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**AMENDMENTS TO
THE PENSION BENEFITS ACT
OCTOBER 1, 2021**

Section 31(2) Triggering Provision

Division of pension on breakdown of relationship

- s. 31(2) Subject to subsections (3) and (4), a member's pension or, if the pension has not commenced, the member's or former member's pension benefit credit must be divided in accordance with the regulations if
 - (a) pursuant to an order of the Court of Queen's Bench made under *The [Family Property Act](#)*, family assets of the member or former member or his or her spouse, former spouse or common-law partner are required to be divided;
 - (b) pursuant to a written agreement between the member or former member and his or her spouse, former spouse or common-law partner, their family assets are divided; or
 - (c) a division of the pension or the pension benefit credit, as the case may be, is required by
 - (i) an order of a court of competent jurisdiction in another province or territory of Canada, or
 - (ii) an order of the Court of Queen's Bench made under subsection (3.4).

No Division if requirements of s.31(2) not met

- ❖ *The Pension Benefits Act* is only a vehicle by which the equalization mandated by *The Family Property Act* is accomplished and s 31(2) of the of *The Pension Benefits Act* is only engaged once the requirements are met. (*Foster v. Foster* 2007 MBCA 96)
- ❖ Until requirements of section 31(2) met the administrator does not have jurisdiction to divide a member's pension
- ❖ definition of "common-law partner"
- ❖ definition of "family assets"
- ❖ definition of "written agreement"

Who has rights to division?

- ❖ spouse

section 1(1) of Pension Benefits Act

- ❖ "common-law partner" of a member or former member means
 - (a) a person who, with the member or former member, registered a common-law relationship under [section 13.1](#) of *The Vital Statistics Act*, or
 - (b) a person who, not being married to the member or former member, cohabited with him or her in a conjugal relationship
 - (i) for a period of at least three years, if either of them is married, or
 - (ii) for a period of at least one year, if neither of them is married;

Meaning of “family asset”

- ❖ Not defined in Pension Benefits Act
- ❖ In Family Property Act s.1(1):

“family asset” means an asset owned by two spouses or common-law partners or either of them and used for shelter or transportation, or for household, educational, recreational, social or aesthetic purposes, including, without restricting the generality of the foregoing,

(a) a family home,

(b) money in a savings account, chequing account or current account with a bank, trust company, credit union or other financial institution where the account is ordinarily used for shelter or transportation or for household, educational, recreational, social or aesthetic purposes, and saving bonds and deposit receipts intended to be used for those purposes,

(c) where an asset owned by a corporation, partnership or trustee would, if it were owned by a spouse or common-law partner, be a family asset, shares in the corporation or an interest in the partnership or trust owned by the spouse or common-law partner having a market value equal to the value of the benefit the spouse or common-law partner has in respect of the asset,



(d) an asset over which a spouse or common-law partner has, either alone or in conjunction with another person, a power of appointment exercisable in favour of the spouse or common-law partner, if the asset would be a family asset if it were owned by the spouse or common-law partner, and

(e) an asset disposed of by a spouse or common-law partner but over which the spouse or common-law partner has, either alone or in conjunction with another person, a power to revoke the disposition or a power to use or dispose of the asset, if the asset would be a family asset if it were owned by the spouse or common-law partner;

Meaning of “written agreement”

- ❖ A “written agreement” is not limited to a comprehensive Separation Agreement

For example:

- an agreement dividing household contents

- a signed order to pay proceeds from a jointly owned home

- an agreement that each party will retain the assets in their possession (Almedral v. Tan 2017 MBQB 54 para 72 (Hatch, J.))

Valid Waiver for parties separating before October 1, 2021

- ❖ For parties who separated before October 1, 2021 the requirements of section 31(6) remain applicable (s. 18(2) *The Pension Benefits Amendment Act*):

- ❖ Opting out
s. 31(6)

A member or former member of a pension plan and a person who is entitled to a division of the member's pension or the member's or former member's pension benefit credit may, after each has received

- (a) independent legal advice; and
 - (b) prescribed information in accordance with the regulations;
- enter into a written agreement, containing prescribed terms, not to divide the pension or pension benefit credit between them. Subsection (2) no longer applies to require that division when the agreement is filed with the administrator who would otherwise be required to give effect to the division.

Prescribed Information

- ❖ a statement from the administrator of the Pension Plan showing the commuted value of the pension benefit credit in the Pension Plan or the amount of the payments under the Pension Plan to which each would be entitled if not for agreement to not divide pension.

