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*Note: Where this policy conflicts with the Financial Services Commission of Ontario Act, 1997, S.O. 1997, c. 28 ("FSCO Act"), Pension Benefits Act, R.S.O. 1990, c. P.8 ("PBA") or Regulation 909, R.R.O. 1990 ("Regulation"), the FSCO Act, PBA or Regulation govern.*

*Note: Bill 171, the Spousal Relationships Statute Law Amendment Act, 2005 (S.O. 2005, c. 5) and Ontario Regulation 324/05 amended the definition of "spouse" in section 1 of the PBA and removed reference to "same-sex partner" from the PBA and the Regulation as of June 13, 2005. This policy has been updated solely for purposes of deleting the note referring to same-sex partners. For further details see policy S500-101. No other changes to this policy have been made since the effective date.*

At the time of marriage breakdown, many family property issues can be resolved in a straightforward manner. Unfortunately, when family assets include pension benefits, the finalization of a negotiated property settlement may be complicated and in some cases delayed because pension legislation may not be fully understood by the negotiating parties.

### **Different Approaches in Family and Pension Law**

There is potential for conflict because family law anticipates an immediate property settlement whereas under pension law, the terms of the property settlement may not take effect for many years. This is because realization of the benefit entitlement is tied to the termination or retirement of the member-spouse from the pension plan.

Access to the pension benefit is realized only when the value of a pension benefit is transferred from a pension plan to a locked-in arrangement or when the member-spouse commences to receive payment of retirement income. (Where reference is made in the article to a "pension in pay", the term refers to the instances described here.)

Recent newspaper reports of court actions dealing with the issue of pension splitting on marriage breakdown reveal the difficulty of the process of assigning pension credits between spouses and the problem in obtaining immediate access to a share of those family assets held in a pension plan.

### **How Pension Credits May Be Assigned**

Under the *Pension Benefits Act* (the "PBA"), up to 50 per cent of the pension benefit accrued by the member spouse during the period the parties were spouses may be credited to the non-member spouse. A pension credit for the non-member spouse is established when a copy of a domestic contract or court order as defined under the *Family Law Act* which provides for the credit is given to the plan administrator. However, it is important to understand that the non-member spouse's entitlement to receive payment from the pension plan does not become effective until the member-spouse's benefits are "in pay".

A pension plan member is not entitled to receive payment of a pension benefit until termination or retirement. Members and former members of a pension plan also become entitled to receive a pension benefit in pay when the pension plan itself is terminated but employment continues. Normally a member-spouse who retires will be entitled to begin receiving periodic pension payments only. Members who terminate prior to attaining the normal retirement age under the plan are usually entitled to elect alternative options. Some options provide for the transfer of the value of the pension benefit to a locked-in tax-assisted retirement arrangement, such as a locked-in RRSP.

When an individual member or former member of a pension plan becomes entitled to receive a pension benefit "in pay", the plan administrator must provide that individual with a written statement that sets out all the options applicable to that individual. Where the member or former member is named in a certified document filed with the plan administrator, a copy of the option statement must also be provided to the non-member spouse. At this time, the non-member spouse's entitlement to receive the pension credit "in pay" becomes effective. The non-member spouse may elect to receive the pension credit under any of the options available to the member-spouse.

Some pension plans may permit the member-spouse to continue employment or defer payment of the pension benefit beyond the normal retirement date under the plan. In these circumstances, the non-member spouse's entitlement to receive the pension credit "in pay" becomes effective when the member attains the normal retirement age.

A marriage may break down after the member-spouse has already transferred the value of the pension benefit to a locked-in RRSP, a Life Income Fund ("LIF") or, has commenced receiving periodic pension payments. Under these circumstances, the PBA permits the immediate assignment of pension credits between the spouses in accordance with the terms of the applicable certified documents. Even if the non-member is entitled to a portion of a locked-in RRSP or to a portion of a LIF rather than a payment from a pension plan, the amount being transferred continues to be subject to the locking-in requirements of the PBA.

*Please note that where the terms "value of pension benefit" or "benefit value" are used, they include the commuted values transferred from defined benefit plans and contributions, with interest, transferred from defined contribution plans.*