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Pension Valuation Approaches and Division Options from Sea to Shining Sea

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Pensions are complicated, and there's not much anyone can do to change that reality. Dealing with these complex assets in the context of property equalization or division can strike fear into the heart of even the most seasoned family lawyer. The goal of this paper is to calm those fears.

Is the separation date, the trial date, or some other date the most appropriate valuation date? Is the administrator's "maximum transferable amount" ever the proper value of the pension for matrimonial property purposes? How do division options and rules vary from pension plan to pension plan and from province to province to territory? How exactly does pension division work under the various pieces of legislation that govern pension plans across Canada and beyond? What are the rules of thumb? What are the key elements to include in a pension division agreement?

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OVERVIEW

It is well-established that pensions are matrimonial property everywhere in Canada. This would include:

- Pensions in pay and pensions not yet in pay,
- Registered and non-registered pensions
- Defined benefit and defined contribution pensions, and
- Pensions registered in the location where the parties reside, and those registered in other jurisdictions

In some jurisdictions, pensions are explicitly mentioned in the legislation that deals with the equalization or division of matrimonial property after marriage breakdown. For example:

- According to **Section 84(2)** of the **British Columbia Family Law Act**, family property includes "a spouse's entitlement under an annuity, a pension plan, a retirement savings plan or an income plan".

- According to **Section 4(1)** of the **Ontario Family Law Act**, ""property" means … in the case of a spouse's rights under a pension plan, the imputed value, for family law purposes, of the spouse's interest in the plan". In other words, pensions are property for net family property (NFP) purposes in Ontario.

- According to **Section 4(1)(c)** of the **Prince Edward Island Family Law Act**, property includes "pension benefits, whether vested or not".

- **Section 7(6)** of the **Alberta Family Property Act**, which addresses the distribution of property, requires that the "value" of pension benefits be distributed "in accordance with this Act when making a family property order", but defers the pension division specifics to the "legislation applicable to the pension plan".

Pensions are not explicitly mentioned in the **Nova Scotia Matrimonial Property Act**, except in **Section 13** which pertains to the unequal division of matrimonial assets or the potential division of property that is not a matrimonial asset. And, the word "pension" does not appear in the **New Brunswick Marital Property Act**.

How a pension is valued in a given province or territory is usually determined by the general principles applicable to the valuation of all matrimonial assets in that jurisdiction. For example:

- The pension would be valued using the same valuation date as is being used for other matrimonial property. The general rule across Canada is that the separation date is the

valuation date. However, there are some important exceptions. In Alberta, the trial date is the valuation date unless the parties agree to a different date. In Saskatchewan, the "petition date" is the valuation date unless the parties agree to a different date. In Nova Scotia, the pension is typically valued as of the separation date although other assets may be valued as of a current date.

- In Alberta and Saskatchewan, all of the pension accrued during the marriage and beyond separation up to the valuation date is valued as matrimonial property (unless the parties agree otherwise).

- If property acquired prior to the marriage is considered to be matrimonial property (as in Nova Scotia), then the portion of the pension acquired prior to the marriage would be included in the valuation (if the parties are using that approach for other assets).

- In contrast to the general rule for matrimonial property valuation in British Columbia, the approach to pension valuation in BC involves inclusion – for valuation purposes – of annual pension that is expected to accrue after separation in respect of during-marriage employment as a result of post-separation salary increases. The reason for this departure from the general rule appears to be to align the resulting pension value with the value of the spouse's portion of the pension if it were divided at the member's retirement date as is usually the case in BC.

Similarly, it is matrimonial property law that establishes whether the default resolution is equalization of matrimonial property by means of a cash payment from one party to the other or by means of an explicit division of each matrimonial asset. With respect to pensions, **usual practice** – in our experience – for dealing with pensions is as follows:

Jurisdiction for Matrimonial Property	**Pensions are Divided (not valued)**	**Pensions are Valued (not divided)**
British Columbia	✓	
Alberta		✓
Saskatchewan	✓	
Manitoba		✓
Ontario		✓
New Brunswick	✓	
Nova Scotia	✓	
Prince Edward Island		✓
Newfoundland & Labrador	✓	

We do not have sufficient experience working with pensions in Quebec, Yukon, Northwest Territories, or Nunavut to comment on those jurisdictions.

In jurisdictions where the pension is typically valued (and not divided), pension division is often an available option to assist with overall matrimonial property equalization.

In jurisdictions where pensions are typically divided (and not valued), there is nothing to prevent the parties from obtaining a pension valuation and equalizing their overall matrimonial property without dividing the pension.

Whereas the valuation approach and principles are determined by the matrimonial property legislation of the governing province or territory, the available pension division options are determined by the pension legislation that governs the specific pension plan in question. This is where things start to get complicated!

From a Canadian family law perspective, the pension legislation that governs pension plans falls in four broad categories:

1. Provincially-registered plans:
- A company with employees in many locations across the country will usually register its pension plan in the province where its head office is located
- Companies that operate in only one province will register their pension plan in that province
- Provincially-registered plans are governed by the pension legislation of the province in which the pension plan is registered

2. Federally-registered plans:
- Employer is in the transportation, communication, or banking sector
- Employer is a crown corporation or other government spin-off (Canada Post, NAV Canada, etc.)
- These plans are governed by the federal Pension Benefits Standards Act (PBSA)

3. Federal government employee plans:
- Federal civil servants, Armed Forces, RCMP, federal judges, Members of Parliament
- There is no overarching pension legislation for these plans
- Each pension plan has a “plan text” that is an Act of Parliament
- Pension division options for these plans are set out in the Pension Benefits Division Act (PBDA) which applies only to members of federal government employee pension plans

4. Other plans:
- Non-registered supplemental top-up plans (for high earners)
- These plans are subject only to the rules of their own plan provisions
- Foreign (US, UK, etc.)
- These plans are governed by the pension legislation of their country of origin

In some provinces (Ontario, for example), the public sector pension plans fall into the "provincially-registered" category. In other provinces (Nova Scotia, for example), the public sector plans are not governed by their province's pension legislation (i.e., they do not fall into the "provincially-registered" category) because each plan text is an Act of the provincial legislature.

DEFINED BENEFIT VERSUS DEFINED CONTRIBUTION PENSION PLANS

The focus of this paper is defined benefit (DB) pension plans. In a DB plan, the pension promise is a monthly amount payable for the plan member's lifetime – beginning on their retirement date and ending when they die. The monthly amount is typically determined based on a formula that takes the member's salary and years of employment into account.

