FSRA Consultation on Proposed Family Law Rule

University Pension Plan's Feedback

January 2024

University Pension Plan Ontario (UPP) is a jointly sponsored, defined benefit (DB) pension plan tailored by and for Ontario's university sector. UPP welcomes the opportunity to provide feedback on proposed family rules and supports FSRA's work to promote sound administration of pension plans. Feedback on select topics is provided below, including answers to the accompanying topic's questions.

Topic 1: Lift and Shift

Question 1: Would creating a new rule and moving some, but not all, provisions currently in the Regulation into a rule via the "lift and shift" approach achieve the desired outcome of reducing uncertainty and improving efficiency? Should FSRA adopt a "lift and shift" approach with respect to all areas over which it has rule-making authority, subject to government decision-making, or should FSRA rules only include requirements in areas where policy changes are being considered?

Response: While UPP generally supports FSRA's exercise of its rule making authority, the "lift and shift" approach described by FSRA in this consultation document would provide no value if the content of the rule is the same as the Regulation. Adopting this approach would not achieve the desired outcome of reducing uncertainty and improving efficiency, especially since the existing Regulations would take precedence over the created rule.

Further, there may be limited value for stakeholders in FSRA creating rules for provisions that are currently in the Regulations since the 'lifted and shifted' rules would not take effect until the Ministry of Finance revoked the corresponding Regulation.

Topic 2: Fees that plan administrators may charge for a DB Statement of Imputed Value

Question 2: Are the existing maximum fees under the PBA sufficient to recover the costs incurred in preparing a statement? If not, what should the maximum be?

Response: The existing maximum cost recovery fees permissible under the PBA are not sufficient in recovering the cost to generate a Statement of Imputed Value. UPP does not charge for the first statement generated, but does for subsequent statement requests (i.e., UPP charges from the second statement onwards).

Question 3: Should special considerations be made for low-income applicants (e.g., a fee waiver), in order to mitigate the impact of the revised maximum fees?

Response: Notionally, UPP supports the implementation of a process to consider waiving fees for low-income applicants; however, administrators generally don't have income information for spouses, and so the collection of spousal income for means-testing purposes introduces operational complexity that FSRA should consider. FSRA should also consider the operational impact of any additional process to plan administrators.

Topic 3: Payment of arrears – division and revaluation of a retired member's pension

Question 4: Do you agree that uncertainty exists with respect to the division and revaluation of a retired member's pension where spouses have made arrangements outside of the pension plan to share pension amounts prior to its actual division?

Response: The issue of arrears creates challenges for administrators, plan members as well as their advisors in almost all circumstances, and not just in those cases where the spouse have made arrangements to share the pension prior to its actual division at source.

There will always be a delay between the date the spouse separated and the date the pension is divided. Subsections 39(1)4 and 39(1)8 of Regulation 287/11 require administrators to calculate the spouse's share as of the separation date, calculate and pay the arrears as instalments to the spouse together with the assigned amount for the life of the retired member. This creates the following problems for the member:

- The longer the period of time that passes between the valuation date and the payment date, the greater the arrears. In practice, this means that members will receive less than 50% of their pension following the revaluation.
- The regime established in Regulation 287/11 is extremely prescriptive and does not provide plan members with the option to start the division on a set date, other than the valuation date. This hinders spouses' ability to execute the intention of their agreements.
- To facilitate the implementation of the spouse's negotiated settlement, some administrators have accepted a waiver of the arrears to which the spouse would otherwise be entitled to under the regulations. Such a waiver is not contemplated by the statute and if challenged, the administrator would not be entitled to rely on the statutory discharge provided for in section 67.4(6) of the Pension Benefits Act because the pension division was not completed in accordance with the regulations.

Question 5: If so, should FSRA make a rule to prescribe how this must be done or expand on its Guidance to address the uncertainty?

Response: FSRA should use its rule making authority to address the problem of arrears inherent in section 39 of Regulation 287/11. Interpretation Guidance on its own could not support a deviation from the revaluation formula set out in the regulation, even in circumstances where the separation agreement provided for the waiver of arrears. This could be addressed in a rule that authorizes the administrator to adjust the lump sum arrears of the eligible spouse's notional share in section 39(1)4 and 39(1)(8) of Regulation 287/11, in accordance with the parties' intentions as expressed in their settlement agreement or court order.

Topic 4: Payment of interest on lump sum transfers

Question 6: Is there uncertainty as to when interest should be added on a lump sum transfer to a member's spouse as a result of Heringer?

Response: Yes, parties and their advisors may not be aware of the application of the interest rules when negotiating and drafting separation agreements.

