FSRA is actively reviewing all FSCO regulatory direction, including but not limited to forms, guidelines and FAQs.

Until FSRA issues new regulatory direction, all existing regulatory direction remains in force.

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Implications of Bill 14 Amendments on the Carrigan Decision

Overview

On October 31, 2012, the Ontario Court of Appeal's decision in Carrigan v. Carrigan Estate (Carrigan) denied the payment of a pre-retirement death benefit to the common law spouse of a plan member because the member was still legally married to another person.

On July 24, 2014, the Ontario government passed **Bill 14, the Building Opportunity and Securing Our Future Act (Budget Measures), 2014**. Schedule 26 of Bill 14 amended the spousal entitlement provisions in sections 44 and 48 of the **Pension Benefits Act** (PBA) to address the Carrigan decision.

The decision and the amendments directly affect members or former members of a pension plan who:

- have not started receiving a pension;
- are legally married to a person they are living separate and apart from; and
- are living with a person who qualifies as a common law spouse under the PBA.

Section 44 of the PBA

Section 44 of the PBA has been amended to confirm the entitlement of a common law spouse to a joint and survivor pension where the member is separated, but not divorced from, a married spouse on the date the member's pension begins. It applies to spouses of members and former members who become entitled to receive their pensions on or after July 24, 2014, the date the amendments came into force.

New subsections

Section 44(10) has been added to the PBA to provide a discharge for plan administrators who commenced payment of a pension under the former section 44 provisions where the following circumstances exist:

- the retired member had a common law spouse and a married spouse from whom she or he was living separate and apart on the date the first installment of the pension was due;
- the common law spouse was the spouse for the purposes of determining that the pension

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should be paid in joint and survivor form;

- the pension was paid or continues to be paid in joint and survivor form to either the retired member or the common law spouse; and,
- the payments otherwise complied with the requirements of the PBA and regulations.

Section 44(11) has been added to the PBA. It provides that if the plan administrator made payment of a pension as a joint and survivor pension and all of the above circumstances existed, no person may make a claim against either the plan administrator or the common law spouse in respect of the payment.

Sections 44(10) and section 44(11) apply where a plan administrator commenced payment of the pension before the amendments came into force (i.e. before July 24, 2014).

Section 48 of the PBA

Section 48 of the PBA has been amended to provide that a common law spouse who is living with a member on the date of the member's death is entitled to the member's pre-retirement death benefit, despite the member having a married spouse, from whom she or he was living separate and apart on the date of death.

However, this amendment only applies where a member dies on or after the date the amendments came into force (i.e. on or after July 24, 2014). The amendments are not retroactive and do not change the Ontario Court of Appeal's interpretation of the former section 48 provisions in Carrigan.

Section 48, as interpreted by the Ontario Court of Appeal in Carrigan, continues to apply to all members and former members who died before the amendments came into force (i.e. before July 24, 2014). Subject to the discharge and release of claims provisions discussed below, it is FSCO's expectation that, for members who died before July 24, 2014, plan administrators pay benefits in accordance with section 48 as interpreted in Carrigan, where applicable, and the timelines set out in section 43 of Regulation 909.

It is ultimately the responsibility of each plan administrator, based on their own legal advice, to make a determination about whether the Carrigan decision applies to a specific situation. If a plan administrator is uncertain about the entitlement of a spouse or a beneficiary to a pre-retirement death benefit, it is incumbent on the plan administrator to take appropriate actions to resolve the uncertainty.

New subsections

Section 48(10.1) has been added to the PBA to provide a discharge to administrators who paid pre-retirement death benefits in respect of deaths occurring before the Carrigan decision (i.e. before October 31, 2012), where the following circumstances exist:

- the member or former member had a common law spouse and a married spouse, from whom she or he was living separate and apart, on the date of death;
- payment of the pre-retirement death benefit was made to the common law spouse; and,
- the payment otherwise complied with the requirements of the PBA and regulations.

Scheduled Online Service Disruption Notice

Please consult our **outage schedule** for more details.