In contrast, the pension promise in a defined contribution (DC) pension plan is that the employer will make specified periodic deposits to the credit of the plan member during the time that the plan member is employed by the employer. DC plans are very much like RRSPs.

COMMUTED VALUE VERSUS FAIR VALUE OF A PENSION

Are all values the same?

At any point in time, a house may have a number of different "values":

- Sale price
- Insured or "replacement" value
- Appraised value for property tax purposes
- Appraised value for mortgage lending purposes

Pensions are no different. Although it may be tempting to rely on a pension value provided by the pension administrator (often at no cost!), one of the parties will be disadvantaged if the relied-on value is significantly greater than or less than the fair value of that pension.

If an administrator provides a pension value, that amount typically pertains to the "maximum transferable amount" (MTA) under the applicable pension legislation. This is the maximum amount that pension legislation would allow the member to assign to their former spouse from the pension plan after a relationship breakdown. These amounts can differ significantly based on the governing pension legislation. Regardless of the jurisdiction, MTAs were never intended to serve as proxies to the fair value of a pension. Often (but not always), the basis for the MTA is the pension's "commuted value" (see below).

A pension value determined by a plan administrator will never be in accordance with the Canadian Institute of Actuaries Standard of Practice for Determining the Capitalized Value of Pension Plan Benefits for a Relationship Breakdown. Values determined in accordance with this actuarial standard of practice would be considered by actuaries to most fairly represent the appropriate value of a pension for matrimonial property purposes. Whenever we refer to the "fair value" of pension in this paper, we are referring to a valuation that is in accordance with the Standard of Practice for Determining the Capitalized Value of Pension Plan Benefits for a Relationship Breakdown.

What is a commuted value?

This is a term used by actuaries and pension administrators. It almost always refers to the lump-sum amount that is available to a pension plan member who terminates employment and wishes to collapse or cash out their DB pension entitlement in favour of a lump-sum transfer to a Locked-in Retirement Account (LIRA) or locked-in Registered Retirement Savings Plan (locked-in RRSP).

When an individual terminates employment, they may give up certain rights in the pension plan. Examples include:

- Entitlement to contractual or ad hoc post-retirement indexing increases,
- Entitlement to receive an unreduced pension on early retirement, and/or
- Entitlement to a temporary bridge pension or other ancillary benefits.

A commuted value calculation will exclude any aspect of the pension that is not fully guaranteed and vested on the calculation date. Thus, the commuted value of a pension is generally (but not always) less than the amount that an actuary would consider to represent the fair value of the pension asset.

The portion of the commuted value that pertains to the "period subject to division", marriage period, or cohabitation period will often, but not always, understate the fair value of the pension for matrimonial property purposes. For example:

CV May UNDERSTATE Fair Value	CV May OVERSTATE Fair Value
Separation occurs prior to vesting of basic or ancillary benefits, such as early unreduced retirement eligibility	Member has a life-shortening illness
Plan regularly grants ad hoc indexing increases to pensions in pay	Plan provides generous spousal death benefits
Plan provides unreduced pensions on early retirement	Member intends to retire later than normal for that employer
Member intends to retire earlier than normal for that employer	

In jurisdictions, like BC, where post-separation salary increases attributable to the during-marriage accrued pension are included in the valuation of the pension for matrimonial property purposes, the commuted value will almost always understate the fair value of the pension.

In some jurisdictions (for example: Alberta, Saskatchewan, Manitoba, and New Brunswick), it is usual for family lawyers to rely on the plan administrator to calculate a commuted value and then to rely on that commuted value as the basis for a pension division (or equalization) that is deemed to be fair to the parties. As may be surmised from the table above, it can be difficult for lawyers to recognize which pension plans and which situations merit scrutiny and when an alternative "fair value" calculation would be in the financial best interests of their client.

ADMINISTRATOR VALUES THAT ARE NOT COMMUTED VALUES

These are examples. This is not an exhaustive list.

a. Ontario Family Law Value

As of 2012, Section 10.1 of the Ontario Family Law Act prescribes the methodology and assumptions to be used in the valuation of a pension for net family property purposes. This is accomplished by pointing to Section 67.2 of the Ontario Pension Benefits Act (or to Section 17 of the new Pooled Registered Pension Plans Act). Section 67.2 then sends the reader to Regulation 287/11 under the Pension Benefits Act which outlines the specifics of the prescribed valuation methodology and assumptions. Section 10.1 is understood to apply to all pensions. Section 10.1(1) applies to Ontario-registered pensions. Section 10.1(2) applies to other pensions on the same basis as Section 10.1(1) applies to Ontario-registered plans "where reasonably possible" "with necessary modifications". The 2020 Court of Appeal decision in *Van Delst v. Hronowky* addressed the meaning of those terms in the context of two federal civil service pensions.

Section 67.2 of the Ontario Pension Benefits Act requires the administrators of Ontario-registered plans to determine the Family Law Value of a pension, if asked by either the plan member or the member's spouse. Administrators are permitted to charge a fee of up to $600 + HST for this service. The tendency is for private sector pension plans to charge the fee. Most public sector pension plans provide family law valuations at no charge.

At its core, an Ontario Family Law Value is simply the weighted average of either two or three (usually three) pension values. One of these is the portion of the commuted value attributable to the marriage period. The other two values in the weighting use assumptions that are similar to the commuted value calculation, except that they assume different retirement ages.

Depending on the demographic characteristics of the plan member and the specifics of the pension plan, an Ontario Family Law Value may be close to, less than, or more than the amount that an actuary would consider to represent the fair value of the pension asset.

The parties may sometimes agree that the Family Law Value is egregiously unfair (in the case of the plan member having a terminal illness, for example). In such instances, there is sometimes an informal agreement to use an alternative valuation prepared by an independent actuary. However, there are no legal decisions on the question of alternative valuations to address unfairness in a Family Law Value.

b. Pension Benefits Division Act (PBDA) Maximum Transferable Amount (MTA)

The three largest federal government employee pensions plans are the Canadian Public Service Pension Plan (CPSPP – covers federal civil servants), the Canadian Forces Superannuation Act pension plan (CFSA), and the RCMP Superannuation Act pension plan.

