommendation No. 8</u>.

We recommend that in dividing a pension benefit no account be taken of an actual or prospective improvement in the pension plan after the division unless at the time of the division the employee spouse has a right to have the improvement made.

[Page 57.]

Tentative Recommendation No. 9.

We tentatively recommend that under a defined contribution pension plan the value of an employee spouse's pension benefit be the amount of contributions and interest held for the employee spouse's account.

[Page 59.]

Tentative Recommendation No. 10.

We recommend that no allowance shall be made for the possibility that the employee spouse will not live until the commencement of a retirement annuity unless, in the case of a valuation and accounting, a valuation without such an allowance would not be just and equitable.

[Page 67.]

Tentative Recommendation No. 11.

We tentatively recommend that no allowance shall be made for the possibility that the pension fund may not be sufficient to pay all annuities unless, in the case of a valuation and accounting, a valuation without such an allowance would not be just and equitable.

[Pages 69-70]

Tentative Recommendation No. 12.

We tentatively recommend that upon a valuation and accounting an allowance may be made for the potential effect of income tax.

[Page 71.]

Tentative Recommendation No. 13.

We tentatively recommend:

(1) that regulations be promulgated under the Pension Benefits Act and under the public sector pension statutes:

(a) adopting annually interest and discount rates to be used in valuing vested deferred annuities under defined benefit pension plans and providing tables of values for such deferred annuities.

(b) requiring a pension plan administrator, upon requisition by a spouse involved in negotiating or litigating the division of matrimonial property upon marriage breakdown, or upon an order of the Court, to provide in prescribed form the information necessary to determine the present value of the employee's normal retirement annuity.

(2) that the regulations be promulgated by the responsible Ministers after receiving the advice of an advisory committee which should include the officials charged with the administration of the pension legislation and persons expert in the disciplines involved in the valuation of deferred annuities.

[Page 76.]

<u>Tentative</u> <u>Recommendation</u> <u>No.</u> <u>14</u>.

We tentatively recommend that, if the law is changed to provide that upon termination of employment an employee is by law entitled to have an amount of money representing his pension benefit transferred to another pension vehicle, a pension benefit shall be valued at that amount for the purposes of division upon marriage breakdown.

[Page 77.]

<u>Tentative</u> <u>Recommendation</u> <u>No.</u> <u>15</u>.

We tentatively recommend that valuation and accounting not be made if it would not be just and equitable.

[Page 81.]

<u>Tentative</u> <u>Recommendation</u> <u>No.</u> <u>16</u>.

We tentatively recommend that a valuation and division

(a) be made only by order of the Court,

(b) be made only on the basis of a valuation made under tentative recommendation no. 13, and

(c) not be made if it would not be just and equitable.

[Page 86.]

Tentative Recommendation No. 17.

We tentatively recommend

(a) that upon a valuation and division the amount paid out for the non-employee spouse's benefit be charged against the employee spouse's pension benefit,

(b) that upon a benefit becoming payable to the employee spouse under the pension plan the pension plan administrator upon the advice of an actuary shall make an appropriate adjustment to the amount paid out, and

(c) that regulations under the pension legislation provide for the making of the reduction in this way.

[Page 86.]

Tentative Recommendation No. 18.

We tentatively recommend that upon a division of proceeds

(a) elections should be made only with the agreement of the non-employee spouse or the approval of the Court, but if the election involves the employee spouse's employment the Court should not withhold its approval unless it is satisfied that the election is not made in good faith,

(b) a death benefit should be divided, and the new public sector pension legislation should be amended to allow the Court to order the division of a death benefit,

(c) a disability benefit or other contingent benefit should be divisible only if the employee spouse had at the time of the division a right to a benefit upon disability or other event.

[Page 101.]

Tentative Recommendation No. 19.

We recommend that in order to effect a division of the proceeds of a pension benefit the Court

(a) be given power to order a pension plan administrator to effect the division and pay to a non-employee spouse such portion of a payment of proceeds as the Court may determine, and

(b) retain its existing power to order an employee spouse to pay to the non-employee spouse a share of the proceeds and to impose upon the employee spouse such trusts as are necessary to give effect to the order.

[Pages 104-105.]

<u>Tentative Recommendation No. 20</u>.

We tentatively recommend that the Matrimonial Property Act be amended to confirm that an employee spouse's pension benefit which began to accrue before the marriage can be pro-rated over the pre-marriage and marriage years.

[Page 107.]

<u>Tentative Recommendation No. 21</u>.

We tentatively recommend that the proposed legislation provide for the amendment of all pension plans to provide for the division of pension benefits in accordance with the Matrimonial Property Act.

[Page 109.]

PART IV

PROPOSED LEGISLATION

MATRIMONIAL PROPERTY AMENDMENT ACT

1. *The Matrimonial Property Act is amended by this Act.*

NOTE: 1 This draft Bill would amend chapter M-9 of the Revised Statutes of Alberta 1980.

[Tentative Recommendation 2, page 38. Tentative Recommendation 3(1), pages 109-110.]

2. *The following is added after Part 1:*

PART 1.1.

DIVISION OF PENSION BENEFITS

18.1 In this Part,

(a) "non-participant spouse" means a person who is the spouse of a participant spouse;

(b) "non-participant spouse's share" means the share of the participant spouse's pension benefit that the Court distributes to the non-participant spouse;

(c) "participant spouse" means a person who is a party to a matrimonial property order or an application for a matrimonial property oder, and

(i) who contributes or has contributed to a pension plan, or

(ii) on whose behalf contributions are made or have been made to a pension plan;

(d) "pension benefit" means every right of a participant spouse to receive a benefit under a pension plan on retirement, death, disability or termination of his participation in the pension plan;

(e) "pension plan" means

(i) a pension plan as defined in the *Pension Benefits Act* that is required to be registered under that Act,

(ii) a pension plan established or continued under

(A) the *Alberta Government Telephones Act*,

(B) the *Local Authorities Pension Act*,

(C) the *M.L.A. Pension Act*,

(D) the *Public Service Management Pension Act*,

(E) the *Public Service Pension Act*,

(F) the *Special Forces Pension Act*,

(G) the *Teachers' Retirement Fund Act*, or

(H) the *Universities Academic Pension Act*,

or under any Act that is a successor to an Act referred to in paragraphs (A) to (H);

(iii) a pension plan

(A) that is required to be registered under an Act similar to the *Pension Benefits Act* in another province that is designated under the *Pension Benefits Act* as a province in which there is in force legislation substantially similar to the *Pension Benefits Act*, and

(B) that is subject to an agreement entered into under section 5 of the *Pension Benefits Act*;

(iv) a pension plan that is required to be registered under the *Pension Benefits Standards Act* (Canada);

(v) a pension plan that is established or registered by or under the laws of another jurisdiction that recognizes this Act or an order made under this Act;

[Tentative Recommendation 1, page 14.]

