

**The Boomers Are Coming:
Economic and Other Issues of Older Individuals**

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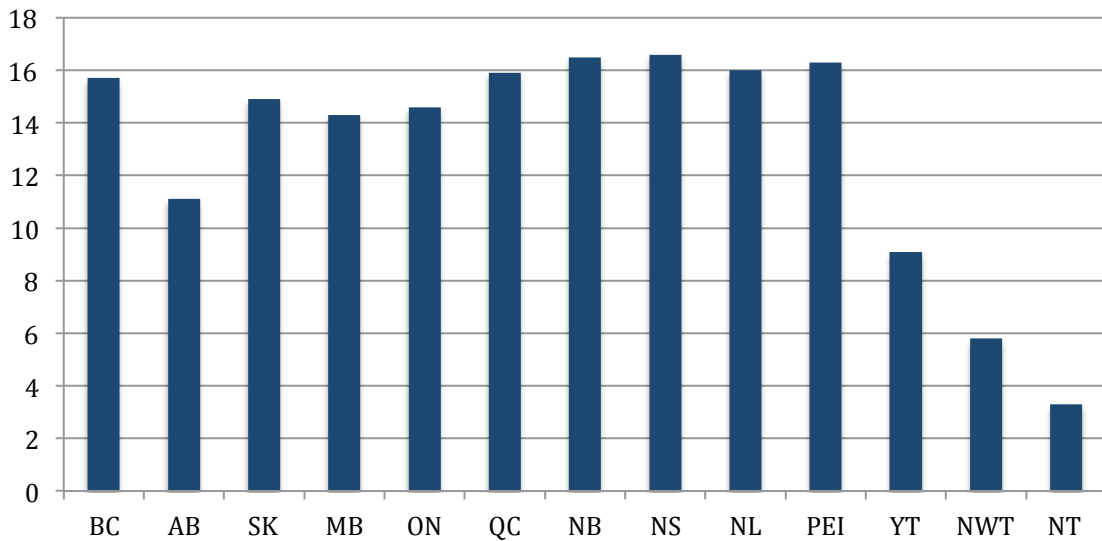
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I. DEMOGRAPHICS

Ours is an aging population. Life expectancy is increasing across the world at the same time as birth rates are falling. According to the United Nations, population of older persons is increasing at a rate of 2.6% per year, outstripping the 1.2% growth rate of the general population; the proportion of people aged 60 and older increased from 8% in 1950 to 11% in 2009, and is expected to climb to 22% by 2050.¹

The growing number of older persons is partly attributable to the remarkable economic, medical and technological progress achieved in the last century and partly to the baby boom that the west experienced between 1946 and 1965, and Canada is no exception. Comparing the 2006 and 2011 census results, Statistics Canada reports that the number of people aged 65 and older has increased by 14.1% and reached a record high of 14.8% of the Canadian population. Statistics Canada further reports that of all five-year age groups, the 60 to 64 group is increasing the fastest – followed, in order, by people who are 100 and older, 85 to 89, 95 to 99 and 65 to 69 – and that population aging will accelerate as the boomers gradually turn 65.²

PROPORTION OF POPULATION AGED 65 AND OVER
(By Percentage)



Source: Statistics Canada, *The Canadian Population in 2011: Age and Sex*

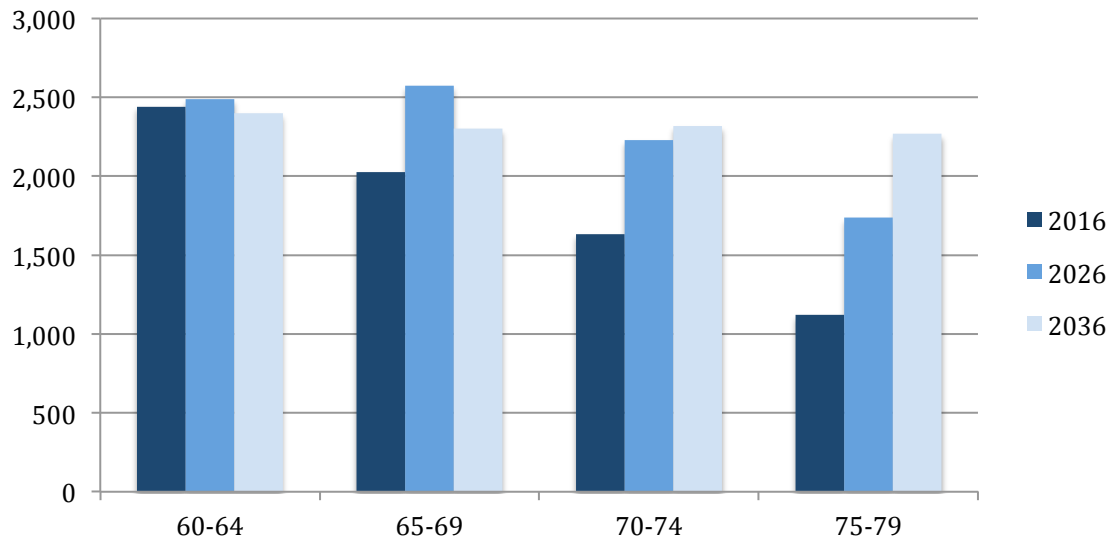
The oldest boomers turned 65 in 2011 and the cohort will not completely exit their early 60s until 2029. Waiting in the wings are 2,128,100 Canadians who are aged 60 to 64, 2,557,300 who are aged 55 to 59 and 2,774,600 who are aged 50 to

¹ *World Population Ageing 2009*, United Nations 2009, pp. viii and ix.