The lump-sum value that is provided by the administrators of these three plans is the Pension Benefits Division Act (PBDA) maximum transferable amount estimate.

The PBDA is the legislation that outlines how federal government employee pensions can be divided on marriage breakdown. Under the PBDA, a maximum of 50% of the "value" of the pension earned during the marriage may be transferred to the former spouse's Locked-in Retirement Account (LIRA). It may therefore be tempting to double this PBDA amount and assume that it is a reasonable estimate of the fair value of the pension – even if pension division is not contemplated. However, this is frequently an incorrect assumption.

The "PBDA x 2" amount will almost certainly differ from the fair value of the pension because it is calculated differently. The key differences are as follows:

	PBDA Value (federal gov't employees)	**Value Determined in Accordance with Actuarial Standard of Practice for Pensions on Marriage Breakdown**
Valuation Date	Current date	Separation date or other valuation date appropriate to the matrimonial property jurisdiction
Mortality Assumption	As of current date, sex-distinct	As of separation or other valuation date, sex-distinct (uses the actual sex of the member)
Economic Assumptions	As of current date	As of separation or other valuation date appropriate to the jurisdiction
Commencement Age for the Pension	Commencement at the retirement age assumed for termination of employment purposes	One to four retirement age scenarios typically illustrated, to permit the parties to select the scenario that most closely reflects the member's retirement intentions
Portion of Pension Included	Accrued during the marriage	Accrued prior to separation and/or accrued during the marriage (depending on jurisdiction governing the matrimonial property matters)

General rule of thumb: The discrepancy in value increases with the length of time since separation. If the separation occurred more than one year prior to the PBDA calculation date, the PBDA value may merit scrutiny. This is particularly true in times of changing interest rates and inflation levels, such as the period from 2019 to the present. Interest rates dropped during the pandemic, then increased as the Bank of Canada acted to manage inflationary pressures, and have recently begun to drop again.

Here are some **federal government employee pension plan examples** that use the "PBDA x 2" amount as the administrator "value":

Plan Member	Separation Date / PBDA Calc Date	Administrator "Value"	Ontario FLV	Fair Value
44 year old male, 14 years of credited service at separation	Jul 2023 / Oct 2023	$190,000	$305,000	$260,000
43 year old male, 15 years of credited service at separation	Oct 2020 / Nov 2022	$310,000	$520,000	$365,000
37 year old female, 8 years of credited service at separation	Jul 2019 / Sep 2020	$205,000	$175,000	$115,000

In the above table, all of the values shown in the various columns pertain only to the period of marriage.

c. New Brunswick Termination Value

In the early to middle 2010s, many of New Brunswick's public sector pension plans were converted from a traditional defined benefit pension plan design to a shared-risk defined benefit pension plan design.

As a result of this change, employees of the New Brunswick government, teachers, and many hospital employees are no longer entitled to receive the "commuted value" of their pension if they choose to collapse their pension and transfer their entitlement out of the pension plan after terminating employment. Instead, these individuals are entitled to receive the "termination value" of their pension as determined in accordance with Regulation 2012-75 under the New Brunswick Pension Benefits Act.

This constraint on the amount of money that a plan member can remove from the plan on termination of employment (the smaller "termination value" rather than the larger "commuted value") would be viewed by many as a positive characteristic of shared-risk pension plans. The constraint is in place, in our opinion, to ensure the long-term sustainability of the various shared-risk plans. As a further advantage (from a "financial security in retirement" perspective), the limitation on the size of the termination value encourages members to retain their entitlement to a monthly lifetime pension that they cannot outlive and discourages members from converting that lifetime pension into a lump-sum amount which would be removed from the plan.

The shared-risk plan's "termination value" is often equivalent to the member's contributions to the plan accumulated with interest (excluding all of the employer's contributions to the plan,

and much of the value of the pension). Sometimes, the termination value is equivalent to the lump-sum value of the pension based on a relatively high rate-of-return assumption and excluding the value of key ancillary benefits such as unreduced early retirement and some indexing. For these reasons, the "termination value" of a New Brunswick shared-risk pension (as calculated by the administrator) is almost always substantially lower than the actual value of the monthly pension that the plan member would receive if they left their pension entitlement in the plan after termination of employment.

The administrator of the various New Brunswick shared-risk plans no longer calculates commuted values for plan members because such a value is not relevant to the current plan provisions. As a result, for these pension plans there is no longer a value available from the pension administrator that could be considered as a proxy for the fair value a member's pension as matrimonial property.

Here are some **New Brunswick shared-risk plan examples**:

Plan Member	Separation Date	Termination Value	Commuted Value	Fair Value
46 year old female, 22 years of credited service at separation	May 2022	$215,000	$340,000	$485,000
40 year old female, 16 years of credited service at separation	Jan 2016	$55,000	$130,000	$120,000
55 year old female, 10 years of credited service at separation	Dec 2016	$70,000	$220,000	$230,000

In the above table, all of the values shown in the various columns pertain only to the period of marriage.

Our view is that the "termination value" of a shared-risk pension should never be used as a proxy for the fair value of a pension. These "termination values" are usually much lower than the amount that an actuary would consider to represent the fair value of the pension asset.

Two of **PEI**'s public sector pension plans have adopted a similar plan design, including strict limits on the amount of money that a member can remove from the plan via LIRA transfer on termination of employment (and no lump-sum LIRA transfers after marriage breakdown). For these plans, the "administrator value" would understate the fair value of the pension as a matrimonial asset.

Similar to New Brunswick, most of **Alberta**'s public sector pension plans no longer calculate commuted values for plan members because such values are not relevant to their current plan provisions. The value that these plans do calculate will almost always be lower than both the commuted value and the fair value of the pension. Some multi-employer (union-sponsored) plans in different pension jurisdictions take a similar approach.

Caution Regarding Division of a Shared Risk Pension (or a Regular DB Pension)

As explained above, the “termination value” of a member’s shared-risk pension, as determined in accordance with the New Brunswick Pension Benefits Act, would be substantially less than the value of the member’s monthly pension entitlement. If the parties were to agree to a LIRA transfer to satisfy an amount owing in respect of an equalization of matrimonial property, then it should be understood that the member’s monthly pension would be reduced by the ratio of the amount of the LIRA transfer to the termination value (and not by the ratio of the LIRA transfer to the actual value of the pension). In other words, the lump-sum value of the monthly pension that the member loses as a result of the LIRA transfer will be larger (perhaps significantly larger) than the value of the LIRA transfer that the spouse receives.