(f) "pension plan administrator" means a person who administers or is responsible for the administration of a pension plan and any pension fund established under the pension plan that provides for a pension benefit and includes a Minister charged with the administration of a pension plan or pension fund.

18.2(1) for the purposes of making a distribution under sections 7 and 9 of the pension benefit of a participant spouse the Court may, where it is just and equitable,

(a) order a participant spouse to pay money to or transfer an interest in property to the non-participant spouse after taking into consideration the present value of the pension benefit subject to any allowance allowed by the Court for tax liability that the participant spouse might incur when he receives the proceeds of the pension benefit,

(b) subject to subsection (2) and notwithstanding anything contained in any statute referred to in section 18.1(e), order a pension plan administrator to pay for the benefit of the non-participant spouse the present value as shown on the certificate issued under section 18.9 of the non-participant spouse's share of the pension benefit unless that payment would prejudice the rights of other persons who have an interest in the pension plan and its fund;

(c) notwithstanding anything contained in any statute referred to in section 18.1(e), order a pension plan administrator to pay to the non-participant spouse the non-participant spouse's share of the proceeds of the pension benefit that would otherwise be payable to the participant spouse as and when a payment of proceeds falls due;

(d) order the participant spouse to pay to the non-participant spouse the non-participant spouse's share of the proceeds of the pension benefit as and when the proceeds are received by the participant spouse and impose upon the participant spouse a trust in favour of the non-participant spouse with respect to the non-participant spouse's share.

[Tentative Recommendation 4, page 42-43;
Tentative Recommendation 12, page 71;
Tentative Recommendation 14, page 77;
Tentative Recommendation 15, page 81;
Tentative Recommendation 16, page 86;
Tentative Recommendation 19, pages 104-105.]

(2) An order shall be made under subsection (1)(b) only where

(a) the participant spouse's pension benefit includes a vested right to a deferred annuity, and

(b) the participant spouse is not receiving an annuity arising out of the pension benefit referred to in clause (a).

[Tentative Recommendation 5, pages 42-43;
Tentative Recommendation 6, page 48.]

(3) In an order made under subsection (1)(c) or (d) in respect of a pension plan referred to in section 18.1(e)(ii) the Court may, where it is just and equitable, divide the death benefit as part of the proceeds of the pension benefit notwithstanding that a person, other than the non-participant spouse, is designated as the beneficiary of that death benefit.

[Tentative Recommendation 18(b), page 101.]

(4) Where an order is made under subsection (1)(c) or (d), the participant spouse shall not make an election under the pension plan without

(a) the consent of the non-participant, or

(b) when the non-participant spouse neglects or refuses to give consent, the approval of the Court.

[Tentative Recommendation 18(a), page 101.]

(5) Notwithstanding subsection (4), where an election under the pension plan relates to the participant spouse's employment the approval of the Court shall not be withheld if the election is being made in good faith.

[Tentative Recommendation 18(a), page 101.]

18.3 An actual or prospective change in the amount of a pension benefit that is or might be caused by an event that has occurred or may occur after the date fixed by the Court for the division of the property shall not be taken into consideration in the distribution of a pension benefit under this Act.

Tentative Recommendation 7, page 56;
Tentative Recommendation 8, page 57.]

18.4 If a participant spouse's pension benefit does not include a vested right to a present or deferred annuity under a pension plan, the value of his pension benefit for the purposes of this Act shall be equal to the amount that the participant spouse would be entitled to under the pension plan if his participation in the pension plan had terminated immediately before the time fixed by the Court for the division of the property.

[Tentative Recommendation 5, pages 45-46;
Tentative Recommendation 9, page 59.]

18.5 If a participant spouse's pension benefit includes a vested right to a deferred annuity, the value of his pension benefit for the purposes of this Act is the greater of

(a) the amount that the participant spouse would be entitled to if his participation in the pension plan had terminated immediately before the time of the valuation, and

(b) the amount

(i) of the present value of the deferred annuity, where the amount of the deferred annuity is prescribed by the pension plan, or

(ii) credited to the participant spouse's pension account, where the amount of the deferred annuity is determined by the amount credited to the account.

[See Report, pages 60-61;
Tentative Recommendation 9, page 112.]

18.6 If under a pension plan the participant spouse is entitled to elect a pension benefit from among retirement annuities or other benefits having different present values, the present value of the normal annuity at a normal retirement age as provided for under the pension plan shall be used as the basis for valuing the pension benefit.

[See Report, pages 63-65.]

18.7(1) Section 7(3) does not apply where

(a) a portion of the participant spouse's pension benefit was acquired before the marriage, and

(b) the determination of the value of the pension benefit is based on the present value of the deferred annuity.

(2) For the purposes of determining the value of the pension benefit based on the present value of the deferred annuity where a portion of the participant spouse's pension benefit was acquired before the marriage, that part of the present value of the pension benefit that bears the same proportion to the present value of the whole of the pension benefit as the length of time that the participant spouse participated in the pension plan before the marriage bears to the total length of time that the participant spouse has participated in the pension plan up to the date fixed by the Court for the distribution of the property is exempted from distribution under this Act.

[Tentative Recommendation 20, page 107.]

18.8 In making a valuation of a pension benefit no allowance shall be made for the possibility that

(a) the participant spouse may die before the commencement of the annuity under the pension plan, or

(b) the pension fund under the pension plan may not be sufficient to pay all the annuities payable under the pension plan, except where the Court considers it just and equitable to do so in respect of making an order under section 18.2(1)(a).

[Tentative Recommendation 10, page 67; Tentative Recommendation 11, pages 69-70.]