For parties separating after October 1, 2021

- ❖ s. 31(6) repealed
- ❖ No requirement for either independent legal advice or information about value of the pension benefit credits that are subject to division to agree not to divide the pension.
- ❖ Because of the limitation that section 31(6) imposed of requiring information about the value of the pension benefit credits, parties could only waive division of pension benefit credits in advance if they had not yet acquired the rights to division (Dundas v. Schafer 2014 MBCA 92) (Before marriage and cohabitation or before one year of cohabitation if not already married, or 3 years of cohabitation if married to someone else)
- ❖ Parties to Cohabitation, Pre-nuptial and Post-nuptial Agreements can now validly waive rights to division of pension at any time.

Duty on Administrator

- ❖ Administrator to provide prescribed information

s. 31(2.1) *Pension Benefits Act*

When a person becomes entitled to the division of a pension or pension benefit credit under subsection (2), the administrator of the pension plan must provide the member or former member and the person entitled to the division with prescribed information.

- ❖ Manner of division

31(2.2) *Pension Benefits Act*

Despite any agreement or court order to the contrary, a division under subsection (2)

- (a) must be made only after the member or former member and the person entitled to the division have received the prescribed information required under subsection (2.1);
- (b) must be made in accordance with the regulations; and
- (c) must not reduce the member or former member's pension or pension benefit credit by more than the prescribed percentage.

- ❖ The Administrator must recommend that before agreeing to receive a percentage of less than 50% on a division (including 0%) the member's spouse or common-law partner should seek legal advice and financial advice as to the implication of agreeing to receive less than 50%
(*Pension Benefits Regulation* s. 11.11(2)(g))
- ❖ The statement must now include the value of any voluntary or ancillary additional contributions
(*Pension Benefits Regulation* s. 11.11(2)(f))
- ❖ Administrator must provide statement within 60 days of receiving request (*Pension Benefits Regulation* s. 11.11(1))

Must state “percentage” or “not entitled to any portion”

Pension Benefits Regulation PART 11

11.4(1) The percentage of a member’s pension benefit credit or pension to be paid to the member’s spouse or common-law partner on a division under subsection 31(2) of the Act must be specified in a written agreement or by an order of the court made under *The Family Property Act*.

11.4(1.1) ...percentage specified ... must not be more than 50%...

11.4(1.2) ...may specify that the member’s spouse or common-law partner is not entitled to any portion.

Query: Does a statement that “we each keep our own assets” require a separate statement that “0% paid” or specific reference that spouse not entitled to any portion of member’s pension, or is this implied?

Problems with Requirement to state percentage

There is no default provision that if percentage not stated and division is required under s. 31(2) that the percentage is 50% absent other percentage designation.

In the absence of a default provision, if an administrator does not receive a written agreement or order they are not able to divide the pension as no percentage is specified.

Even for 50% division, a written agreement or court order required.

This increases needless litigation.

Also, practical difficulties in converting amount needed to a percentage, and then need to adjust for variance in amount transferred.

Administrator cannot withhold pension payments without authority

Functionally this also means that if a member becomes entitled to receive pension payments, that they will get their full pension payments as the administrator has no authority to holdback the amount that will potentially be payable on division.

The Pension Benefits Act

Entitlement to a pension

Section 21(1) A member of a pension plan becomes entitled to a pension under the plan upon ceasing to be an active member of the plan while employed in Manitoba.

Section 21(2) outlines the amount and terms of the pension, but it does not address whether any amount must be held back if the member and their spouse/common-law partner are living separate and apart.

Contrast with other Provisions in *The Pension Benefits Act*

The PBA does mandate holdback in other circumstances. For example:

s. 21.3(5) requires reduction of amount that may be payable under s 31(2) to a person who is living separate and apart from the non-resident at time of application for withdrawal.

s. 21.3.1(4) specifies that the amount withdrawn by a member/former member over 65 must be reduced by any amount that is or may become payable under s 31(2) from the plan to a person who is living separate and apart from the transferor at the time the transferor applies for the transfer.

s. 21.3.2(5) specifies that for an application for payment due to hardship, the amount withdrawn must be reduced by amount that is or may become payable to separated spouse or common-law partner.

s. 21.4(4) specifies that that for an application for a one-time transfer by a person 55 or older, the amount is to be reduced by amount that is or may become payable to separated spouse or common-law partner.

s. 31.1 reduces the amount subject to garnishment by the amount payable to another person entitled to division under s. 31(2) on day garnishment served.

