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— Franks & Zalev - This Week in Family Law

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Contents

COVID-19 Update

This week, we have two new COVID-19-related cases to discuss. In the first case, *Tarkowski v. Lemieux*, 2020 CarswellOnt 8070 (C.J.), Justice Jones gave the mother sole custody of the parties' daughter, but gave the father sole authority to decide whether to vaccinate her for COVID-19 if/when a vaccination becomes available.

Second, in *Thibert v. Thibert*, 2020 CarswellOnt 8441 (S.C.J.) Justice Pomerance was faced with the difficult question of how to ensure that the father, who had been charged with domestic assault but was not going to be able to be tried until at least 2021, could continue having in-person contact with the parties' young children after their local supervised access centre closed down because of COVID-19.

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***Tarkowski v. Lemieux*, 2020 CarswellOnt 8070 (C.J.) - Jones J.**

Whenever an effective COVID-19 vaccine is developed, the courts are going to have to deal with cases where one parent refuses to allow his/her child(ren) to be vaccinated. In *Tarkowski v. Lemieux*, Justice Jones pre-emptively dealt with this issue as part of determining which parent would be able to make major medical decisions for the parties' daughter (including whether to vaccinate her for COVID-19 if/when a vaccine is developed).

The parties had a 6-year-old daughter together who had lived primarily with the mother since they separated in 2015.

After several years of high conflict custody litigation, the case went to trial. Both parties claimed sole custody. In support of his position, the father claimed, among other things, "that the mother has been negligent in her handling of the child's health issues, particularly with respect to the child's vaccination schedule", and had "only had the child vaccinated after the OCL and then the case management judge weighed in on the issue, and even then, the mother was hesitant in getting the child vaccinated, and only completed the child's vaccinations the night before the doctor testified at trial."

After hearing the evidence, which was completed before the pandemic struck, Justice Jones rejected the father's claim for custody and granted the mother's claim for sole custody. However, to avoid any disputes if/when a COVID-19 vaccine is developed, and because she had serious concerns about the mother's judgment with respect to the child's medical care, Justice Jones gave the father sole decision making authority over whether and when the child should be vaccinated:

[73] In deciding to grant the father final decision-making power on the issue of whether [the child] should receive vaccinations, I have considered the history of this mother and this father on the vaccine issue, including:

1. The mother's initial refusal to consent to [the child] being immunized as an infant,

2. The fact that, in the past, the mother has expressed concerns that vaccinations might be linked to autism (a theory universally debunked) or might cause serious immune system problems, and that she refused to accept the recommendation of Avery's first doctor that the benefits of a vaccination far outweighed any potential risk from a vaccination to [the child].

3. The fact that the mother claimed a religious exemption which allowed her to register [the child] in daycare and in school without having her vaccinated and without telling the father that she had done so,

4. The mother's decision to have the child vaccinated with one vaccine at a time that delayed the child achieving immunity from common childhood diseases even when her current doctor assured her that [the child] was tolerating vaccines well.

5. The fact that the mother showed some hesitancy even after she agreed to take the child for vaccinations, and that it took her from mid 2017 to January 2020 before the child's vaccination schedule was completed.

6. The father may have initially had some reservations about immunization, but he is now clearly in favour of vaccinations. He understands the risks to the child and to others if the child is not vaccinated. I credit him with pursuing this issue and ensuring that [the child] received her childhood vaccinations.

To ensure that any future COVID-19 related vaccination issues could be dealt with expeditiously, Justice Jones also put the following process in place:

[74] Should a vaccine against Covid-19 become available, these parents will have to decide whether [the child] should be vaccinated against it. Since children and young people often show little or no reaction to the virus, a decision to vaccinate a child may be informed by a public health concern that COVID-19 is a virus that is easily spread and which disproportionately harms older people, and people with challenged immune systems. Ultimately, a decision to vaccinate [the child] may be a decision to protect other vulnerable people against [the child] spreading the disease. As any vaccine may pose some risk, and a new vaccine may pose unknown risks, it is imperative that [the child's] parents receive the same advice on this issue from a medical health professional.