18.9(1) A pension plan administrator shall, pursuant to an order of the Court or on a request made by or on behalf of a person who is a party to an action for the distribution of matrimonial property, issue a certificate setting forth the information that is necessary to determine

(a) the benefits to which the participant spouse would be entitled on the termination of his participation in the pension plan,

(b) the amount and the prospective commencement date of any deferred annuity in which the participant spouse has a vested right,

(c) the present value of

(i) the normal annuity that will be provided to the participant spouse at his normal retirement date as provided for under the pension plan, and

(ii) any other annuities specified by regulation, and

(d) the amount

(i) of the contributions made under the pension plan by the participant spouse,

(ii) of the contributions, if any, made under the pension plan by the participant spouse's employer that are made for ghe benefit of the participant spouse and in which the participant spouse has a vested interest, and

(iii) of any interest earned on the contributions as provided for under the pension plan.

(2) A certificate issued under subsection (1) and its contents are admissible in evidence in respect of a distribution of property under this Act without proof of the signature or position of the person issuing the certificate.

(3) The Lieutenant Governor in Council may make regulations

(a) prescribing interest rates and discount rates to be used by a pension plan administrator for determining the value of pension benefits for the purpose of providing information under subsection (1);

(b) prescribing tables setting out values of pension benefits based on the rates prescribed under clause (a);

(c) prescribing the information to be provided by a pension plan administrator under subsection (1);

(d) prescribing the form of certificates that are to be provided under subsection (1);

(e) requiring that the amount payable under section 18.2(1)(b) be paid by the pension plan administrator into a plan that will provide a retirement income for the non-participant spouse;

(f) prescribing the conditions under which a payment referred to in clause (e) shall be held in trust for the non-participant spouse under a plan that provides for a deferred annuity or a registered retirement savings plan or by an agency referred to in section 9 of the *Pension Benefits Act;*

(g) governing the determination of the residual pension benefit of a participant spouse after the division of a pension benefit under section 18.2(1)(b).

(4) The Minister may appoint a committee that shall include an actuary and an accountant to advise him on interest rates and discount rates to be prescribed under subsection (3)(a) and on matters to be prescribed under subsection (3)(b) and (c).

[Tentative Recommendation 13, pages 76;
Tentative Recommendation 17, page 114.]

NOTE: 2 Division of pension benefits.

3(1) Every pension plan administrator as defined in section 18.1 of the Matrimonial Property Act shall ensure that the pension plan that he administers is amended so that the pension plan provides for the division of the pension benefits in accordance with the Matrimonial Property Act.

(2) To the extent that a pension plan is not amended so that it provides for the division of pension benefits in accordance with the Matrimonial Property Act the pension plan shall be deemed to be amended so as to provide for the division of pension benefits in accordance with the Matrimonial Property Act.

[Tentative Recommendation 21, page 109.]

NOTE: 3 Amendment to pension plans.

4. This Act comes into force on Proclamation.

NOTE: 4 Coming into force.

PART V

APPENDICES

APPENDIX A

SASKATCHEWAN LAW REFORM COMMISSION

Extract from proposed Matrimonial Property Act
(from Tentative Proposals for reform of The Matrimonial Property Act, 1984)

32.-(1) In distributing an interest of a spouse in a pension plan, the court may:

(a) declare that the spouse holds the pension rights in trust for the spouses on such terms and conditions as the court directs;

(b) vest in the other spouse an interest in the pension rights, and order that the employer, upon receiving notice of the order, not pay any sum to the employee spouse under the pension plan except in accordance with the terms of the order; or

(c) divide the value of the pension rights according to section 27, and order:

(i) payment of the other spouse's share of the pension rights in a lump sum or instalments; or

(ii) distribution of other matrimonial property to the other spouse.

(2) For the purpose of clause (1)(c), and subject to subsection (3), the value accumulating during marriage of a spouse's interest in a pension plan shall be deemed to equal the total contributions made by the spouse from the date of marriage to the date of valuation, together with:

(a) the amount earned from investment of such contributions if the plan is a money accumulation plan; or

(b) a reasonable rate of interest in respect of such contributions if the plan is other than a money accumulation plan.

(3) Where the pension plan is non-contributory, or where the employer contributions significantly exceed the contributions of the spouse, the court may attribute to the spouse a portion of the employer's contributions not exceeding one half of the total contributions made during the marriage, having regard to the date the pension rights vest, other terms of the plan, and the circumstances of the employment relationship.

(4) In subsection (3), "contributions" includes monies paid in or committed to a funded pension plan, or an employer's notional contribution to a non-funded pension plan.

Section 32. Section 32 is new. Its inclusion makes it clear that rights in a pension plan are matrimonial property. Subsection 32(1) provides that the court may defer distribution by declaring that the spouse holds pension rights in trust for the other spouse, or by vesting in the other spouse an interest in the pension plan. The court may also value and distribute the pension rights.

There are a number of contingencies that make the valuing of pensions difficult and imprecise. (See the discussion at pages 62-76 of this report.) Subsections (2) and (3) provide a formula for valuing pension rights. The court is directed to divide the employee contributions made during the marriage, together with an appropriate rate of interest. The table of interest rates published annually in the Gazette pursuant to _The Pension Benefits Act_ may provide some guidance in this regard. Subsection (3) permits the court to deem up to one-half of the contributions to be employee contributions in appropriate circumstances.

DIVISION OF PENSION RIGHTS
UPON
MARRIAGE BREAKDOWN

COMMENTS PREPARED FOR THE

INSTITUTE OF LAW RESEARCH AND REFORM

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April 1, 1985

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I. INTRODUCTION

Our comments on this topic are prepared in response to a request from Mr. W.H. Hurlburt, Q.C., dated March 1, 1985. Our comments relate to his memorandum of January 14, 1985 which provided a framework for discussion of the possible ways to divide pension rights on marriage breakdown. We have divided our brief into three main sections - in the first we make observations of a general nature, which we hope will add to the discussion contained in Mr. Hurlburt's memorandum, - in the second we offer examples of various means of division of rights, - in the third, we focus on the five means of division described in the memorandum along with further commentary where we felt it appropriate.

II. GENERAL COMMENTS

a) Initially, it will be important to determine what types of pension or benefits are to be covered by statutory guidelines. Some possibilities include the following:

- Pension plans - these are generally registered under the Pension Benefits Act of Alberta (PBA), although if the plurality of members is outside Alberta the registration may be administered by another jurisdiction. Some plans are not registered under the PBA but fall under Alberta legislative authority, for example the Local Authorities Pension Plan and the Alberta Government Telephones Pension Plan.