This issue is highlighted in the pension administrator’s standard marriage breakdown information document (our emphasis):

> “The contributor is advised to consider other options to obtain funds to pay his or her obligations. **The loss of pension benefits may be greater than the cost of accessing other sources of funds.**”

It would be preferable, in our opinion, for the parties to agree to a settlement that does not involve a LIRA transfer if the party who owes the equalization payment is a member of a New Brunswick shared-risk pension plan.

Although this “loss of pension benefits is greater than the amount the spouse receives” issue is most apparent with the New Brunswick shared-risk pension plans, family lawyers and their clients should understand that – when a pension is “divided” by means of a LIRA transfer – it is possible that the amount of the monthly pension that the member loses in his or her retirement years may be larger than what was anticipated at the time that the separation agreement was negotiated. For example, if the “accrued during the marriage” pension is $1,000 per month on the separation date and the parties agree to a LIRA transfer based on 50% of the pension accrued during the marriage, the plan member may expect a $500 per month pension reduction on retirement. The plan member may be surprised and perturbed if it turns out that the pension reduction is (for example) $700 per month instead. If a LIRA transfer is being contemplated, it may be advisable for the plan member to ask the plan administrator how the LIRA transfer-related pension reduction on retirement will be calculated.

TO DIVIDE OR NOT TO DIVIDE?

As family lawyers know, pension division is an accepted, relatively common approach to the sharing or equalizing of matrimonial assets after marriage breakdown in many provinces.

However, there can be financial risks to the plan member and/or the non-member spouse if the pension is divided without a clear understanding of the reasonableness of the lump-sum value that is being divided or the periodic payments that are being divided. Sometimes, pension division can be fair to both parties. Sometimes, it can be highly unfair to one of the parties. Sometimes (with respect to the New Brunswick shared-risk plans, for example, as discussed above), it can be highly unfair to both parties.

If the basis for the pension division is an agreed-on lump-sum value for the pension asset, the parties (and their lawyers) should understand whether the agreed-on value is:

1. The fair value of the pension (calculated in accordance with accepted actuarial principles for pension valuation on relationship breakdown),
2. An administrator value (as discussed earlier), or
3. The prescribed Family Law Value (applies only to Ontario family law matters)

Even if the parties intend to equalize their overall matrimonial property without dividing the pension, it is important to understand which of the above categories the agreed-on pension values falls into.

If the parties decide to rely on an administrator value, their lawyers may wish to retain an independent actuary to help them understand whether that administrator value is similar to, much lower than, or much higher than the fair value of the pension.

If the outcome of the pension division is establishing the non-member spouse as a “limited member” of the plan with a “separate pension” (the only permitted approach to pension division for Nova Scotia-registered plans, also available with federally-registered plans and in several other provinces – see the table at the end of this paper for details), it is important to understand how the spouse’s monthly pension will be determined. The same pension division agreement wording can lead to different outcomes, depending on the jurisdiction of registration of the pension plan and sometime on the plan’s internal administrative practices.

When it comes to DB pension plans, the accepted practice in most (but not all) jurisdictions is that the pension should be valued as of the separation date (see discussion in the Overview section for some exceptions). The practical outcome of this practice will differ based on whether the pension is to be divided or whether its value is to be offset on a lump-sum basis by other assets, and by the jurisdiction that governs the pension plan in question.

To illustrate how the same pension division wording can lead to different outcomes, here is a **Nova Scotia example** (male plan member):

- As of separation, the 50-year-old member has accrued a pension of 2.0% x 10 years x $50,000 = $10,000 per annum
- This is the amount of pension, beginning at age 65 and continuing for his lifetime, that the member would receive if he had terminated employment on the separation date
- All of this pension was accrued during the marriage
- $50,000 is the member's salary in the year of separation

➢ If an actuary were asked to determine the lump-sum value of this pension as of the separation date for purposes of an asset offset, they could easily do so. Half of this amount, the lump-sum value of a pension of **$5,000 per annum**, is the amount that the member would have to pay the spouse in lieu of a pension division. It is up to the parties to decide whether or not interest should be granted from the valuation date to the settlement date. The details of the agreed-on approach would be specified in the separation agreement.

- When the member retires 15 years after separation, his accrued pension has increased to 2.0% x 25 years x $70,000 = $35,000 per annum
- $70,000 is the member's salary in the year of retirement

➢ If the pension is governed by the **Nova Scotia Pension Benefits Act** and the parties agree to a pension division whereby the spouse is to receive a proportionate share of the member's pension equal to 50% of the pension accrued during the marriage, then the plan administrator would pay the spouse a lifetime pension equivalent in value to 50% x $35,000 x (10 / 25) = **$7,000 per annum** payable for the member's lifetime. The spouse's pension would begin on the same date that the member's pension begins. The actual annual pension payable to the spouse would be more or less than $7,000 because it would depend on the spouse's age on the member's retirement date.

➢ If the pension is governed by the federal **Pension Benefits Standards Act** and the parties agree to a pension division whereby the spouse is to receive 50% of the pension accrued during the marriage, then the plan administrator would pay the spouse a pension equivalent to 50% x $10,000 = **$5,000 per annum**. Depending on the wording of the separation agreement, the spouse might receive $5,000 per annum beginning on the member's retirement date and continuing for the member's lifetime (not for the spouse's lifetime) or the spouse might receive a different annual pension (more or less than $5,000 per annum, but equivalent in value) that commences on a date of the spouse's choosing and continues for the spouse's lifetime.

- Under the **Nova Scotia Pension Benefits Act**, the spouse will share in the benefit of the member's increased salary after separation if the pension benefit formula is of the "final average earnings" or "career average salary" type and if the parties opt for pension division. However, the same is not true if the pension is governed by the federal **Pension Benefits Standards Act**.

In the above example, if the intent of the parties is to divide the pension so that the spouse will receive a proportionate share equivalent to $5,000 per annum (and not $7,000 per annum) when the member retires, then the separation agreement should be carefully worded to ensure this outcome. A checklist for separation agreements can be found later in this paper.

Regardless of the jurisdiction that governs the pension plan, the parties may divide the pension based on either the **cohabitation date** or the **marriage date**. The agreed-on start date should be specified in the separation agreement.

