

Breaking up is complicated

A look at divorce law in Ontario and how HR might have to get involved

BY ANDREW FELDSTEIN

As an HR practitioner, it is useful to have basic knowledge about divorce, the workplace and recent changes in family law. Understanding the intersection of these three areas will help explain why lawyers representing both sides of a separating couple may request HR information relating to pension, benefits and the division of assets.

Grey divorce

According to *Maclean's* magazine, the only age group seeing a rise in divorce is people over the age of 50 — the baby boomers. The “grey” divorce rate is currently at 47 per cent, while the general divorce rate is at 38 per cent in Canada.

A number of couples find their relationship has run out of steam after the children are grown and, with life expectancy growing (79 years for men and 84 for women), couples are disinclined to “tough out” a bad relationship or marriage when they could have another 25 years or more of life.

Division of assets

According to section five of Ontario's Family Law Act (FLA), as a general rule, the spouse with the lesser net family property is entitled to “one-half the difference” of the wealthier spouse's net family property (equalization of net family property).

The net family property of each spouse is determined by calculating the spouse's net worth on the separation date (valuation date), subtracting the spouse's personal net worth on the marriage date, and excluding all forms of excludable income or property gained over the course of the marriage.

The objective of this section is to recognize contributions to the marriage can be financial and non-financial, and to presume an equal contribution by both parties.

It is important to note the matrimonial home is treated distinctly from other property. Even if the matrimonial home was owned by one spouse prior to marriage, its value will not be deducted if it is still the matrimonial

home on the date of separation. Rather, the value of the matrimonial home is shared regardless of when it was acquired.

Changes in pension valuation

Section 4 of the FLA broadly defines “property” to include rights in a vested pension plan. Accordingly, pensions may be included in the net family property and equalized.

In June 2011, Ontario proclaimed changes to the Pension Benefits Act (PBA) and the FLA relating to the valuation and division of pension assets in the breakdown of a spousal relationship.

Under the legislation, former spouses of plan members are able to receive an immediate payment of their share of pension assets, either as a lump-sum transfer or a division of monthly pension payments assets, provided the court order, family arbitration award or domestic contract was made on or after Jan. 1, 2012.

Moreover, the valuation of pension assets is calculated by the plan administrator in accordance with formulas set out in the new family law regulations made under the PBA. Rather than applying traditional actuarial practices in valuing the pensions, the pension administrator uses a prescribed formula that applies to all pensions equally.

Finally, parties must apply directly to the plan administrator to receive the valuation of pension assets for the division of pension assets. One of the downsides of this new process is if the spouses don't agree with the pension valuation, there is no appeal or second opinion. HR practitioners may have to deal with questions about this.

Spousal support obligations

Under the Divorce Act, either spouse may apply for an interim or final order of spousal support. Support may be indefinite or time-limited, periodic or lump sum, and is intended to:

- balance the economic advantages and disadvantages of the marriage and its breakdown
- adjust for the financial impact on the custodial spouse(s) of raising the parties' children

- compensate for hardship resulting from marriage breakdown
- promote economic self-sufficiency “within a reasonable length of time.”

Once a court has determined a spouse's entitlement to support, it will use the *Spousal Support Advisory Guidelines* to determine the amount and duration of support. Under the guidelines, the duration of spousal support will be indefinite for relationships of 20 years or longer (the courts consider the length of cohabitation and not the length of the marriage).

However, indefinite support may also be appropriate under the “rule of 65” which states the duration of support will be indefinite even if the relationship is shorter than 20 years, if the length of the relationship in years plus the recipient's age at the date of separation equals or exceeds 65.

Accordingly, a spouse marrying late in life must be wary about the financial state of her partner. If, for instance, a couple marries when they are both 60 and one is destitute when they decide to separate three years later, the impoverished spouse may nevertheless be entitled to indefinite support.

Child support

Child support is the right of the child (not the support payee parent). Accordingly, the non-custodial parent has an obligation to pay support, regardless of the custodial parent's income. Under section 33(1) of the FLA, a court may, on application, order a person to provide support for dependants and determine the amount of support. The *Child Support Guidelines* specify the support amount and depend on both the payor's income and the number of children for whom support is owed.

In Ontario, the Family Responsibility Office (FRO) receives every child support and spousal support order made by the Ontario courts, collects the amounts owed under the order and pays it to the person to whom it is owed.

The FRO has the legal duty to take enforcement action against those who do not pay support as ordered.

As an HR practitioner, you may deal with employees whose wages are garnished for the purposes of child or spousal support.

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