- Other plans providing pensions - these plans often evolve out of the employment practice of the employer. They are sometimes used to provide pension benefits in excess of those allowed by Revenue Canada from tax exempt contributions. Some are registered as pension plans under the PBA and some are not.

- Registered Retirement Savings Plan - pension plans purchased by an individual. A significant feature of these plans is that they may be in the name of one spouse with contributions paid by the other spouse.

- Deferred Profit Sharing Plans - similar to pension plans.

- Miscellaneous plans - while not pension plans in the sense of those just listed, the benefits under the following can be considered to accrue during the period of employment:
  - paid up life insurance
  - post retirement major medical expense
  - stock option plans
  - executive compensation schemes

For the purpose of this report, we have assumed that the benefit to be divided between the spouses derives from a pension plan. What will be divided will be either the appraised value of the pension or the pension itself.

b) The Allocation Problem

Given that a value or an amount of pension has been determined, the allocation problem addresses the size of each spouse's portion. One way to view the problem is to look at a simple life cycle diagram.

Event	p	m	s	d	e	r
	30	34	40	43	55	65

Age of Employee Spouse

p - plan participation commences

m - marriage

s - separation

d - divorce

e - eligibility to retire

(qualifies to commence income)

r - retirement

Usually the benefit to be divided is allocated to the non-employee spouse at 50% x the ratio of the period between marriage and separation to the period between joining the plan and separation. Using the above diagram, the benefit would be multiplied by 50% and further multiplied by 6 (s - m) divided by 10 (s - p). In divorce cases to date periods after the separation are excluded from the calculation.

An alternative allocation which may be used for pension plans which base benefits on earnings near retirement is 50% of the ratio of the period of marriage (s - m) to the period of membership in the plan (r - p), all multiplied by the projected pension at retirement.

It is necessary to determine the date of the valuation of each share. This may vary with the mode of distribution, which is discussed later. If a capitalized value is used the date of separation will usually be used as the date of valuation. If the period between the separation and the actual trial date is appreciable, it may be appropriate to add pre-judgement interest to an award valued at the date of separation.

c) Vesting and Maturity

These two terms will be used to define the employee spouse's various rights to an employer sponsored pension.

Vesting refers to an employee's right to receive at some point in the future a pension from the employer. Depending on different plan provisions, legislation and the age of the employee, this may occur immediately or as late as 15 years from employment date.

Maturity can be defined as the first opportunity to elect to receive pension payments. Maturity ages will differ by plan, however, age 55 with various service requirements is very common. In special circumstances, or where an employee has substantial years of credited service, lower ages are possible.

Once an employee has satisfied the vesting requirements, he must still reach the maturity age in order to receive a pension. In the period between the vesting age and the maturity age there remains a probability of death, disability or termination of employment, which, in the first instance can affect whether or not a benefit will actually be paid or in the other two instances, the amount of the benefit.

An employee may choose to continue working past the maturity age, in which case the pension is not normally payable until actual retirement.

d) Mode of Settlement

The benefit to the non-employee spouse will be determined either in relation to the contributions to the pension plan or in relation to the pension provided by the plan. Which method is more appropriate depends on the type of the plan. For example, under a money purchase (defined contribution) pension plan the amount of an employee's pension is not determined until he retires. As a result, the division will be related to the contributions made to the plan. Similarly, Registered Retirement Savings Plans and Deferred Profit Sharing Plans also fall into this category and the division will be based on the amount of contributions. On the other hand, defined benefit pension plans may be non-contributory on the part of the employee. In this case the division can only be determined in relation to the pension provided by the plan. Further, the division can be based on the capitalized value of the pension or on the pension itself. If the defined benefit plan is a employee contributory plan, the division may be based either on the pension or on the contributions. The choice may depend upon whether the employee is vested or not vested. We elaborate further on this in the examples.

e) Capitalization

If the division is to be based on the pension provided by the plan, one alternative is to treat this as an asset and obtain an appraisal of its value, i.e. to capitalize the pension.

To appraise the value of the pension, an actuary will make various demographic and economic assumptions which seem appropriate to the plan and the circumstances. The assumptions may relate to such contingencies as rates of interest, probability of survivorship, probability of termination of employment and rates of increase in the cost of living. The choice of assumptions and the number of assumptions required depends upon the variety of conditions under which a benefit is payable. For example, if a fixed pension is payable at a fixed age, the actuary may only need to make assumptions as to interest and survivorship. However, if the full pension were available at a variety of ages - perhaps on disability - and included cost of living and survivorship benefits, many more assumptions would be required.

In the case of a fixed pension payable at a fixed age, another approach to obtaining an appraisal is to use the single premium quoted on a competitive basis by a Canadian Life Insurance company for the same amount of pension. One might go further and "strip out" the insurance company's profit and contingency margins which are built into its single premium. However, a problem with using this approach, is that it is very dependent on the interest rates in effect at the time the calculation is made. If the calculation were made say one year later, when interest rates were much lower, the value calculated could be significantly higher. Since a pension "asset" is not an immediately realizable quantity, like a bond or other investments, it may be more appropriate to use a long term interest rate in determining its value. This would be a rate such as might be used in the actuarial valuation of a pension plan, such as 6% to 8% which are typical today. It is not the current rate on long term bonds (i.e. 10% to 14%) nor a real rate of return (i.e. 2% to 3%) which is a return net of inflation.

f) Deferred Payments at Maturity

This approach ascribes a portion of the deferred pension payable from the plan to the non-employee spouse. These payments are made at the time the employee spouse elects to receive his pension. An advantage of this approach is that it allows all contingencies to run their course and therefore presents a concise method of dividing the pension. However, the approach has several drawbacks:

- The non-employee spouse's financial dependency is still controlled by the employee spouse. The employee spouse decides when to elect to receive a pension.

Although the pension is split equally, the value of the pensions will not necessarily be equal due to the differences in male and female mortality.

Frequently an employee will elect a reduced amount of pension in order to provide a survivors pension to a dependent spouse. If a limitation is placed on this election in order to maximize benefit to the non-employee spouse it may create inequities relative to a second spouse whose interest in the plan might be much greater - for example, if remarriage occurred at age 30 and that marriage lasted until retirement age.