Section 48(10.2) has been added to the PBA. It provides that if the administrator made payment of the pre-retirement death benefit and all the above circumstances existed, no person may make a claim against either the administrator or the common law spouse in respect of the payment.

Other Spousal Rights and Entitlements

As the legislative wording of section 48 differs from the wording used in other provisions, the Superintendent's position continues to remain that in the absence of a tribunal or court decision, the Carrigan decision does not apply to any other provisions in the PBA and regulations that provide specific rights to, or obligations on, spouses who are not living separate and apart from the member at the relevant time.

Other Information

- **Carrigan decision**
- **Letter** from the Deputy Superintendent, Pensions, in support of the application for leave to appeal to the Supreme Court of Canada
- Previous communications
  - **Carrigan v. Carrigan Estate – Ontario Court of Appeal decision on entitlement to pre-retirement death benefits under section 48 of the Pension Benefits Act**
  - **Carrigan v. Carrigan Estate – Supreme Court of Canada Denies Leave**
  - **FSCO's Position on the Implications of the Carrigan Decision**

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Ontario

December 6, 2012

Mr. Raymond Colautti
Barrister and Solicitor
2510 Ouellette Avenue, Suite 300
Windsor ON N8X 1L4

Dear Mr. Colautti:

Re: Carrigan v. Carrigan Estate, 2012 ONCA 736

The Superintendent of Financial Services (the "Superintendent") supports the application for leave to appeal that your client, Jennifer Margaret Quinn, is filing with the Supreme Court of Canada regarding the above decision of the Ontario Court of Appeal.

Superintendent and FSCO

The Superintendent is the Chief Executive Officer of the Financial Services Commission of Ontario ("FSCO"), which is an arm's length agency of the Ontario Ministry of Finance. FSCO and the Superintendent are established by the *Financial Services Commission of Ontario Act, 1997* (the *"FSCO Act"*).

The *FSCO Act* states that one of the purposes of FSCO is to provide regulatory services that protect the public interest and enhance public confidence in the regulated sectors. The regulated sectors as defined in the *FSCO Act* include all persons who establish or administer a pension plan within the meaning of the *Pension Benefits Act* (the *"PBA"*) and all employers or other persons on their behalf who are required to contribute to any such pension plan.

The Superintendent's powers under the *FSCO Act* include the administration and enforcement of the *PBA* and the general supervision of the pension sector. The enforcement powers under the *PBA* include a general power under section 87 to order any person to comply with the *PBA*, its regulations, or the pension plan.

.../2

The Superintendent therefore has concurrent jurisdiction with the courts to order the payment of pension benefits, including pre-retirement death benefits.
The Superintendent understands that the pension sector is concerned with the confusion and uncertainty created by the Court of Appeal's majority decision in this case. The Superintendent shares the concerns that have been expressed.

Pension Benefits Act

The *PBA* applies to any pension plan that is provided for persons employed in Ontario. At present 8,426 pension plans are registered with FSCO. In addition, 1,690 multi-jurisdictional pension plans are registered in other provinces of Canada and many of these have members in Ontario. The benefits in the *PBA*, including spousal survivor rights, apply to such Ontario members.

The *PBA* is a public welfare statute that provides minimum statutory standards for plan members and their spouses and beneficiaries. Section 48 is an example of the minimum statutory standard provided to spouses of plan members who die before reaching retirement age.

Section 48 of the *PBA* governs pre-retirement death benefits, which are to be paid out in the following order of priority when a pension plan member dies before reaching retirement age:

a) The spouse who is the plan member's spouse at the date of death has a pre-emptive right to the death benefits (subject to the trumping effect of subsection 48(13) set out below), provided that the plan member is not living separate and apart from that spouse or provided that the spouse has not signed a waiver of the death benefits;

b) If there is no spouse who is not living separate and apart from the plan member, the beneficiary named in a designation by the plan member is entitled to the death benefits, subject to the same trumping effect of subsection 48(13);

c) If there is no spouse living separate and apart from the plan member and no beneficiary, the death benefits are paid to the plan member's estate, again subject to the same trumping effect of subsection 48(13).