PENSION DIVISION OPTIONS AND RESTRICTIONS

The table at the end of this paper presents a summary of what division options are available for pension plans registered in different jurisdictions. There is no requirement, in any Canadian jurisdiction, to divide a pension for matrimonial property division or equalization purposes. However, if the pension is to be divided, the parties must select one of the division options available based on the plan's jurisdiction and the status of the plan member.

There are three major approaches to pension division. Each approach is not necessarily always available to the parties (see the table at the end of the paper).

a. LIRA Transfers

LIRA transfers may be the least understood of the division options. LIRA stands for Locked-in Retirement Account. Sometimes called "locked-in RRSPs", LIRAs are RRSPs with strings attached. The non-member spouse should understand that locked-in means locked-in. With few exceptions, the LIRA can only be accessed in one's retirement years.

In some jurisdictions, the LIRA can never be accessed as a lump sum. In other jurisdictions, up to 50% of the LIRA can be accessed as a lump sum at the time that the LIRA is converted to an income stream. In Saskatchewan, the entirety of the LIRA can be accessed as a lump sum. Any withdrawals from a LIRA are immediately taxed as income.

The greatest challenge of managing a LIRA is the drawdown decision. Draw down the balance too slowly, and the non-member spouse's heirs will be basking on a beach in the Cayman

Islands after the spouse's death. Draw it down too quickly, and the non-member spouse will run out of money before he or she dies.

The other difficulty with LIRAs is the challenge of replicating the investment return results of the professional pension fund managers. Pension plans pay "institutional" investment management fees which are substantially lower than the "retail" investment management fees that most individuals pay when they invest in mutual funds. Will the non-member spouse be able to make the astute investment decisions necessary to replicate the amount of pension the member gave up in order to implement the LIRA transfer? Will the non-member spouse be able to continue to make astute investment decisions as they age into their 80s and 90s and beyond?

In a DB pension plan, the employer takes on the longevity risk (the risk of outliving one's assets) and the investment risk. In a LIRA, the account holder must shoulder both the longevity risk and the investment risk.

A LIRA transfer is sometimes the only pension division option available. This is true for **non-retired members of Ontario-registered plans and Manitoba-registered plans**, as well as **all members** of **federal government employee plans and New Brunswick-registered plans**. In these instances, a LIRA transfer may be appealing to the plan member because it defers the pain of equalization. But, the transfer will require the member to give up some pension and once it's gone, it's gone forever. And the non-member spouse does not receive a pension. He or she instead receives a "locked-in" lump sum that is subject to the above-mentioned longevity and investment risks.

In our opinion, a LIRA transfer (when available) should be viewed as the equalization solution of last resort in most instances. One exception to the caveat against LIRA transfers is when the plan member is seriously and terminally ill. If this is the case, a LIRA transfer may actually be the optimal equalization strategy.

If a LIRA transfer is the only division option available and the financial circumstances of the parties are such that matrimonial property could be equalized without a defined benefit pension having to be divided by means of a LIRA transfer, in our opinion the "no division, no LIRA transfer" approach merits serious consideration.

b. "Separate Pension" or Lump-sum Transfer within the Plan (a.k.a. "Converted Pension")

Many pension plans registered federally, in British Columbia, Alberta, Saskatchewan, Nova Scotia, and Newfoundland & Labrador permit a lump-sum transfer within the plan. In some cases, like Nova Scotia private sector plans, this is the only option for division. With this type of pension division, there is a lump-sum transfer (akin to a LIRA transfer) but the lump sum is used to establish a separate monthly pension from the plan in the non-member spouse's name. The former spouse becomes a "limited member" of the pension plan.

Different jurisdictions have different rules for establishing the start and end dates and the amount of the pension payable to a limited member. Often, the pension would continue for the spouse's entire lifetime, such that the pension plan continues to shoulder both the longevity risk and the investment risk.

Pension start dates vary by jurisdiction. For example, in a federally-regulated plan, the limited member can choose their pension commencement date (subject to some conditions). For Nova Scotia plans, on the other hand, the spouse cannot choose the commencement date. The pension commences when the member retires or on the member's normal retirement date if earlier.

Some plans refer to these division arrangements as "separate pensions". Others refer to them as "converted pensions".

c. Division at Source

"Division at source" is an option that is available to **retired members** of pension plans registered in **British Columbia, Saskatchewan, Manitoba, and Ontario**, as well as retired members of **federally-registered plans**. A division at source involves dividing each monthly pension payment "if and when" it is made. The member's pension (which ends on the member's death) is divided. The division ends when the pension ends. If the former spouse is entitled to a spousal survivor pension, the survivor pension would commence on the member's death and continue for the spouse's remaining lifetime. Taken together, the divided pension and the spousal survivor pension provide the spouse with monthly payments throughout their remaining lifetime. The entitlement to a spousal survivor pension protects the spouse from the risk of the plan member dying prematurely.

If the former spouse is not entitled to a spousal survivor pension and the pension is divided on an "at-source" basis, their income stream would cease on the member's death even if death occurs shortly the pension division begins.

QUIRKS TO BE AWARE OF – A SAMPLING

Determining Which Jurisdiction Governs the Pension Plan

Pension plans are subject to pension legislation in the jurisdiction in which they are registered.

The jurisdiction of registration is usually shown in the member's annual pension statement. As noted earlier, pension division options are typically determined by the jurisdiction of registration for the plan and not by where the plan member resides.

However, there are some exceptions to this rule – just to keep things interesting for family lawyers! Here are some examples:

- If the pension plan is registered in Alberta and the plan member works in a company facility located in Ontario, the member would be deemed an "Ontario member" of the Alberta-registered plan. As a result of inter-provincial reciprocity agreements, the Ontario pension division rules might apply in place of the Alberta pension division rules.

- However, if this same plan member works at home in Ontario, it is likely that they would be deemed to be an "Alberta member" of the plan because they do not work in a company facility. In this case, the Alberta pension division rules are almost certainly the ones that would apply.

- Section 123 of the British Columbia Family Law Act sets out division rules for plans that are not BC-registered. On reading Section 123, an actuary's reaction would be that BC legislation probably cannot supersede the legislation of the province where the pension plan is registered or require a pension plan in another jurisdiction to act in a manner that is contrary to the provisions of their plan text. However, we are told that some BC family lawyers have been able to successfully negotiate implementation of the BC FLA pension division rules for pension plans that are not BC-registered.