III. EXAMPLES

The following examples elaborate on the possible division methods for defined benefit plans. As mentioned previously, the division of benefits from defined contribution plans, due to the nature of these plans should be related to contributions.

Assume a defined benefit pension plan provides the following benefits:

1. At retirement (age 65) - a pension for life of 1 1/2% of earnings for each year of service (i.e. a pension based upon an average of career earnings).

2. Before retirement:

   (a) termination of employment

   (i) vested - deferred pension earned to date

   (ii) not vested - refund of employee contributions

   (b) death - value of pension earned to date but not less than the employee's contributions with interest.

3. Employee contributions - 5% of earnings

4. Employer contributions - balance of the cost of the plan.

Further, assume that the following long term economic and demographic assumptions are appropriate for the purposes at hand:

(i) investments earn 5% per year

(ii) earnings increase at 4% per year

(iii) mortality follows 1971 GAM mortality table (this table is typical of those used to value pension plans)

Say, John joined the plan at age 30. He married Mary when he was 34. The couple started divorce proceedings about the time John reached age 40.

John's earnings, plan contributions and pension earned during the past 10 years are as follows:

John's Age Beginning of Year	Earnings	Contributions Made in Year	Contributions Accumulated End of Year	Pension Earned in Year	Total Pension Earned to End of Year
30	$20,000	$1,000	$1,025	$300	$ 300
31	20,800	1,040	2,142	312	612
32	21,632	1,082	3,358	324	936
33	22,497	1,125	4,679	337	1,273
34	23,397	1,170	6,112	351	1,624
35	24,333	1,217	7,665	365	1,989
36	25,306	1,265	9,345	380	2,369
37	26,319	1,316	11,161	395	2,764
38	27,371	1,369	13,122	411	3,175
39	28,466	1,423	15,237	427	3,602

Before elaborating on the methods available for the division of benefits it may be useful to consider whether only benefits accrued to date should be counted or whether future increases in these benefits (say, due to salary increases) should also be counted. In addition, if only benefits accrued to date are counted, one must consider whether the employee is vested or not vested. If the employee is vested, the division of benefits will likely be related to pension. Or, the actuary could assign probabilities of completing the vesting period, giving some value where the employee is close to the end of a "sudden" vesting period. In this case the division would be related to pension. If an employee is not vested, the division of benefits will be related to contributions (as in a defined contribution plan). The variety of answers which could result are illustrated by the following examples.

A common assumption is to look at the accrued benefit of the employee spouse as if he terminated employment on the date of separation.

(A) Termination of employment (assumption)

(i) if he is not vested: John has been married for 6 of his 10 years of plan participation. If he were to terminate he would be entitled to a refund of his contributions with interest - $15,237. He should split 60% (6 years out of 10 years) of this or $9,142. His wife would be entitled to half of this or $4,571. He would be entitled to the balance or $10,666.

(ii) (a) if he is vested: John has earned $3,602 annual pension to date - 60% of this is $2,161. His wife would be entitled to half of this or $1,081 of deferred pension. She may be granted its value instead. He would remain entitled to the balance of the deferred pension or $2,521.

(b) Alternative: John earned a pension of $1,273 before he got married (to age 33) and has since earned an additional $2,329. His wife would be entitled to half of this or $1,165 of deferred pension. She may be granted its value instead. Under some plans it may be difficult to obtain the starting figure for this calculation. Assuming ease of calculation is desirable, the prorata method of (ii) (a) above is preferable.

(B) Capitalization of deferred pension

In (ii) above, Mary is entitled to a deferred pension of $1,081. She may be granted its value instead. Using the assumptions first described, this value is $2,594. This value excludes the value of the death benefit which the plan would pay should John die prior to retirement. Had this also been included, the total value for Mary would increase to $3,148. If the plan provided a benefit on disability, and this were included, the value would be higher still. Each additional benefit complicates the calculation by increasing the number of assumptions which must be made by the actuary. An employer often has the choice of including some death and disability benefits within its pension plan or providing for these separately through a group insurance contract. If all pension plan benefits are to be valued, equity would suggest that in other circumstances the group insurance benefits also be valued.

(C) Single premium charged by an insurance company

An alternative to (B) would be to base the capitalization on the single premium Mary might pay if she wanted to buy from an insurance company the deferred annuity of $1,081 per year on the life of John. Single premiums take into account current market interest rates, compared to an actuarial valuation which is based on an expected long term interest rate. If current market rates were say 8%, the value would be $1,048 (compared to $2,594).

(D) Continuation of employment to normal retirement (alternate assumption to termination of employment)

Assume John continued a member of the plan to age 65 and his salary increased at 4% per year. His pension would be $22,096. He was married for 6 years or 17% of his 35 years of plan membership. Therefore, using the prorata approach, Mary would be entitled to 8.5% of $22,096 or $1,878 of deferred pension. She may be granted its value instead. Using the assumptions first described, the value is $4,507.

Variation: Assume John's company improved the pension plan to 2% of earnings when John was 50 years old. His pension at retirement would now be $26,483. If Mary is entitled to 8.5% she would receive $2,251 of deferred pension. Alternatively, John could have left his company for employment in another which offered the 2% plan. The implication is that the ex-spouse could have an interest in the pension the employee would accumulate after separating from both the ex-spouse and the employer. If a method is adopted it should be applied consistently, in this case regardless of whether the employee remains or joins a new plan.

Since John's future career path and plan membership is unknown, the value of his eventual pension cannot be anticipated nor calculated. It is possible to partially offset this disadvantage by incorporating a rate of termination of employment assumption in the calculation. It would be important to choose rates which are typical of job, company and industry in which John was employed.

(E) Termination of employment (again)

Assuming John is vested, the capitalized value of the deferred pension rights granted to Mary (based on the long term interest rate) is $2,594.

This value is less than the share of John's contribution to which she would have been entitled if John were not vested, that is $4,571. If

John were older when marriage breakdown occurred the value of his pension would have been larger and the situation just described would be less likely to occur. The change takes place at a threshhold age, which varies depending upon the actuarial assumptions. If actual termination of employment occurs an employee is granted a return of his contributions with interest if that results in a larger amount.

Mary's share of the contributions ($4,571) is equivalent in value to a deferred pension of $1,904 per year. This pension is 53% of the pension John has earned to date. It compares to $1,081 of deferred pension to which Mary would be entitled (30% of the pension John has earned to date) solely by dividing the pension according to the period of marriage.