[75] When and if such a vaccine becomes available, both parents should meet with the child's doctor to discuss vaccination for [the child] against COVID-19. In the event that the mother refuses to attend this meeting with the father and the doctor, or, at the meeting, refuses to consent to the child being vaccinated, I am granting the father, as an incident of custody and access, the unilateral power to consent to [the child] being vaccinated against COVID-19. I am satisfied that he has no bias against vaccinations in general, and will be able to decide this issue on the advice he receives. If the father decides that the child should be vaccinated, and if the child's regular doctor is prepared to administer the vaccination to the child, the father shall arrange with the child's regular doctor, currently Dr. Radivojevic, to administer the vaccination.

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***Thibert v. Thibert*, 2020 CarswellOnt 8441 (S.C.J.) - Pomerance J.**

Supervised access centres have been closed since the pandemic started in March. While this has created a significant problem for some parents, in *Thibert v. Thibert* Justice Pomerance provided parties with a clear roadmap for how courts are going to decide whether to allow a family member or another member of the community to supervise access during the closure.

The father in *Thibert* had been charged with domestic assault. While Justice Pomerance did not discuss the details of the charges in her decision, she made it clear that "[t]he allegations are serious and, on their face, raise concerns about safety."

To "facilitate an ongoing relationship between the [father] and his children" and recognize that the "charges [against the father] have yet to be tested or proven" on the one hand, while ensuring "that any access arrangements reflect the need to protect the safety of all family members" on the other, before the pandemic started Justice Pomerance ordered that the father would be able to see the children at a local supervised access centre.

By all accounts, the father's supervised access with the children had gone well, and the supervisors had reported that the father had "acted appropriately throughout the periods of access". However, when the supervised access centre closed in March 2020 because of COVID-19, the parties were unable to agree on an alternate access supervisor.

The father initially proposed his mother and brother as potential supervisors, but Justice Pomerance rejected them because she was "concerned about the prospect of supervision by a close family member" who "may feel conflicted about recording or reporting problems during access visits, for fear that it will prejudice father's position on the criminal charges."

The father subsequently proposed six friends and acquaintances who were prepared to supervise his access. All of the father's proposed supervisors swore affidavits confirming that:

> a. They do not have any criminal record or pending criminal charges.
>
> b. They are aware that there are pending criminal charges against the [father] in relation to allegations of domestic violence between [the father] and the [mother].
>
> c. They have no personal knowledge regarding the allegations or the criminal charges.
>
> d. They are willing and able to supervise the [father's] contact with the children.
>
> e. They understand that, by doing so, they are undertaking a legal obligation and that they would not permit anything inappropriate to happen to the children during the visits.
>
> f. Four of the six proposed supervisors have valid drivers' licences and are willing to assist with transportation for exchange of the children for visits.
>
> g. They are following COVID-19 health protocols at home and at work.

The mother, however, rejected all of the father's proposed supervisors for a number of reasons, but primarily because she "barely knows [the father's proposed supervisors] and cannot leave her children with people she does not know or trust". However, she also did not suggest any other potential supervisors.

On the morning of the motion, the mother advised the Court that her aunt, who was apparently only willing to supervise one two-hour visit a week at her house, was the only supervisor to whom she would agree. As the mother's aunt lived 50 km away, the mother also asked that the father be required to pay for her to transport the children to and from her aunt's house. The aunt also indicated that she did not want the father's parents and other immediate family to be able to come to her home to see the children.

After carefully reviewing the evidence, Justice Pomerance determined that all six of the father's proposed supervisors were appropriate, and ordered that it would be up to the father "to choose which of the supervisors he asks to serve on a given occasion, based on their availability." She also concluded that it would be in the children's best interests to increase his access from the two hours a week proposed by the mother to four hours a week.

Ultimately, the father was successful on the motion because he adduced clear and cogent evidence to address all of the court's potential concerns, and provided, to use the words of Justice Pazaratz in *Ribeiro v. Wright*, 2020 CarswellOnt 4090 (S.C.J.), "realistic solutions" and "creative and realistic proposals which demonstrate both parental insight and COVID-19 awareness."

In contrast, while the mother's concerns about who the supervisor would be were completely understandable, her refusal to make any proposals for an alternate supervisor until the 11th hour, and then to only propose terms that were impractical and unnecessarily restrictive undoubtedly led to her lack of success on the motion.