- Some pension plans, usually those covering public sector employees, are not subject to local pension legislation. In such cases, the plan text (which may be an Act of Parliament or an Act of a provincial legislature) would determine the available division options. Examples of such plans include federal government employee plans (civil service, RCMP, Armed Forces, Members of Parliament, federal judges, etc.) and the Nova Scotia public service and teachers' plans. In contrast, the Ontario public sector plans are subject to Ontario provincial pension legislation.

Before negotiating a settlement and drafting the pension-related sections of a separation agreement, it is critical that lawyers understand the jurisdictional question and confirm which pension division options are – and are not – available to the parties.

Spousal Survivor Pensions

A member's pension begins on the member's retirement date and continues for their remaining lifetime. A spousal survivor pension would begin on the member's death (if the spouse is alive) and then continue for the spouse's remaining lifetime.

Whether or not an individual is a "spouse" and entitled to receive a spousal survivor pension is determined by the definition of spouse in the plan text and by the governing pension legislation. A member cannot name or select their "spouse" for pension purposes. An

individual either meets the plan's definition or they don't. It is up to the pension plan to make this determination.

A separation agreement or order that purports to make a former spouse the "spouse" for spousal survivor pension purposes cannot override the plan's definition and/or the governing pension legislation.

Depending on the jurisdiction, the individual who is eligible to receive a spousal survivor pension on the member's death might be:

- The person who was living with the member (married or not) on the retirement date
- The person who was married to, but separated from, the member on the retirement date
- The person who was living with the member on the member's date of death

To ensure the long-term financial security of a former spouse as best possible, it is important to understand whether or not the former spouse is eligible for the spousal survivor pension associated with the member's pension.

If the former spouse has an entitlement to a spousal survivor pension, then that is an asset of the spouse that should be valued as matrimonial property.

Transition from "Pre-retirement" to "Post-retirement" Division Options

The general rules for pension division options are set out in the table at the end of this paper. However, there are some local quirks to be aware of. For example:

- In some provinces, it is usual for interest to be applied to an equalization payment (from the asset valuation date to the date of settlement). In other provinces, this is not normal practice. With respect to lump-sum LIRA transfers, it would be reasonable to apply the same rule as would apply to any other equalization payment in that jurisdiction.

- In Alberta, if the member is within ten years of normal retirement (i.e., who is 55 years or older, for most plans), **Section 81(3)** of the **Alberta Employment Pension Plans Regulations** allows for the pension division to be delayed until the member terminates, retires, or dies. In this case, the division would be based on the pension accrued to that future date, taking into account the increased value of the pension due to salary increases or eligibility for unreduced early retirement benefits. For members under age 55 (for most plans), the pension cannot be deferred to a future date.

- In British Columbia, **Section 115(3)** of the **British Columbia Family Law Act** requires that the pension division occur only after the member is eligible to receive a pension (usually

at age 55). Pension plans for "specified individuals" are permitted to delay the pension division even further, until the member's pension actually commences.

- British Columbia and Ontario are the only provinces that address pensions in a detailed manner in their Family Law Acts. Elsewhere in Canada, pension legislation determines the pension division options available.

Unusual Approaches to Division at Source

Not every pension plan in every jurisdiction follows the "general rules". For example, some of the Manitoba public sector plans will permit a division at source of both the member's monthly pension and the spousal survivor monthly pension. If this is the approach selected by the parties and the plan member dies first, the spousal survivor monthly pension payments will be divided in the same proportion as the member's pension was divided. The member's portion of the spousal survivor pension will be paid to the member's estate until the spouse dies. Remember that it is the member's death that triggers commencement of the spousal survivor pension and that the spousal survivor pension, once it starts, will continue for the spouse's remaining lifetime. We are not aware of this arrangement being available with any other pension plans in any other jurisdictions.

COURT ORDERS AND SEPARATION AGREEMENTS

Key Clauses to Include

Once the net family property statement or other financial disclosure is completed (including the after-tax values of any pensions) and it's been determined "who owes who how much", the parties may agree or the court may order a pension division.

When drafting the pension division sections of a separation agreement or court order:

1. Confirm that the division approach contemplated (division at source, internal lump-sum transfer within the pension plan, or LIRA transfer) is available and permitted by the plan and its governing legislation. If in doubt, check the attached table or ask an actuary for assistance.

2. Focus on documenting the intent of the parties and providing clear instructions to the pension plan administrator(s).

3. Avoid extraneous narrative information (such as the steps taken to obtain the pension valuation, and definitions that may or may not be relevant). Also avoid duplication of instructions in multiple paragraphs, as this can lead to contradictory provisions and difficulties implementing the agreement or order.

4. It remains advisable to <u>always</u> provide the administrator with a draft copy of the separation agreement or order, and to obtain their comments, prior to finalizing and executing the agreement or order.

5. Ontario FSRA Forms FL-5 and FL-6 are covering memos to the separation agreement, to be provided to the pension administrator <u>only</u> if the pension plan is Ontario-registered. These forms are executed only by the non-member spouse and would not typically form part of the formal separation agreement.

If there is to be a division by **LIRA transfer or lump-sum transfer within the plan** (the separate pension/converted pension approach), the agreement or order would specify details such as:

- The exact lump sum to be transferred and the "as of" date for the transfer. The "as of" date clarifies whether or not interest is to be paid from the separation date to the date of actual transfer.

- For Ontario only, the 2014 *Heringer* decision confirmed that paying interest on an equalization payment that originates in a pension plan is neither the default nor is it required. The legal principles regarding the payment of interest in respect of an equalization payment would presumably be the same, whether the equalization payment is made in cash or from a pension plan or RRSP.

- To minimize the possibility of a transfer that is not in accordance with the intent of the parties (or the intent of the court), it is best to specify a dollar amount for the transfer and to make explicit mention of interest:

    - If interest is <u>not</u> to be paid, then words such as "$100,000 as of the date of actual transfer" should achieve the parties' intentions.

    - If interest <u>is</u> to be paid, then words such as "$100,000 as of the separation date (or some other specified date), with interest to the date of actual transfer" should achieve the parties' intentions.