The trumping effect in subsection 48(13) states that an entitlement under section 48 is subject to any right to or interest in the death benefits set out in an order under Part I of the *Family Law Act*, a family arbitration award, or a domestic contract. That is the protection provided by the *PBA* for former spouses of plan members who die prior to retirement.

Based on the above, Mrs. Carrigan had no right to "trump" an existing spouse under section 48 of the *PBA*. She had been living separate and apart from the plan member

Mr. Carrigan since 2000; and there was no court order, arbitration award, or domestic contract that entitled her to a share of the pre-retirement death benefits.

In addition, the beneficiaries under the designation signed by Mr. Carrigan had no right to the pre-retirement death benefits because there was a spouse at the date of Mr. Carrigan's death, who had a pre-emptive right to the benefits – Ms. Quinn. Ms. Quinn was a "spouse" within the meaning of section 48 of the *PBA* at the time of Mr. Carrigan's death because she had been living continuously with Mr. Carrigan in a conjugal relationship for at least 3 years prior to his death. This was the finding of the trial judge and the period of conjugal cohabitation appears to have been an agreed-upon fact before the Court of Appeal.

The *PBA* defines "spouse" as meaning, **except where indicated otherwise in the *PBA***, either of two persons who are married to each other or **who are not married to each other and are living together in a conjugal relationship continuously for a period of not less than 3 years** or who are in a relationship of some permanence if they are the natural or adoptive parents of a child as defined in the *Family Law Act*. Because the *PBA* does not "indicate otherwise" in section 48, the Superintendent has always interpreted "spouse" to include unmarried spouses as defined in the *PBA* for the purposes of section 48. The Superintendent's interpretation and application of section 48 is reflected on FSCO's public web site, which contains a publication for plan members called "If You are Thinking About Retirement", which explains that surviving spouses – clarified as including unmarried spouses as defined in the *PBA* – are entitled to death benefits under the pension plan.

The legislative scheme in section 48 and the definition of "spouse", as set out above, have been in the *PBA* since 1987.

The Court of Appeal's majority decision does not seem consistent with section 48 of the *PBA* as the Superintendent has always interpreted and applied it.

A "spouse" is given a number of other rights and entitlements under the *PBA*. The Court of Appeal's majority decision could be interpreted to disentitle unmarried spouses from the following rights or entitlements in addition to those provided in section 48 (this is not necessarily an exhaustive list):

- Post-retirement death benefits under section 44;
- The right to inspect certain prescribed records of the plan under section 29;
- The right to waive a survivor pension under section 46;
- The right to have a survivor pension guaranteed by the Pension Benefits Guarantee Fund under section 84 (the Pension Benefits Guarantee Fund acts as a partial insurance fund for defined benefit plans when their sponsors have become insolvent);

- The right to receive a statement of survivor benefits from the plan administrator, under section 43 of Regulation 909 to the *PBA*;
- The right to consent to a withdrawal of retirement savings arrangement by the owner of that arrangement in financial hardship circumstances, under section 85 of Regulation 909;
- The right to consent to withdrawal or transfer of funds and survivor benefits in respect of various locked-in retirement savings arrangements, under Schedules 1, 1.1, 2, and 3 of Regulation 909.

The Court of Appeal's majority decision may therefore have implications under the *PBA* for unmarried spouses beyond the entitlement to pre-retirement death benefits under section 48.

Issues arising from Court of Appeal's Majority Decision

The pension sector looks to the Superintendent for guidance on interpreting and achieving compliance with the *PBA*. Guidance is given both on an individual basis in response to specific inquiries, and more generally through web-site publications such as the publication mentioned above.

The pension sector comprises not only plan sponsors and administrators, but members, former members, pensioners, trade unions, trustees, custodians, actuaries, auditors, investment consultants, and legal advisors.

Because pension benefits attract beneficial tax treatment, the Canada Revenue Agency also looks to the Superintendent from time to time for guidance in an attempt to have the *PBA* and the *Income Tax Act* work consistently with each other.