And now, for some cases that have absolutely nothing to do with COVID-19.

Costs: The Shortest *Newsletter* Case You Will Ever See

Thomson v. Fleming, 2020 CarswellOnt 7581 (S.C.J.) - Baltman J.

We offer you no summary of the facts. We offer no discussion of the underlying issues. We give you Justice Baltman and only Justice Baltman:

> [10] Let me be clear: a cost order is not a "choice". And "forthwith" means now, not when it suits the party. It is foundational to our system of justice that court orders be obeyed. As O'Connell J. stated in *Jassa v. Davidson*, 2014 ONCJ 698, at para. 44, "[c]ourt orders are not made as a form of judicial exercise. An order is an order, not a suggestion and non-compliance must have some consequences". See also *Cummings v. Cummings*, 2020 ONSC 3093, at para. 46.

'Nuff said.

Pensions! How to Deal with Federal Pensions (in Ontario)!! Hooray!!!

Van Delst v. Hronowsky, 2020 CarswellOnt 7596 (C.A.) - Rouleau, Hourigan and Roberts JJ.A.

There is an old Billy Crystal routine where he plays Howard Cosell interviewing Marvin Hagler, Thomas Hearns, Larry Holmes, Muhammad Ali (all of whom are also perfectly voiced by Billy Crystal). It's available on YouTube. In answer to one of Cosell's questions, Larry Holmes answers, "Well, Howard . . . I like eggs . . . I loooove eggs."

What does that have to do with pensions? Well, we hate pensions ("hate" is such a strong word - let's say "really dislike"). They are complicated. They are confusing. There are rules for valuing them. There are rules for dividing them at source. They are complicated by things like "joint survivor" pensions; elections; and survivor benefits. They are a major cause of solicitor's negligence claims. They often require an actuary (especially in dealing with division options) in all but the most basic cases, and we then need to retain a translator to translate the advice from the actuary into English. So, as much as Larry Holmes loves eggs, we hate pensions.

However, this recent decision from the Ontario Court of Appeal makes us hate pensions just a *little* bit less, by clarifying how interests in Federally regulated pensions are to be valued (in Ontario).

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How to Value a Federal Pension

In 2012, to simplify the valuation of pensions for the purposes of property division, the Ontario government amended the *Pension Benefits Act*, R.S.O. 1990, c. P.8 (the "*PBA*") and the *Family Law Act*, R.S.O. 1990, c. F.3 (the "*FLA*"). The amended Acts set out standard rules to follow for pension valuations (such as age of retirement, etc.), and valuations became the responsibility of pension administrators as opposed to privately retained actuaries. Gone were the days when each party retained their own expert actuary to opine on the value of a pension, and standard valuation rules were implemented that offered generalized "pension justice" that allowed for exceptions in only the most outlying cases (cases of imminent death, for example). To paraphrase Justice Hourigan, the amendments allowed courts to get out of the pension valuation business.

However, the standardization of pension valuations in the *PBA* and *FLA* only applied to pensions administered pursuant to the *PBA*. The amendments did not clearly speak to the valuation of other pensions - Federal pensions under the *Public Service Superannuation Act*, R.S.C. 1985, c. P-36 ("*PSSA*") or foreign pensions, for example. Therefore, the question remained as to

how to value these other pensions for equalization purposes, and it is this question the Ontario Court of Appeal answered in *Van Delst*.

The parties were married in October 1995, and they separated in September 2016. They each worked for entities governed by the *PSSA*. The appellant husband became a pension member on December 4, 1984, and retired on December 17, 2016. The respondent wife started working for the Royal Canadian Mounted Police in 2008, and was still employed there when the trial started.

The wife started an application in May 2017, for spousal support, child support, custody, and equalization of net family properties. In August 2017, the husband filed his answer. In September 2018, the wife amended her application to include a claim for divorce. The parties were able to resolve all issues except equalization, which proceeded to trial. The most significant component of the net family property calculation was the value of the parties' pensions.

According to s. 10.1(1) of the *FLA*, the "family law value" of a spouse's interest in a pension plan is determined in accordance with s. 67.2 of the *PBA*. However, where the pension is not governed by the *PBA*, s. 10.1(2) of the *FLA* requires that the *PBA* approach be used, "with necessary modifications". One element of the valuation calculation under the *PBA* is the "normal retirement date" under the pension plan. *PBA* pension plans are *required* to provide a normal retirement date, which then allows for a straightforward valuation calculation. The *PSSA*, however, does not set a normal retirement date.