It is important to note that the method of division which provides the greatest advantage to the non-employee spouse at one age will not necessarily provide the same advantage at another.

(F) Projected earnings

Assume John's pension is to be based upon his earnings in the year prior to his retirement. His earnings based on a projection at 4% per year from age 40 are expected to be $75,886. His pension at 1 1/2% per year of participation is $39,840 of which $6,830 is in respect of the 6 years during which he was married to Mary. This method implicitly assumes the

the continuation of John's employment to normal retirement and as a result has some of the same difficulties described in (D). Mary's share of the $6,830 pension is $3,415. The value of this (based on the long term interest rate) is $8,195.

If instead, the calculations were based on the assumption of John's termination of employment:

(i) if John were vested, his pension would be based on his earnings just prior to termination. His pension would be $4,270 (based on 10 years participation and earnings of $28,466) of which $2,562 is in respect of his plan participation while married to Mary. His wife would be entitled to half of John's pension earned during their period of marriage. This is half of $2,562 or $1,281. She may be granted its value instead. This value (based on the long term interest rate) is $3,074.

(ii) if John were not vested, his wife would be entitled to half of his contributions, with interest, prorated for their period of marriage. This amounts to $4,571.

Comment: The pension to which Mary would be entitled in example first cited above - $3,415 - is 80% of the pension John would actually receive ($4,270) if he terminated employment the day after their divorce.

IV. METHODS OF DIVISION OF RIGHTS

With the above comments as background, the following is a description of five possible methods of division of pension rights:

(a) Valuation and Accounting - this requires the determination of the value of the pension entitlement which is then used to determine what money or property is granted to the spouse in order to ensure an equitable division. The plan member retains all rights to the pension.

The following amounts are taken from the examples previously cited:

Career earnings plan	Value to Mary
(i) termination of employment	
- not vested	$4,571
- vested	$2,594 ($1,048*)
(ii) continuation of employment	$4,507

* capitalization at market interest rate - all other capitalized amounts could be reduced proportionately if the market interest rate rather than the long term interest rate were used.

Final earnings plan

(i)	termination of employment	
	- not vested	$4,571
	- vested	$3,074
(ii)	continuation of employment	$8,195

Note: It is customary for pension plans to provide that the value of the termination benefit when vested should not be less than the employee's contributions, with interest to the date of determination.

(b) Splitting the Pension Account - the amount determined in (a) is transferred to a separate account in the pension plan and used to pay a pension to Mary. The pension would be considered a portion of John's pension and deducted from the amount he became entitled to receive. For example, assume John is a member of the final earnings plan and:

(i) the value is determined assuming termination of employment and he is vested - i.e. $3,074. To his retirement this would accumulate to $10,410 and provide $1,056 of pension (assuming the plan earns and credits the long term interest rate). This is 2.7% of John's total pension of $39,840.

OR

(ii) the value is determined assuming continuation of employment - i.e. $8,195. To his retirement this would accumulate to $27,751 and provide $2,866 of pension. This is 7.2% of John's total pension.

Comment: John was married to Mary for 17% of his years of plan participation. If she was entitled to share in 17% of John's pension, she should receive 8.5%. In (i) above the 2.7% of John's pension she receives is substantially less than 8.5% because increases in John's earnings after the divorce are not taken into account. In (ii) the 7.2% of John's pension she receives is still less than 8.5% however the result is the net of two factors; the first - she receives credit for the interest rate earned by the plan which is higher than John's earnings increases. Historically interest rates are higher than the rates of earnings increase. The second factor is that the funds are counted as belonging to Mary and therefore would be returned to her with interest in the event of John's death before retirement. This "benefit" has a cost and accordingly affects the amount of her pension. Enabling pension legislation would likely be required if this method is to be used to divide pension benefits.

(c) Payment of Capitalized Value - the amount determined in (a) is paid out of the plan at the time of the divorce. Mary would receive a credit in her RRSP. John would suffer a reduction in his credited service under the plan. The reduction could be accomplished by prorating the service by the amount taken out of the plan relative to the liability held for future benefits. This would need to be provided by the employer on the advice of its actuary.

(i) career earnings plan - depending upon whether John's interest in the plan is as a not vested termination or a vested termination or as a continuing member, the value to Mary is either \$4,571 or \$2,594 or \$9,013 (as per (a) above). His total pension to the date of divorce of \$3,602 has a value of \$10,499 (note: this value takes into account the value of the death benefit provided under the plan which would be paid to John's beneficiary). The reduction in service is 4.4 years or 2.5 years or 8.6 years, respectively. The reductions might be different if the capitalized values were based upon a market interest rate.

(ii) final earnings plan - as above, the corresponding values to Mary from (a) are \$4,571; \$3,074; \$8,195. However, the value of John's pension depends upon whether or not he continues employment. John's expected pension if he continues employment is $39,840, which has a value of $116,010 which is approximately $3,315 for each of his 35 years of service. The reductions in service would then be 1.4 years or .9 years or 2.5 years, respectively. But John's pension would be $4,270 if he terminated employment the day after their divorce. This has a value of $12,434. The reduction in service would then be 3.7 years or 2.5 years or 6.6 years, respectively.

Note: The actual reduction in service would depend on the rules adopted by the employer and likely would take into account the probability of an individual continuing employment.

At present, Revenue Canada does not permit payments out of a pension plan while an employee is still employed. We have, on behalf of one our our clients, approached Revenue Canada with a plan modification to permit payment out of the plan at the order of a competent tribunal. However, we have not received a ruling on this.

(d) Imposition of a Trust on the Pension Holder - John would be required to pay Mary part of each payment he receives from the plan. He could either (i) pay the amount of pension to which Mary is entitled according to one of the methods previously described or (ii) pay a share of his pension determined by dividing his years of marriage by his eventual years of participation in the plan. In this case, 50% of the pension for the 6 years of marriage (out of a total of 35) is 8.5% of his pension. This percentage would be higher if he retired earlier with fewer years of service or lower if he retired later.

(e) Payment by the Pension Plan of Other Spouse's Share as it comes due -this is the same as (d) except the plan is obliged to make the payments. If the share approach in (d)(ii) is adopted it would be important to keep track of John's participation in the plans of all employers he eventually works for so that the denominator is correct. Mary would receive her share of the pension from each plan.