As a result of the Court of Appeal's majority decision, there is confusion and uncertainty in the pension sector which the Superintendent shares. Even if the majority decision is now the law, and unmarried spouses no longer have any entitlement to death benefits under section 48 of the *PBA* where the plan member is still legally married, the answers to a number of other questions remain unclear: Do unmarried spouses no longer have any status under the *PBA* at all in these circumstances? What is the effect of this decision on domestic contracts? What is the effect on waivers? Can designations made by plan members prevail over the minimum standards provided in the *PBA*?

Another source of confusion arises from the two majority decisions, which are inconsistent with each other. The decision of Juriansz, J.A. indicates that unmarried spouses have no entitlement under section 48 of the *PBA* and seems to lean in favour of a plan member having freedom of choice to designate someone else when the plan member has an unmarried spouse. On the other hand, the decision of Epstein, J.A. indicates that an unmarried spouse has no status under section 48 if there is a married spouse – even if the married spouse is living separate and apart from the plan member. This is a subtle distinction but one that requires clarification.

.../5

The majority decision raises important questions of statutory interpretation. As noted in the dissenting judgment, the majority's reasons seem to go against the principle of statutory interpretation that the same words should be given consistent meaning throughout the statute.

Also, many of the 1,690 multi-jurisdictional plans registered across Canada have members in Ontario. There are multi-jurisdictional agreements in effect among all of the jurisdictions that provide that regardless of the province of registration, the pension statute of the province in which a particular plan member reports for work governs that member's benefits. The Court of Appeal's majority decision therefore has implications for pension plans registered outside Ontario.

Finally, most jurisdictions in Canada have similar pension standards legislation that provides for the priority of payment of pre-retirement death benefits on a pre-emptive basis to spouses or other recognized spousal relationships. Therefore, this issue has a national dimension.

Conclusion
For all of the above reasons, the Superintendent supports the application for leave to appeal the Court of Appeal's majority decision.

Yours very truly,

K. David Gordon
Deputy Superintendent, Pensions
by delegated authority from
the Superintendent of Financial Services

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Carrigan v. Carrigan Estate – Ontario Court of Appeal decision on entitlement to pre-retirement death benefits under section 48 of the Pension Benefits Act (PBA)

On October 31, 2012, the Ontario Court of Appeal released its decision in Carrigan v. Carrigan Estate. The case considered the rights of spouses to pre-retirement death benefit under section 48 of the PBA. In denying the benefit to a common law spouse (a person who is not legally married to a plan member but qualifies as a spouse under the definition in section 1 of the PBA) who was living with the member at the date of death, the Court gave an interpretation which was unexpected and inconsistent with how section 48 had been previously administered. If the decision stands it may also create uncertainty about the interpretation of other spousal rights provisions in the PBA.

Application for leave to appeal to the Supreme Court of Canada has been filed by the common law spouse. Because of its implications, the Deputy Superintendent has filed a letter Size: ## kb in support of the Leave Application. More information about the case can be found in the letter.

FSCO is awaiting the outcome of this application, and if leave is granted, the ultimate view of the Supreme of Canada.

The decision affects members or former members of a pension plan who:

- have not started receiving a pension;
- are legally married to a person who they are living separate and apart from; and
- are living with a person who qualifies as a common law spouse under the PBA.

Members or former members who are affected by the decision and who want their common law spouse to be the beneficiary of the pre-retirement death benefits may file a current beneficiary designation with the plan administrator naming the common law spouse as beneficiary. All members and former members should consider obtaining legal advice for estate planning matters.

Pension plan administrators may also wish to seek legal advice on the implications of the Carrigan decision pending further appeal.

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Ontario

December 6, 2012

Mr. Raymond Colautti
Barrister and Solicitor
2510 Ouellette Avenue, Suite 300
Windsor ON N8X 1L4

Dear Mr. Colautti:

Re: Carrigan v. Carrigan Estate, 2012 ONCA 736

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The Superintendent's powers under the *FSCO Act* include the administration and enforcement of the *PBA* and the general supervision of the pension sector. The enforcement powers under the *PBA* include a general power under section 87 to order any person to comply with the *PBA*, its regulations, or the pension plan.