Some plan members try to settle their affairs without the advice of legal counsel. As a result, they may not appreciate that if an equalization payment is satisfied using pension assets, the amount payable will include interest if it is expressed as a percentage.

Even plan members who have retained legal counsel may not be advised of this nuance, because the addition of interest to one asset is contrary to the property equalization scheme in the *Family Law Act*. The issue of interest is addressed in the family law regime through the operation of pre-judgement interest and post-judgement interest on the global settlement amount and not on individual assets.

Question 7: If so, could this uncertainty be adequately addressed by revisions to the Administration of Pension Benefits Upon Marriage Breakdown Guidance or new FSRA Interpretation Guidance?

Response: No, this uncertainty cannot be adequately addressed through guidance alone. The Ontario Superior Court of Justice's decision in *Heringer v Heringer* was not appealed. This interpretation of section 67.3(6) of the Pension Benefits Act and section 30 of Regulation 287/11 will hold precedence until it is challenged by another court decision, or the underlying regulation is amended, or a rule is introduced.

Question 8: If not, should FSRA propose a rule that sets out the treatment of interest as described in the Heringer decision such that:

a. Interest is to be applied where the amount to be transferred is expressed as a percentage of the imputed value, and
b. Interest is not to be applied where the amount to be transferred is expressed as a specified amount unless the settlement instrument expressly requires that interest be added.

Response: No, FSRA should not propose a rule that requires plan members to pay interest in addition to a lump sum equalization payment where that payment is expressed as a proportion of the family law value. It is not clear that such a rule would be supported by a statutory interpretation of the relevant provisions.

The purpose of the PBA is to establish minimum standards. In the context of the division of pensions upon the dissolution of a marriage, one of those minimum standards is that no more than 50% of the member's pension can be used for equalization purposes. This is the purpose of section 63. 7(6) of the PBA, to set out the maximum percentage that can be assigned.

With respect, section 63.7(6) of the PBA does not provide that the equalization amount be updated. Rather, this section provides that the maximum limit of the amount that may be assigned as equalization can be updated and not the amount itself. For example, if the family law value on the date of separation was $400,000, 50 percent of that value would be $200,000 as of the date of separation. If many years pass between the date of separation and the date the parties agree on a settlement, the maximum amount of the pension the member can access to satisfy any equalization obligation may increase, from $200,000 to a greater amount. The increase in the maximum limit, however, does not automatically apply to increase the amount of the assignment, if that assignment is expressed as a percentage.

This interpretation is supported by a plain reading of section 30 of Regulation 287/11. The family law value is to be "updated in accordance with this section for the purposes of subsection 67.3(6) of the Act". The purpose of this section is to set out the maximum limit. The purpose of this section is not to create a requirement for the plan administrator to add interest to lump sum equalization payments that are expressed as a percentage. In that regard, subsection 67.3(6) of the Pension Benefits Act is unlike section 24.2(1) of Regulation 909, which requires interest to be added to the commuted value payable to a former member from the date of termination to the beginning of the month in which the amount is paid.

Question 9: If you disagree that FSRA should propose a rule that sets out the same treatment of interest as the Heringer decision, as described above, should FSRA propose a rule that provides for an alternative treatment of interest? If so, what should that treatment be?

Response: Yes, FSRA should propose a rule that provides for an alternative treatment of interest. The alternate treatment should simplify the administration of pension division on marriage breakdown by aligning, to the extent possible, pension rules with the family law regime.

By removing the requirement to add interest to the assignee of a lump sum amount that is expressed as a percentage, we could simplify the rules to eliminate one of the anomalies that family lawyers, mediators, and arbitrators have to remember. The issue of interest is addressed in the family law regime through the operation of pre and post-judgement interest. If required, the interest is applied globally and not on an individual asset.

Topic 5: Forms

Question 10: Should FSRA allow for greater flexibility with respect forms used by stakeholders. If so, what should be the scope of that expanded flexibility? For example, the use of non-standard forms may increase the expense of retaining a third-party professional to assist with the valuation and division process. FSRA Consultation Paper: Potential FSRA Rule on Family Law Matters Page 16 of 20.

Response: Flexibility with respect to these prescribed forms is not an issue. UPP does not intend to develop its own forms.

Currently, there are a few prescribed forms that cannot be executed electronically. FSRA should allow for greater flexibility by encouraging and allowing the use of electronic signatures in prescribed forms.

In an increasingly digital world where members may work remotely for periods of time and have reduced patience for administrative tasks, UPP is of the view that members should be able to execute forms digitally through a secure online portal. As it stands, certain prescribed forms, such as Form 3 – Waiver of Joint and Survivor Pension, must be printed, signed, and then submitted to UPP since they cannot be executed digitally.

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