V. CONCLUSION

Perhaps the choice of method of division should be influenced by the ages of the parties. Young couples might prefer methods which involve the splitting of the value of the pension [(a), (b), and (c) above] whereas older couples might prefer methods which involve splitting the pension itself [(d) and (e) above]. The point at which the preference changes might be difficult to determine and may well depend on their ages and ease of division of other family assets.

Methods which involve the assumption of the continuation of employment of the employee spouse should perhaps only be considered when there is a reasonable chance of its fulfillment, or, at least, the employee spouse is beyond the maturity age.

If, as a general rule, the calculation of the value of the pension includes the value of other benefits provided by the plan (e.g. pre-retirement, death benefits, disability benefits) it would be appropriate to consider the value of similar benefits provided by the employer through other means (e.g. insurance plans).

If the employee's spouse becomes entitled to a pension [(d) and (e) above] it would be reasonable to require that she bear a proportionate risk of the insolvency of the plan. Conversely, if she receives immediately the value of the pension it might be appropriate to adjust the value for the risk of insolvency, although this adjustment would be negligible if a termination of employment assumption were made in the calculation of the value.

DIVISION OF PENSION RIGHTS
UPON
MARRIAGE BREAKDOWN

FURTHER COMMENTS PREPARED FOR THE

INSTITUTE OF LAW RESEARCH AND REFORM

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April 16, 1985

EXAMPLES

The following examples elaborate on the possible division methods for defined benefit plans for a person who is age 55 at the time of divorce.

Assume a defined benefit pension plan provides the following benefits:

1. At retirement (age 65) - a pension for life of 1 1/2% of earnings for each year of service (i.e. a pension based upon an average of career earnings).

2. Before retirement:

   (a) termination of employment

   (i) vested - deferred pension earned to date

   (ii) not vested - refund of employee contributions

   (b) death - value of pension earned to date but not less than the employee's contributions with interest.

3. Employee contributions - 5% of earnings

4. Employer contributions - balance of the cost of the plan.

Further, assume that the following long term economic and demographic assumptions are appropriate for the purposes at hand:

(i) investments earn 5% per year

(ii) earnings increase at 4% per year

(iii) mortality follows 1971 GAM mortality table (this table is typical of those used to value pension plans)

Say, John joined the plan at age 30. He married Mary when he was 34. The couple started divorce proceedings about the time John reached age 55.

John's earnings, plan contributions and pension earned during the past 10 years are as follows:

John's Age Beginning of Year	Earnings	Contributions Made in Year	Contributions Accumulated End of Year	Pension Earned in Year	Total Pension Earned to End of Year
45	$28,103	$1,405	$26,848	$422	$5,109
46	29,228	1,461	30,118	438	5,547
47	30,397	1,520	33,688	456	6,003
48	31,613	1,581	37,587	474	6,477
49	32,877	1,644	41,845	493	6,970
50	34,192	1,710	46,495	513	7,483
51	35,560	1,778	51,572	533	8,017
52	36,982	1,849	57,116	555	8,571
53	38,462	1,923	63,171	577	9,148
54	40,000	2,000	69,782	600	9,748

Before elaborating on the methods available for the division of benefits it may be useful to consider whether only benefits accrued to date should be counted or whether future increases in these benefits (say, due to salary increases) should also be counted. In addition, if only benefits accrued to date are counted, one must consider whether the employee is vested or not vested. If the employee is vested, the division of benefits will likely be related to pension. Or, the actuary could assign probabilities of completing the vesting period, giving some value where the employee is close to the end of a "sudden" vesting period. In this case the division would be related to pension. If an employee is not vested, the division of benefits will be related to contributions (as in a defined contribution plan). The variety of answers which could result are illustrated by the following examples.

A common assumption is to look at the accrued benefit of the employee spouse as if he terminated employment on the date of separation. Since John is 55 years old and has 25 years of service, we could also assume that he is vested in his pension.

(A) Termination of employment (assumption)

(i) John has been married for 21 of his 25 years of plan participation. If he were to terminate he would be entitled to the deferred pension payable from age 65 which he has earned to date, this is $9,748 per year. He should split 84% (21 years out of 25 years) of this or

$8,188. If this wife is entitled to half of this she would be credited with $4,094 of deferred pension. She may be granted its value instead.

(ii) Alternative: John earned a pension of $994 before he got married (to age 33) and has since earned an additional $8,754. His wife would be entitled to half of this or $4,377 of deferred pension. She may be granted its value instead. Under some plans it may be difficult to obtain the starting figure for this calculation. Assuming ease of calculation is desirable, the prorata method of (i) above is preferable.

(B) Capitalization of deferred pension

In (i) above, Mary is entitled to a deferred pension of $4,094. She may be granted its value instead. Using the assumptions first described, this value is $21,728. This value excludes the value of the death benefit which the plan would pay should John die prior to retirement. Had this also been included, the total value for Mary would increase to $24,784. If the plan provided a benefit on disability, and this were included, the value would be higher still. Each additional benefit complicates the calculation by increasing the number of assumptions which must be made by the actuary. An employer often has the choice of including some death and disability benefits within its pension plan or providing for these separately through a group insurance contract. If all pension plan benefits are to be valued, equity would suggest that in other circumstances the group insurance benefits also be valued.

(C) Single premium charged by an insurance company

An alternative to (B) would be to base the capitalization on the single premium Mary might pay if she wanted to buy from an insurance company the deferred annuity of $4,094 per year on the life of John. Single premiums take into account current market interest rates, compared to an actuarial valuation which is based on an expected long term interest rate. If current market rates were say 8%, the value would be $13,398 (compared to $21,728).

(D) Continuation of employment to normal retirement (alternate assumption to termination of employment)

Assume John continued as a member of the plan to age 65 and his salary increased at 4% per year. His pension would be $17,240. He was married for 21 years or 60% of his 35 years of plan membership. Therefore, using the prorata approach, Mary would be entitled to share in 60% of $17,240. At 50% her share is $5,172 of deferred pension. She may be granted its value instead. Using the assumptions first described, the value is $27,449.