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The Superintendent therefore has concurrent jurisdiction with the courts to order the payment of pension benefits, including pre-retirement death benefits.
The Superintendent understands that the pension sector is concerned with the confusion and uncertainty created by the Court of Appeal's majority decision in this case. The Superintendent shares the concerns that have been expressed.

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Section 48 of the *PBA* governs pre-retirement death benefits, which are to be paid out in the following order of priority when a pension plan member dies before reaching retirement age:

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b) If there is no spouse who is not living separate and apart from the plan member, the beneficiary named in a designation by the plan member is entitled to the death benefits, subject to the same trumping effect of subsection 48(13);

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Based on the above, Mrs. Carrigan had no right to "trump" an existing spouse under section 48 of the *PBA*. She had been living separate and apart from the plan member

Mr. Carrigan since 2000; and there was no court order, arbitration award, or domestic contract that entitled her to a share of the pre-retirement death benefits.

In addition, the beneficiaries under the designation signed by Mr. Carrigan had no right to the pre-retirement death benefits because there was a spouse at the date of Mr. Carrigan's death, who had a pre-emptive right to the benefits – Ms. Quinn. Ms. Quinn was a "spouse" within the meaning of section 48 of the *PBA* at the time of Mr. Carrigan's death because she had been living continuously with Mr. Carrigan in a conjugal relationship for at least 3 years prior to his death. This was the finding of the trial judge and the period of conjugal cohabitation appears to have been an agreed-upon fact before the Court of Appeal.

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The legislative scheme in section 48 and the definition of "spouse", as set out above, have been in the *PBA* since 1987.

The Court of Appeal's majority decision does not seem consistent with section 48 of the *PBA* as the Superintendent has always interpreted and applied it.

A "spouse" is given a number of other rights and entitlements under the *PBA*. The Court of Appeal's majority decision could be interpreted to disentitle unmarried spouses from the following rights or entitlements in addition to those provided in section 48 (this is not necessarily an exhaustive list):

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The Court of Appeal's majority decision may therefore have implications under the *PBA* for unmarried spouses beyond the entitlement to pre-retirement death benefits under section 48.

Issues arising from Court of Appeal's Majority Decision

The pension sector looks to the Superintendent for guidance on interpreting and achieving compliance with the *PBA*. Guidance is given both on an individual basis in response to specific inquiries, and more generally through web-site publications such as the publication mentioned above.

The pension sector comprises not only plan sponsors and administrators, but members, former members, pensioners, trade unions, trustees, custodians, actuaries, auditors, investment consultants, and legal advisors.

Because pension benefits attract beneficial tax treatment, the Canada Revenue Agency also looks to the Superintendent from time to time for guidance in an attempt to have the *PBA* and the *Income Tax Act* work consistently with each other.

As a result of the Court of Appeal's majority decision, there is confusion and uncertainty in the pension sector which the Superintendent shares. Even if the majority decision is now the law, and unmarried spouses no longer have any entitlement to death benefits under section 48 of the *PBA* where the plan member is still legally married, the answers to a number of other questions remain unclear: Do unmarried spouses no longer have any status under the *PBA* at all in these circumstances? What is the effect of this decision on domestic contracts? What is the effect on waivers? Can designations made by plan members prevail over the minimum standards provided in the *PBA*?

Another source of confusion arises from the two majority decisions, which are inconsistent with each other. The decision of Juriansz, J.A. indicates that unmarried spouses have no entitlement under section 48 of the *PBA* and seems to lean in favour of a plan member having freedom of choice to designate someone else when the plan member has an unmarried spouse. On the other hand, the decision of Epstein, J.A. indicates that an unmarried spouse has no status under section 48 if there is a married spouse – even if the married spouse is living separate and apart from the plan member. This is a subtle distinction but one that requires clarification.