    - Although best practice is to specify the dollar amount of the transfer and to provide explicit instructions regarding the payment (or non-payment) of interest, some pension plans (for example, the Alberta public sector plans) require that the amount of the transfer be expressed only as a percentage (for example, 50%). In such situations, the parties should identify the dollar amount that they want transferred and they should agree on the remedy if the <u>actual</u> amount transferred (based on the percentage shown in the separation agreement) is larger or smaller than the <u>expected</u> amount.

The agreement or order should also specify:

- The party who is responsible for informing the pension administrator of the agreement.
- The deadline for informing the pension administrator.
- The remedies if the administrator is not informed in a timely manner.

If the administrator is not advised of a pension division in a timely manner, complications may arise. These could extend to the funds no longer being available for division as a result of the member's termination of employment, retirement, or death.

If there is more than one pension, the separation agreement or court order should deal with each pension in a separate section.

If there is to be a **division at source** of the pension (i.e., a division of the monthly pension payments while the pension is in pay), the agreement or order would specify details such as:

- The proportion of the member's pension that will be payable to each party (in percentages). The percentages should take into account, amongst other considerations, the value of the spouse's spousal survivor pension and the amount of the equalization obligation to be satisfied by means of the pension division.
- A numerical example based on the member's current pension (to clarify and confirm the intent of the parties).
- The start date of the division. This would often be the separation date but could be a later date, depending on the matrimonial property jurisdiction and/or the parties' preferences. In Ontario, the deemed arrears and required retroactivity provisions of the legislation create complexity if the parties have been informally dividing the pension pending a formal agreement. Some Ontario-registered pension plans will divide the pension as of a current date if the agreement is clear on this point. For Alberta-registered plans, the start date of the division must be in the future (after the date on which the executed separation agreement or final order is given to the plan).
- Whether the spouse's portion of the member's pension will revert to the member (with reversion) or continue to the spouse's estate (no reversion) if the spouse predeceases the member. The 2021 Ontario Court of Appeal decision in *Meloche v. Costa-Meloche* confirmed, for Ontario-registered pension plans, that both approaches are possible. Generally speaking, both approaches are possible in <u>any</u> instance where an at-source division of a monthly pension in pay is an available pension division option.

The plan member's pension comes into pay on his or her retirement date and continues until his or her death, regardless of whether or not there is a pension division.

Under a "with reversion" pension division:

- If the plan member predeceases the non-member spouse: The member's pension (and the pension division) would cease on the member's death. The former spouse's spousal survivor pension would commence the plan member's death and then continue for the spouse's remaining lifetime.

- If the spouse predeceases the plan member: The pension division would cease even though the plan member's pension continues (because the member is still alive). The spouse's portion of the member's monthly pension would "revert" back to the plan member and the member would receive the full amount of his or her monthly pension from the date the spouse's death until the date of the member's death.

Under a "no reversion" pension division:

- If the plan member predeceases the non-member spouse: The member's pension (and the pension division) would cease on the member's death. The former spouse's spousal survivor pension would commence the plan member's death and then continue for the spouse's remaining lifetime.

- If the spouse predeceases the plan member: The spouse's portion of the member's pension would not revert back the plan member. Instead, the pension division would continue and the spouse's portion of the member's monthly pension would be paid to the spouse's estate after the spouse's death, for the plan member's remaining lifetime. When the plan member dies, the pension, and thus the pension division, would cease.

Actuarially speaking, the "no reversion" approach is the proper approach for an equitable equalization of matrimonial property. If the parties prefer the "with reversion" approach, then it would be equitable to increase the amount that the spouse receives while alive to compensate for the fact that the division will not continue for the member's entire lifetime. Such an increase would ensure that the lump-sum value of the payments the spouse receives under the "reversion" approach is the same as if "no reversion" approach had been used.

If the intent is to establish a **separate pension** (sometimes called a "converted pension") payable for the spouse's lifetime, then the order or agreement would contain clauses that are a blend of the "LIRA transfer"/"lump-sum transfer within the plan" clauses and the "division at source" clauses. Lawyers who do not have a proven template for such agreements may wish to consult an independent actuary for assistance.

For any "division at source" arrangement, the agreement or order should also specify:

- Whether the ad hoc and/or contractual indexing increases will be shared proportionately by the parties.
- The party who is responsible for informing the pension administrator of the agreement.
- The deadline for informing the pension administrator.
- The remedies if the administrator is not informed in a timely manner.

If the administrator is not advised of a pension division in a timely manner, complications may arise. These could extend to the funds no longer being available for division as a result of the member's termination of employment, retirement, or death.

If there is more than one pension, the separation agreement or court order should deal with each pension in a separate section.

REMEMBER:
The plan administrator may be reluctant to send a vaguely-worded agreement back to the parties for clarification. There may be a tendency for the administrator to "read between the lines" and interpret the agreement in a way that the parties did not intend. To ensure that the pension division proceeds as the parties intended, it is important to provide clear and unambiguous instructions to the administrator. If in doubt, ask an independent actuary to review your draft agreement. The actuary speaks "pension" and help you see the agreement through the eyes of the pension administrator.

Clauses to Avoid

If the pension-related paragraphs of a separation agreement or order are incomplete or ambiguous, the administrator may send the agreement or order back because it cannot be implemented as written, resulting in delays and additional legal fees for the parties. An even worse outcome would be that the administrator decides to <u>guess</u> the intent of the parties.

For example, if the agreement simply states: "the parties agree that the pension will be divided at source", the administrator will have questions such as:
- In what proportions? 50%/50%? 80/20%?
- Starting when?
- If the spouse predeceases the member, will the division continue (with the spouse's payments going to the spouse's estate) or will the division cease (with the spouse's payments reverting to the plan member)?
- If there are indexing increases, are they shared proportionately?

The wording in the agreement or order must also be in accordance with applicable pension legislation. Otherwise, the administrator will be unable to implement the division.

For example, if the order reads: "the parties agree that Sally will be named as the beneficiary for pre-retirement and post-retirement death benefits under Joe's pension plan", the result may not be as expected. There is a clear distinction between "spouse" and "beneficiary". For example, the member can name anyone of their choosing as beneficiary. However, the person who satisfies the legislation's (and the plan's) definition of "spouse" will always take precedence over a named beneficiary. So, if Joe acquires a new spouse (common-law or legally-married) and then dies, the new spouse will receive the benefits despite Sally being the named beneficiary.

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HELPFUL RESOURCES

For most provinces and territories, it can be difficult to find comprehensive guidance regarding pension valuation approaches and division/equalization options. We hope that this paper will fill some of that gap.