Variation: Assume John's company improved the pension plan to 2% of earnings for each year of future service when John was 55 years old. His pension at retirement would now be $19,737. If Mary is entitled to share in 60%, her half is $5,921 of deferred pension. Alternatively, John could have left his company for employment in another which offered the

2% plan. The implication is that the ex-spouse could have an interest in the pension the employee would accumulate after separating from both the ex-spouse and the employer. If a method is adopted it should be applied consistently, in this case regardless of whether the employee remains or joins a new plan.

Since John's future career path and plan membership is unknown, the value of his eventual pension cannot be anticipated nor calculated. It is possible to partially offset this disadvantage by incorporating a rate of termination of employment assumption in the calculation. It would be important to choose rates which are typical of job, company and industry in which John was employed.

(E) Projected earnings

Assume John's pension is to be based upon his earnings in the year prior to his retirement. His earnings based on a projection at 4% per year from age 55 are expected to be $59,210. His pension at 1 1/2% per year of participation is $31,085 of which $18,651 is in respect of the 21 years during which he was married to Mary. This method implicitly assumes the the continuation of John's employment to normal retirement and as a result has some of the same difficulties described in (D). Mary's share of the $18,651 pension is $9,326. The value of this (based on the long term interest rate) is $49,493.

If instead, the calculations were based on the assumption of John's termination of employment: his pension would be based on his earnings just prior to termination. His pension would be $15,000 (based on 25 years participation and earnings of $40,000) of which $12,600 is in respect of his plan participation while married to Mary. His wife would be entitled to half of John's pension earned during their period of marriage. This is half of $12,600 or $6,300. She may be granted its value instead. This value (based on the long term interest rate) is $33,436.

Comment: The pension to which Mary would be entitled in the example first cited above - $9,326 - is 74% of the pension John would actually receive ($12,600) if he terminated employment the day after their divorce.

METHODS OF DIVISION OF RIGHTS

With the above comments as background, the following is a description of five possible methods of division of pension rights:

(a) Valuation and Accounting - this requires the determination of the value of the pension entitlement which is then used to determine what money or property is granted the spouse in order to ensure an equitable division. The plan member retains all rights to the pension.

The following amounts are taken from the examples previously cited:

Career earnings plan	Value to Mary
(i) termination of employment	$21,728 (13,398*)
(ii) continuation of employment	$27,449

* capitalization at market interest rate - all other capitalized amounts could be reduced proportionately if the market interest rate rather than the long term interest rate were used.

Note: It is customary for pension plans to provide that the value of the termination benefit should not be less than the employee's contributions, with interest to the date of determination.

Final earnings plan

(i)	termination of employment	$33,436
(ii)	continuation of employment	$49,493

(b) Splitting the Pension Account - the amount determined in (a) is transferred to a separate account in the pension plan and used to pay a pension to Mary. The pension would be considered a portion of John's pension and deducted from the amount he became entitled to receive. For example, assume John is a member of the final earnings plan and:

(i) the value is determined assuming termination of employment - i.e. $33,436. To his retirement this would accumulate to $54,464 and provide $5,523 of pension (assuming the plan earns and credits the long term interest rate). This is 17.8% of John's total pension of $31,085.

OR

(ii) the value is determined assuming continuation of employment - i.e. $49,493. To his retirement this would accumulate to $80,619 and provide $8,176 of pension. This is 26.3% of John's total pension.

Comment: John was married to Mary for 60% of his years of plan participation. If she was entitled to share in 60% of John's pension, she should receive 30%. In (i) above the 17.8% of John's pension she receives is substantially less than 30% because increases in John's earnings after the divorce are not taken into account. In (ii) the 26.3% of John's pension she receives is still less than 30% however the result is the net of two factors; the first - she receives credit for the interest rate earned by the plan which is higher than John's earnings increases. Historically interest rates are higher than the rates of earnings increase. The second factor is that the funds are counted as belonging to Mary and therefore would be returned to her with interest in the event of John's death before retirement. This "benefit" has a cost and accordingly affects the amount of her pension. Enabling pension legislation would likely be required if this method is to be used to divide pension benefits.

(c) Payment of Capitalized Value - the amount determined in (a) is paid out of the plan at the time of the divorce. Mary would receive a credit in her RRSP. John would suffer a reduction in his credited service under the plan. The reduction could be accomplished by prorating the service by the amount taken out of the plan relative to the liability held for future benefits. This would need to be provided by the employer on the advice of its actuary.

(i) career earnings plan - depending upon whether John's interest in the plan is as a vested termination or as a continuing member, the value to Mary is either $21,728 or $27,449 (as per (a) above). His total pension to the date of divorce of $9,748 has a value of $59,011 (note: this value takes into account the value of the death benefit provided under the plan which would be paid to John's beneficiary). The reduction in service is 9.2 years or 11.6 years, respectively. The reductions might be different if the capitalized values were based upon a market interest rate.

(ii) final earnings plan - as above, the corresponding values to Mary from (a) are $33,436 and $49,493. However, the value of John's pension depends upon whether or not he continues employment. John's expected pension if he continues employment is $31,085, which has a value of $188,177 which is approximately $5,376 for each of his 35 years of service. The reductions in service would then be 6.2 years or 9.2 years, respectively. But John's pension would be $15,000 if he terminated employment the day after their divorce. This has a value of $90,804. The reduction in service would then be 9.2 years or 13.6 years, respectively.

Note: The actual reduction in service would depend on the rules adopted by the employer and likely would take into account the probability of an individual continuing employment.

At present, Revenue Canada does not permit payments out of a pension plan while an employee is still employed. We have, on behalf of one our our clients, approached Revenue Canada with a plan modification to permit payment out of the plan at the order of a competent tribunal. However, we have not received a ruling on this.

(d) Imposition of a Trust on the Pension Holder - John would be required to pay Mary part of each payment he receives from the plan. He could either (i) pay the amount of pension to which Mary is entitled according to one of the methods previously described or (ii) pay a share of his pension determined by dividing his years of marriage by his eventual years of participation in the plan. In this case, 50% of the pension for the 21 years of marriage (out of a total of 35) is 30% of his pension. This percentage would be higher if he retired earlier with fewer years of service or lower if he retired later.

(e) Payment by the Pension Plan of Other Spouse's Share as it comes due -this is the same as (d) except the plan is obliged to make the payments. If the share approach in (d)(ii) is adopted it would be important to keep track of John's participation in the plans of all employers he eventually works for so that the denominator is correct. Mary would receive her share of the pension from each plan.