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Also, many of the 1,690 multi-jurisdictional plans registered across Canada have members in Ontario. There are multi-jurisdictional agreements in effect among all of the jurisdictions that provide that regardless of the province of registration, the pension statute of the province in which a particular plan member reports for work governs that member's benefits. The Court of Appeal's majority decision therefore has implications for pension plans registered outside Ontario.

Finally, most jurisdictions in Canada have similar pension standards legislation that provides for the priority of payment of pre-retirement death benefits on a pre-emptive basis to spouses or other recognized spousal relationships. Therefore, this issue has a national dimension.

Conclusion
For all of the above reasons, the Superintendent supports the application for leave to appeal the Court of Appeal's majority decision.

Yours very truly,

K. David Gordon
Deputy Superintendent, Pensions
by delegated authority from
the Superintendent of Financial Services

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Carrigan v. Carrigan Estate – Supreme Court of Canada Denies Leave

On March 28, 2013, the Supreme Court of Canada denied leave to appeal the Ontario Court of Appeal's decision in Carrigan.

The Court of Appeal's decision in Carrigan v. Carrigan Estate considered the rights of spouses to pre-retirement death benefit under section 48 of the PBA. In denying the benefit to a common law spouse (a person who is not legally married to a plan member but qualifies as a spouse under the definition in section 1 of the PBA) who was living with the member at the date of death, the Court gave an interpretation that was unexpected and inconsistent with how section 48 had been previously administered.

The Court of Appeal's interpretation of the pre-retirement death benefit provision under section 48 of the PBA is now law. The decision directly affects members or former members of a pension plan who:

- have not started receiving a pension;
- are legally married to a person who they are living separate and apart from; and
- are living with a person who qualifies as a common law spouse under the PBA.

The effect of this decision is that in cases where a member is living with a common law spouse but is still legally married to (and living separate and apart from) another person, the member is free to designate whomever he or she chooses to be the recipient of the pre-retirement death benefit, including his or her common law spouse.

Members or former members who are affected by the decision and who want their common law spouse to be the beneficiary of the pre-retirement death benefits may file a current beneficiary designation with the plan administrator naming the common law spouse as beneficiary. All members and former members should consider obtaining legal advice for estate planning matters.

Pension plan administrators may also wish to seek legal advice on the implications of the Carrigan decision.

As the decision is now final FSCO will be reviewing the implications of the Carrigan decision for both plan beneficiaries and plan administrators.

Content on this page has been transferred from the Financial Services Commission of Ontario (FSCO) site as a PDF for reference. Links that appear as related content have also been transferred and can be found at the end of this document.

FSCO's Position on the Implications of the Carrigan Decision

Overview

On October 31, 2012, the Ontario Court of Appeal's decision in Carrigan v. Carrigan Estate (Carrigan) denied the payment of a pre-retirement death benefit to the common-law spouse of a plan member because the member was still legally married to another person.

On March 28, 2013, the Supreme Court of Canada denied leave to appeal the Court of Appeal's decision in Carrigan. The denial of leave means the Court of Appeal's interpretation of the pre-retirement death benefit provision under section 48 of the Ontario Pension Benefits Act (PBA) is now final. The decision directly affects members or former members of a pension plan who:

- have not started receiving a pension;
- are legally married to a person who they are living separate and apart from; and
- are living with a person who qualifies as a common-law spouse under the PBA.

In the May 2013 budget, the government announced a commitment to "review the Ontario Court of Appeal's recent ruling regarding spousal entitlements in the case of Carrigan v. Carrigan Estate, propose amendments to the PBA and, if necessary, amend the regulations under the PBA". Until then, FSCO is providing its conclusion of the implications of the Carrigan decision for purposes of the PBA.

Possible Implications for the PBA

There are a number of provisions in the PBA and Regulation 909 that grant rights to "spouses" of members, former members and retired members, if the spouse is not living separate and apart from the member when the right is to be exercised. In general terms, it is the Superintendent's position that in the absence of a tribunal or court decision, the Carrigan decision does not apply to any other provision in the PBA and Regulation 909 that provide specific rights to spouses who are not living separate and apart from the member at the relevant time, because the legislative wording in these other provisions is different from the language found in section 48.