Both parties retained experts (actuaries) and tendered reports valuing their respective pensions. The wife's expert used 65 as her "normal retirement date" because, although retirement with an unreduced pension was possible at 60, a "fair amount" of civil servants work past 60. The husband's expert calculated the value using ages 60 and 65. He used 60 because this is when all members who joined prior to 2013 were entitled to unreduced benefits. The husband's expert also opined that 65 was reasonable for several reasons, including because it was not unusual for members to retire after 60, and the majority of pension plans in Canada define the normal retirement age as 65. Notably, this is *precisely* the sort of argument the pension-related amendments to the *PBA* and *FLA* were meant to avoid.

Based on pre-separation evidence of the parties' intended retirement dates, and relying on the pre-*PBA* amendment case of *Di Francesco v. Di Francesco*, 2011 CarswellOnt 5265 (S.C.J.), the trial judge concluded that the "normal retirement dates" for the husband and wife were ages 60 and 65, respectively (the trial judge found that the wife continued to work and intended to do so until age 65, while the husband planned to retire when he was entitled to an unreduced pension).

In calculating the parties' net family properties, the trial judge also did not include the wife's survivor benefits under the husband's pension in her net family property because she would lose her entitlement to those benefits on divorce. The value of the husband's survivor benefit was not provided and was not included in his net family property. Contingent survivor benefits were included in the net family property calculation, over the husband's objection.

On appeal, the main issue was the valuation of the parties' federally regulated pensions for equalization purposes. With respect to that main issue, three aspects of the trial judge's reasons were challenged:

(a) The determination of the parties' normal retirement dates;

(b) The decision not to include in the wife's net family property the contingent interest she held in the husband's pension; and

(c) The inclusion of a contingent survivor benefit in valuating the parties' pensions.

The Court of Appeal held that the trial judge had reached the right conclusions on the survivor benefit and contingent survivor benefit issues, but that she had erred in her approach to all three issues by failing to heed the requirement of s. 10.1(2) of the *FLA* that, in valuing pensions that are not provincially regulated, the Ontario method of valuation should be applied, with only necessary modifications.

Ultimately, Justice Hourigan, for a unanimous Court of Appeal, decided that the correct approach to pension valuation issues for non-*PBA*-regulated pensions is to follow the scheme of the *PBA* as closely as possible, getting valuations from their pension administrator where possible. Only where this is not possible, or where issues remain as to the proper application of the Ontario regime to a federal pension plan, should parties refer such issues to a trial judge for determination - preferably with the aid of a jointly appointed expert.

Generally, the rules for valuing pensions are set out in s. 67.2 of the *PBA* and the regulations. They comprise a "rule book" for pension valuations, setting out standard valuation assumptions such as "normal retirement date" and life expectancy, etc.

As noted above, the other relevant legislative provisions are found in sections 10.1(1) and 10.1(2) of the *FLA*:

> 10.1(1) The imputed value, for family law purposes, of a spouse's interest in a pension plan to which the Pension Benefits Act applies is determined in accordance with section 67.2 or, in the case of a spouse's interest in a variable benefit account, section 67.7 of that Act. 2009, c.11, s. 26; 2017, c. 8, Sched. 27, s. 21 (1).
>
> 10.1(2) The imputed value, for family law purposes, of a spouse's interest **in any other pension plan** is determined, **where reasonably possible, in accordance with section 67.2** or, in the case of a spouse's interest in a variable benefit account, section 67.7 of the Pension Benefits Act ***with necessary modifications***. 2009, c.11, s. 26; 2017, c. 8, Sched. 27, s. 21 (1). [emphasis added]

Justice Hourigan held that the phrase "with necessary modifications" in s. 10.1(2) indicated a specific legislative intent that the substance of s. 67.2 of the *PBA* be applied, while recognizing that some details may require modification. His Honour then noted that the words, "with necessary modifications" are a "contemporary reformulation of the Latin phrase *mutatis mutandis*": *R. v. Penunsi*, 2019 CarswellNfld 268 (S.C.C.), at para. 49, meaning that the rules to be applied are read with necessary changes in points of detail, while the matter remains the same (*mutatis mutandis* is a personal favourite of ours; it says so much with so little).