For **background information** on defined contribution (DC) and defined benefit (DB) plans:

- https://www.canada.ca/en/financial-consumer-agency/services/retirement-planning/employer-sponsored-pension.html

For **British Columbia** family law matters:

- Q&A on Pension Division on the Breakdown of a Relationship: https://www.bcli.org/wp-content/uploads/2017/03/March-2017-Questions-and-Answers-on-Pension-Division-Final.pdf
    - We are told that the BC Law Institute will be updating this document in the near future

For **Alberta** family law matters:

- Draft interpretive guideline on pension division after marriage breakdown: https://open.alberta.ca/dataset/623fa691-3296-4bf4-ae01-ebd3cd657f99/resource/bfab5391-affa-4ed2-963e-e1fed5b1706e/download/ig-05-marriage-breakdown-draft.pdf
    - This draft document is not perfect in its details, but it does give a helpful summary of the pension division options

For **Saskatchewan** family law matters:

- Guidance for understanding pension division rules for Saskatchewan-registered plans: https://fcaa.gov.sk.ca/public/CKeditorUpload/Pensions/Bulletin_-_Division_on_Spousal_Relationship_Breakdown_-_August_2017.pdf

For **Ontario** family law matters:

- Guidance for members and spouses: https://www.fsrao.ca/consumers/how-fsra-protects-consumers/pensions/pensions-and-marriage-breakdown-guide-members-and-their-spouses
    - Includes link to FSRA forms

- Guidance to administrators: https://www.fsrao.ca/industry/pensions/regulatory-framework/guidance-pensions/administration-pension-benefits-upon-marriage-breakdown
    - More technical, but useful

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Pension Division Settlement Options by Jurisdiction of Plan Registration
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Member NOT Retired at Separation

	British Columbia	Alberta	Saskatchewan	Manitoba	Ontario
Available forms of division	Lump sum to LIRA (often restrictions) or separate pensions	Lump sum to LIRA (some public plans offer separate pensions)	Lump sum to LIRA or separate pensions (if plan rules allow)	Lump sum to LIRA	Lump sum to LIRA
Amount assignable to spouse	0 → 100% of pension at retirement attributable to marriage	0 → 50% of commuted value of pension earned during joint accrual	0 → 50% of commuted value at separation (prior to EURD) or at retirement (post-EURD) attributable to marriage	0 → 50% of commuted value at separation attributable to marriage	0 → MTA on page 2 of Form 4

Member IS Retired at Separation

	British Columbia	Alberta	Saskatchewan	Manitoba	Ontario
Available forms of division	At source, spouse keeps survivor pension	Separate pensions (usually)	At source with reversion, spouse keeps survivor pension	At source, spouse keeps survivor pension Separate pensions (some plans)	At source, spouse keeps survivor pension
Amount assignable to spouse	0 → 100% of pension at retirement attributable to marriage	0 → 50% of commuted value of pension earned during joint accrual	0 → 50% of commuted value at retirement	0 → 50% of commuted value at separation attributable to marriage	0 → MTA on page 2 of Form 4

- In BC, the rules are complicated, based both on status on the date the order is filed with the administrator and also on when certain prescribed forms are filed.
- In Alberta, the status on the date that the pension division order is filed with the administrator is the determinant.
- EURD = earliest unreduced retirement date (will vary by member and by plan)
- MTA = maximum transferable amount = 50% of the maximum amount divisible

Pension Division Settlement Options by Jurisdiction of Plan Registration
(page 2 of 3)

Member NOT Retired at Separation

	New Brunswick	Nova Scotia (Private Sector and Teachers')	Nova Scotia Public Service Plan	Prince Edward Island	Newfoundland & Labrador
Available forms of division	Lump sum to LIRA	Separate pensions on member's retirement	Lump sum to LIRA	Depends on the plan (no pension legislation) Separate pensions (public sector plans)	Prior to EURD: lump sum to LIRA On or after EURD: separate pensions
Amount assignable to spouse	0 → 50% of commuted value at separation	0 → 50% of pension at retirement attributable to marriage	0 → 50% of commuted value at separation attributable to marriage	Depends on the plan (because there is no pension legislation)	0 → 50% of commuted value at separation attributable to marriage

Member IS Retired at Separation

	New Brunswick	Nova Scotia (Private Sector and Teachers')	Nova Scotia Public Service	Prince Edward Island	Newfoundland & Labrador
Available forms of division	Lump sum to LIRA	Separate pensions on member's retirement	Separate pensions on member's retirement	Depends on the plan (no pension legislation) Separate pensions (public sector plans)	Separate pension
Amount assignable to spouse	0 → 50% of pension at retirement	0 → 50% of pension at retirement attributable to marriage	0 → 50% of pension at retirement attributable to marriage	Depends on the plan (because there is no pension legislation)	0 → 50% of commuted value at separation attributable to marriage

- For the Nova Scotia Public Service plan, the member's status at the settlement date determines the division options. For other Nova Scotia plans, the status on the separation date is the determinant.
- EURD = earliest unreduced retirement date (will vary by member and by plan)

Pension Division Settlement Options by Jurisdiction of Plan Registration

Member NOT Retired at Separation

	Federal Gov't Employee	Federally-registered	Non-registered or Foreign
Available forms of division	Lump sum to LIRA	a. LS to LIRA b. LS within plan c. At source	Depends on plan (often not possible)
Amount assignable to spouse	0 → MTA in PBDA estimate statement	Depends on plan, often full value of the pension at separation (including portion accrued pre-marriage)	Depends on plan (often 0)

Member IS Retired at Separation

	Federal Gov't Employee	Federally-registered	Non-registered or Foreign
Available forms of division	Lump sum to LIRA, spousal survivor pension is cancelled	a. At source, spouse keeps survivor pension b. Establish 2 lifetime pensions	Depends on plan (often not possible)
Amount assignable to spouse	0 → MTA in PBDA estimate statement	Depends on plan, often full value of the pension at separation (including portion accrued pre-marriage)	Depends on plan (often 0)

- For federal government employee plans, the spousal survivor pension is cancelled if the parties divorce after retirement, even if there is no LIRA transfer.
- For federally-registered plans, the member's status at the settlement date determines the division options. For other plans, the status on the separation date is the determinant.
- MTA = maximum transferable amount = 50% of the maximum amount divisible