Section 44 of the PBA

However, there is a special concern about section 44 of the PBA, which sets out the rights of a spouse to a joint and survivor pension, because the legislative wording is similar to the wording in section 48. After careful consideration, the Superintendent is reading the Carrigan decision

narrowly. In the absence of a tribunal or court decision dealing specifically with section 44, it is the Superintendent's position that the Carrigan decision does not take away the common-law spouse's right to a joint and survivor pension under section 44, even if the member is still legally married to another person (who is living separate and apart from the member) on the date the pension begins. The Superintendent is taking this position for the following reasons:

- The Carrigan decision is inconsistent with the Superintendent's view of how the spousal rights provisions in the PBA have been previously understood and applied, and should not be extended to other provisions until future decisions explicitly apply the Carrigan decision to these other sections of the PBA.
- In the Carrigan decision, each of the three judges gave separate reasons for their decision and articulated different interpretations of the "spousal rights" under sections 1(1) and 48 of the PBA. Therefore, it is unclear as to which of these approaches will be applied to other provisions of the PBA.
- The rationale in support of the majority position that gave the member the "freedom of choice" to decide the beneficiary of the death benefits would not be applicable to section 44.

For these reasons, the Superintendent's position is that plan administrators are not in contravention of the PBA, if they continue to treat the member's common-law spouse as entitled to a joint and survivor pension under section 44, even if the member is still legally married to another person (who is living separate and apart from the member at retirement). Similarly, if the member has a common-law spouse in these circumstances and does not want to have the pension paid as a joint and survivor pension, the common-law spouse should continue to sign the waiver provided for in section 46 of the PBA.

Administration of Pre-Retirement Death Benefits

Prior to the Carrigan decision, it was FSCO's expectation that plan administrators administered the payment of pre-retirement death benefits in accordance with the prevailing understanding of how section 48 applied (i.e., that a pre-retirement death benefit would have been paid to the common-law spouse who was living with the member at the time of death, even if the member was legally married to someone else).

Sections 48(9) and (10) of the PBA provide that plan administrators may rely on the information that is provided to them in order to pay the pre-retirement death benefit, and that the administrator is discharged on making the payment if the benefit was paid in accordance with that information.

In light of sections 48(9) and (10), and the prevailing understanding of how section 48 applied prior to the Court of Appeal's decision in Carrigan, it is the Superintendent's position that there is no requirement for plan administrators to revisit the payment of any pre-retirement death benefits prior to October 31, 2012.

General

The Superintendent cautions that this is an area of uncertainty in the law. It is ultimately the responsibility of each plan administrator, based on their own legal advice, to make a determination on whether the Carrigan decision impacts a specific situation.

Information for Plan Members

Members or former members who are affected by the decision and who want their common-law spouse to be the beneficiary of their pre-retirement death benefits, may file a current beneficiary designation with the plan administrator, which names the common-law spouse as the beneficiary. All members and former members should consider obtaining legal advice for retirement and estate planning matters.

Other Information

- Implications of Bill 14 Amendments on the Carrigan Decision
- Carrigan decision
- Letter Size: ## kb from the Deputy Superintendent, Pensions, in support of the application for leave to appeal to the Supreme Court of Canada
- Previous communications
  - Carrigan v. Carrigan Estate – Ontario Court of Appeal decision on entitlement to pre-retirement death benefits under section 48 of the Pension Benefits Act
  - Carrigan v. Carrigan Estate – Supreme Court of Canada Denies Leave

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Implications of Bill 14 Amendments on the Carrigan Decision

Overview

On October 31, 2012, the Ontario Court of Appeal's decision in Carrigan v. Carrigan Estate (Carrigan) denied the payment of a pre-retirement death benefit to the common law spouse of a plan member because the member was still legally married to another person.

On July 24, 2014, the Ontario government passed Bill 14, the Building Opportunity and Securing Our Future Act (Budget Measures), 2014. Schedule 26 of Bill 14 amended the spousal entitlement provisions in sections 44 and 48 of the Pension Benefits Act (PBA) to address the Carrigan decision.