Any departure from the *PBA* methodology must be justified as necessary by the party seeking that departure: *Kelly v. Kelly*, 2017 CarswellOnt 21320 (S.C.J.), at paras. 161-162. Justice Hourigan adopts this statement. Therefore, if one of the parties can show that, because a plan is not regulated under the *PBA*, a modification to the approach is necessary, departure will be warranted. Otherwise, the default position is that the *PBA* approach must be used.

This is undoubtedly correct because, as noted by the Court, it is consistent with the legislative intent in reforming pension valuation on marital breakdown - to create a uniform approach to create certainty. Therefore, a non-Ontario pension is to be valued, for family law purposes, the same way as would an Ontario regulated pension. The valuation rules and formula in the *PBA* and regulations must be applied to a non-Ontario pension with modifications only where necessary. *PBA* pensions, Federal pensions and foreign pensions are to be valued in the same manner, to the extent reasonably possible.

Therefore, the error in the judgment below was that the trial judge had not defaulted to the requirement that a federally regulated pension should be valued as would be a *PBA*-regulated pension, unless a departure from that method was necessary in the circumstances. Instead, the judge below applied a pre-legislative-reform "tailoring" of the valuations to the parties' specific circumstances.

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What is the "Normal Retirement Date"?

The "normal retirement date" is one of the variables included in the pension valuation methodology prescribed under the *PBA* (this is because the value of a pension is nothing more that the present value of a stream of payments - the earlier the retirement, the longer the payments, and the higher the value of the pension). However, while every *PBA*-regulated pension must specify a "normal retirement date" (see ss. 1(1) and 10(1)(4) of the *PBA*), the Federal plans in this case did not so specify.

Therefore, to calculate the value of the parties' pensions in this case in accordance with the *PBA* methodology, the parties' expert actuaries had to fix a value for this variable.

The question for the Court of Appeal, then, accepting that the details of the plan at issue did not "map perfectly" into the *PBA* valuation regime, was "what modification was necessary"?

Relying on definition of "normal retirement date" in the *PBA* and in several provincially regulated pension plans, along with guidance from the Financial Services Commission of Ontario, Justice Hourigan held that the "normal retirement date" for an extra-provincial pension does not result in a case-specific inquiry. Rather, it is a functional value representing **the date at which the pension plan entitles any given member to unreduced pension benefits**. The question does not result in a case or party-specific inquiry. This was a "necessary modification." And in the case of the *PSSA* pensions at issue in this case, the terms of the *PSSA* made it clear at what age all contributors were entitled to retire with an unreduced pension, which is equivalent to the "normal retirement date" in the provincial plans.

As a "functional equivalent" to the "normal retirement date" was apparent on the face of the parties' pension plan, it was not necessary to engage in a party-specific inquiry about the date of anticipated retirement. Applying an approach based on the terms of the pension plan rather than the intentions of the parties, the normal retirement date for *these* parties was determined to be **age 60** (this followed from a somewhat detailed and complicated review of the terms of the *PSSA*). However, a caution is required: given the different pension regimes within the *PSSA*, while the "normal retirement date" will always be the date a person can retire with an unreduced pension - it does not necessarily follow that the "normal retirement date" for all people in a *PSSA* plan will be age 60. Rather, some investigation and careful reading of the *PSSA* (or an actuary) will be required.

Justice Hourigan then offers this advice:

> [41] I add the following regarding the process to be followed when valuating non-Ontario pensions. Generally, the same process should be followed as with a provincially regulated plan. The parties should request that the pension administrator generate a value based on the Ontario law. If a pension administrator, who is not regulated by the provincial legislation, refuses to calculate the value, or if issues arise regarding the necessary modifications to be made, directions from the court may be sought. The preferable approach is that a single jointly-appointed expert provides expert evidence. The appointment of competing valuators should be avoided because it encourages the type of costly valuation litigation that the new legislation was designed to avoid.

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The Survivor Pension

Should the trial judge have included the survivor pension in the wife's net family property?