Permitted Withdrawals from Pensions, LIRAs and LIFs

- ❖ *The Pension Benefits Regulations* Part 10

Transfer from Pension, LIRA and LIF at or after Age 55

- ❖ *Pension Benefits Act* s. 21.4 sets out ability to transfer once-in-a lifetime, a maximum of 50% of the total balances in one or more LIRAs, LIFs or pension benefit credits under a pension plan to a prescribed RRIF.
- ❖ Subject to a maintenance garnishment order, and preservation order, consent of cohabiting spouse/common-law partner and holdback of amount potentially payable as a result of 31(2) division if person is separated
- ❖ *The Pension Benefits Regulations* Part 10 DIVISION 4 sets out the rules. This is available to a member, surviving spouse or common-law partner, and person entitled to division under s. 31(2))

A Non-resident can make a lump sum withdrawal

- ❖ *Pension Benefits Act s. 21.3* permits a non-resident to make a lump sum withdrawal of commuted value of pension, LIRA or LIF.
- ❖ *Pension Benefits Act Regulations PART 10 DIVISION 5* sets out rules for commuting a non-resident's interest in a pension plan, and for allowing a non-resident to withdraw the balance of their LIRA or LIF.
- ❖ Subject to a maintenance garnishment order, and preservation order, consent of cohabiting spouse/common-law partner and holdback of amount potentially payable as a result of 31(2) division if person is separated

Part 10 Division 6 PBA Regulation

Small Pensions, LIRA or LIFS

- ❖ For a defined benefit plan a small pension is the annual pension to be provided at normal retirement age that is not more than 4% of the YMPE for the year in which commutation event occurs, or
- ❖ the pension has a commuted value of less than 20% of the YMPE for the year in which commutation event occurs.
- ❖ For a defined contribution plan, a small pension is if the commuted value is less than 20% of the YMPE for the year in which commutation event occurs.
- ❖ A small LIRA or LIF is if the total of the amount plus interest compounded annually at rate of 6% from Dec 31 of year of application being filed to end of year owner turns 65 years old is less than 40% of the YMPE for the year in which application made.

YMPE

- ❖ Year's Maximum Pensionable Earnings (YMPE) is the term used to refer to employment earnings on which the Canada Pension Plan contributions and benefits are calculated. For 2021 this is \$61,600.

Owner has Shortened Life Expectancy

- ❖ PART 10, DIVISION 7 of the Regulation sets out the ability to access a pension plan, LIRA or LIF for owner who is terminally ill and has a shortened life expectancy by reason of a terminal illness or disability to less than two years as certified by a doctor.
- ❖ all or part may be withdrawn.
- ❖ if not separated from spouse or common-law partner, consent required.

Survivor's Pension or Division under section 31(2)

- ❖ DIVISION 8 sets out rules for transfer.
- ❖ Note that must be transferred to a LIRA, LIF or a pension where the administrator of the plan to which the transfer is being made agrees to administer the transferred amount as Manitoba locked-in money

Withdrawal or Transfer from Prescribed Plan at or after age 65

- ❖ *Pension Benefits Act* s. 21.3.1
- ❖ Person age 65 years or older may make a lump sum withdrawal of balance owed to them under pension plan or transfer balance if permitted by Income Tax Act, to a RRIF, RRSP, or another pension plan that permits acceptance of funds.
- ❖ Subject to maintenance garnishment order, and preservation order, consent of cohabiting spouse/common-law partner and holdback of amount potentially payable as a result of 31(2) division if person is separated.
- ❖ Note warning on Pension Commission website about Unlocking Pension Scams

Lump sum withdrawal on Grounds of Financial Hardship

- ❖ *Pension Benefits Act s. 21.3.2*
- ❖ Subject to a maintenance garnishment order, and preservation order, consent of cohabiting spouse/common-law partner and holdback of amount potentially payable as a result of 31(2) division if person is separated.
- ❖ Application limited to once a year per ground of financial hardship
- ❖ PART 10 Division 12 of regulations sets out prescribed eligible grounds of hardship and maximum amounts permitted.

Prescribed Eligible Grounds of Financial Hardship

- ❖ PART 10 DIVISION 12 of Pension Benefits Regulations
- ❖ Low expected Income – total income from all sources before taxes for upcoming 12 months is equal or less than $\frac{2}{3}$ of the YMPE for the year application signed.
- ❖ Maximum withdrawal is 75% of the $\frac{2}{3}$ rd amount of YMPE less other total income plus tax payable on withdrawal.
- ❖ Medical expenses – for applicant, cohabiting spouse/common-law partner or a dependent medical and dental costs not covered by insurance
- ❖ Rental Arrears and Mortgage Arrears.

Thank you for your attention