The decision and the amendments directly affect members or former members of a pension plan who:

- have not started receiving a pension;
- are legally married to a person they are living separate and apart from; and
- are living with a person who qualifies as a common law spouse under the PBA.

Section 44 of the PBA

Section 44 of the PBA has been amended to confirm the entitlement of a common law spouse to a joint and survivor pension where the member is separated, but not divorced from, a married spouse on the date the member's pension begins. It applies to spouses of members and former members who become entitled to receive their pensions on or after July 24, 2014, the date the amendments came into force.

New subsections

Section 44(10) has been added to the PBA to provide a discharge for plan administrators who commenced payment of a pension under the former section 44 provisions where the following circumstances exist:

- the retired member had a common law spouse and a married spouse from whom she or he was living separate and apart on the date the first installment of the pension was due;
- the common law spouse was the spouse for the purposes of determining that the pension should be paid in joint and survivor form;
- the pension was paid or continues to be paid in joint and survivor form to either the retired member or the common law spouse; and,
- the payments otherwise complied with the requirements of the PBA and regulations.

Section 44(11) has been added to the PBA. It provides that if the plan administrator made payment of a pension as a joint and survivor pension and all of the above circumstances existed, no person may make a claim against either the plan administrator or the common law spouse in respect of the payment.

Sections 44(10) and section 44(11) apply where a plan administrator commenced payment of the pension before the amendments came into force (i.e. before July 24, 2014).

Section 48 of the PBA

Section 48 of the PBA has been amended to provide that a common law spouse who is living with a member on the date of the member's death is entitled to the member's pre-retirement death benefit, despite the member having a married spouse, from whom she or he was living separate and apart on the date of death.

However, this amendment only applies where a member dies on or after the date the amendments came into force (i.e. on or after July 24, 2014). The amendments are not retroactive and do not change the Ontario Court of Appeal's interpretation of the former section 48 provisions in Carrigan.

Section 48, as interpreted by the Ontario Court of Appeal in Carrigan, continues to apply to all members and former members who died before the amendments came into force (i.e. before July 24, 2014). Subject to the discharge and release of claims provisions discussed below, it is FSCO's expectation that, for members who died before July 24, 2014, plan administrators pay benefits in accordance with section 48 as interpreted in Carrigan, where applicable, and the timelines set out in section 43 of Regulation 909.

It is ultimately the responsibility of each plan administrator, based on their own legal advice, to make a determination about whether the Carrigan decision applies to a specific situation. If a plan administrator is uncertain about the entitlement of a spouse or a beneficiary to a pre-retirement death benefit, it is incumbent on the plan administrator to take appropriate actions to resolve the uncertainty.

New subsections

Section 48(10.1) has been added to the PBA to provide a discharge to administrators who paid pre-retirement death benefits in respect of deaths occurring before the Carrigan decision (i.e. before October 31, 2012), where the following circumstances exist:

- the member or former member had a common law spouse and a married spouse, from whom she or he was living separate and apart, on the date of death;
- payment of the pre-retirement death benefit was made to the common law spouse; and,
- the payment otherwise complied with the requirements of the PBA and regulations.

Section 48(10.2) has been added to the PBA. It provides that if the administrator made payment of the pre-retirement death benefit and all the above circumstances existed, no person may make a claim against either the administrator or the common law spouse in respect of the payment.

Other Spousal Rights and Entitlements

As the legislative wording of section 48 differs from the wording used in other provisions, the Superintendent's position continues to remain that in the absence of a tribunal or court decision, the Carrigan decision does not apply to any other provisions in the PBA and regulations that provide specific rights to, or obligations on, spouses who are not living separate and apart from the member at the relevant time.

Other Information

- Carrigan decision
- Letter Size: ## kb from the Deputy Superintendent, Pensions, in support of the application for leave to appeal to the Supreme Court of Canada
- Previous communications
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  - Carrigan v. Carrigan Estate – Supreme Court of Canada Denies Leave
  - FSCO's Position on the Implications of the Carrigan Decision