The husband argued that the trial judge erred by *not* including the contingent interest the wife had in the husband's pension (valued at $392,000) in her net family property (even though it would only be available to the wife if the husband died **while they were still married**). The husband argued that, as of the date of separation, there was no intention to divorce (the wife did not claim a divorce in her original application). The wife argued that she was not entitled to a survivor pension if she was not his spouse at the time of his death. She ultimately sought and was granted a divorce.

While the Court of Appeal agreed that the survivor pension should not be included, they did not agree with the reasoning below. The trial judge reasoned that the wife had ultimately asked for a divorce, which was consented to by the husband, and therefore would not fall within the definition of a "survivor" within the *PSSA*.

The correct approach, opined Justice Hourigan, was to ask the same question as asked on the valuation issue and the issue of "normal retirement date": What would the law require if this were an Ontario pension - and were there any "necessary modifications" to that approach in the circumstances?

The *PBA* only mandates a value for a survivor pension payable to a former spouse of the member if the separation occurs *after* retirement. However, under the *PSSA*, a separated spouse is entitled to a survivor pension if the parties are still married (i.e. not divorced) when the member dies.

Justice Hourigan pointed to the fact that no modification to the "usual approach" in the *PBA* regime was necessary. He again emphasized the expectation that the Ontario regime must be applied where reasonably possible, "unless there are **compelling** reasons not to." In these circumstances, however, where entitlement to the survivor benefit terminates upon divorce, and the parties consented to a divorce early in the proceedings, there was no "compelling reason" to depart from the requirements of the standard rules so as to force the wife to include the value of an asset she would never realize upon.

We have one issue with this rationale. Under the *PBA*, a spouse is entitled to a survivor pension if s/he is the spouse on retirement. Under the *PSSA*, a separated spouse is entitled to a survivor pension, as long as she is still married to the member on the date of death. Ultimately, the court must consider whether, on the date of separation, there is any basis to think that the parties will not actually divorce. While we would think that, in most cases, the answer will be "no", using the fact of a subsequent divorce as justification for not including the survivor pension, respectfully, uses hindsight, offending general valuation principles: *Ross v. Ross* (2006), 34 R.F.L. (6th) 229 (Ont. C.A.); *Horch v. Horch* (2017), 1 R.F.L. (8th) 1 (Man. C.A.). However, the "Hindsight Rule" admits many exceptions, Justice Hourigan is not a Chartered Business Valuator, and the result is correct.

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The Contingent Survivor Benefit

Did the trial judge err in including a contingent survivor benefit in the husband's net family property?

Under the *PSSA*, a contingent survivor benefit is payable to a pension member's future potential spouse. Some value for a contingent survivor benefit is included in the value of a pension based on the probability of the member having an eligible spouse at death and based on the age of the spouse. At trial, the Court included the value of the contingent survivor benefit in the husband's net family property. The husband argued that the trial judge had erred doing so.

Again, the Court of Appeal found that the trial judge reached the correct result but for the wrong reason. And, again, the Court stated that the correct approach was to determine what the law would require if this were an Ontario pension, and then determine whether any modifications of that approach are necessary in the circumstances.

For a *PBA* pension, the Financial Services Commission has mandated that pension plan administrators must include the value of contingent survivor benefits in the family law value of a pension - this, notwithstanding that the member will never actually receive the contingent survivor benefit (they would be dead).

Any unfairness aside, however, that is how a *PBA* pension would be valued, and absent any "necessary modification" that is how a *PSSA* pension is to be valued for family law purposes in Ontario. To do otherwise would be a modification of the standard valuation methodology, and there was no "compelling reason" to do so. To address the possible unfairness, Justice Hourigan noted (and he is probably right) that "[t]he ability to confer a survivor benefit on a future partner is of value to a pension member even if the member does not receive these funds personally." No changes were necessary for the Court to apply the usual provincial approach to these federal pensions.

The only problem we have with this is what appears to have been a "throw-away" line in his Honours decision: "The appellant's retirement was a post-separation event, and such events generally will not affect the valuation of assets on valuation day according to the standard methodology." However, if that is the case, why did the post-separation divorce impact the value of the wife's survivor pension?

All-in-all an excellent judgment and some long-needed clarification.

We still hate pensions.

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