² *The Canadian Population in 2011: Age and Sex*, Statistics Canada 2012, pp. 3, 4 and 11.

54, compared to the 5,585,300 Canadians who are aged 65 and older.³ Statistics Canada's projections suggest a significant increase in the number of Canadians who are age 65 and older through to 2036, with the number of those in the 75 to 79 age group doubling.

PROJECTED POPULATION BY AGE GROUP
(In Thousands)



Source: Statistics Canada, table 052-0005, catalogue no. 91-520-X (medium growth projection)

The boomers are the first generation for whom divorce carried only a marginal stigma. Although some provinces, such as British Columbia, were fortunate enough to bring provincial divorce legislation and divorce courts with them into Confederation,⁴ the federal *Divorce Act* enabling civil divorces nationwide did not become law until 1968 when the first of the boomers would have been 22 years old.⁵

In the early years of the *Divorce Act*, the divorce rate was fairly low, at 134.8 divorces per 100,000 people in 1971. However, the switch to a no-fault approach in the 1985 *Divorce Act*, when the first boomers would have been 39 years old, triggered a surge in the divorce rate to a high of 362.3 per 100,000 in 1987,⁶ following which the divorce rate crept slowly downward to a low of 217.8 per 100,000 in 2004. In 2008, when Statistics Canada ceased collecting data from the Central Registry of Divorce Proceedings, the 25-year total divorce rate – the proportion of marriages expected to have terminated by the twenty-fifth year –

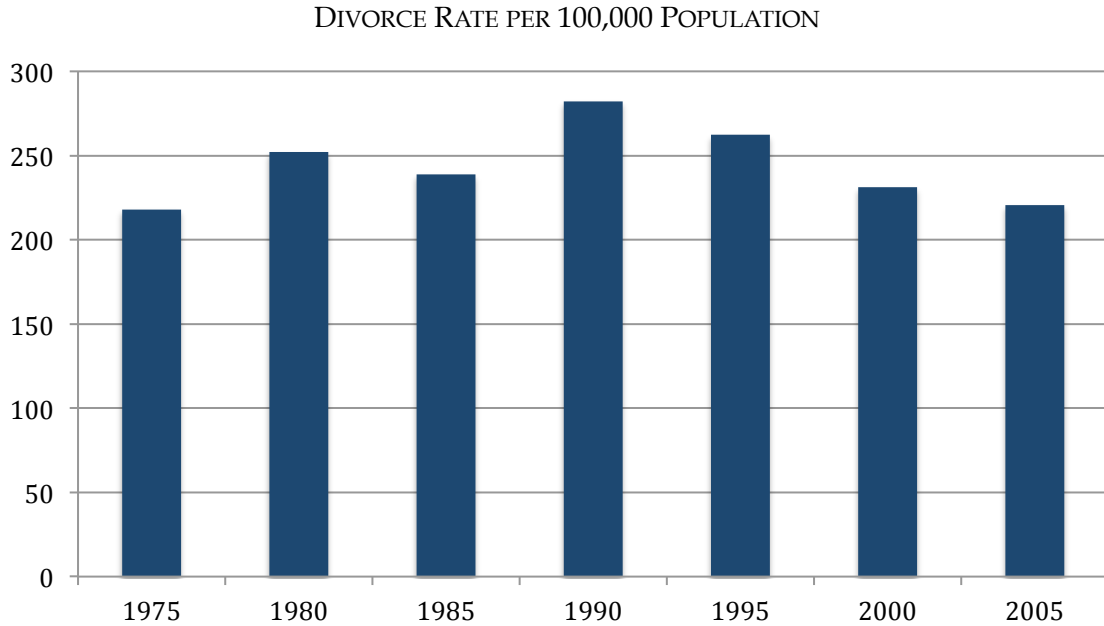
³ Population estimate for 2014 (Statistics Canada, CANSIM, table 051-0001).

⁴ Proclamation of Governor Sir James Douglas at Fort Langley, British Columbia on 19 November 1858; see *Divorce and Matrimonial Causes Act*, SBC 1897, c. 62 amending *Divorce and Matrimonial Causes Act*, 1857 (UK), 20 & 21 Vict. c. 85.

⁵ *Divorce Act*, 16 Eliz. II, SC 1967-68, c. 24.

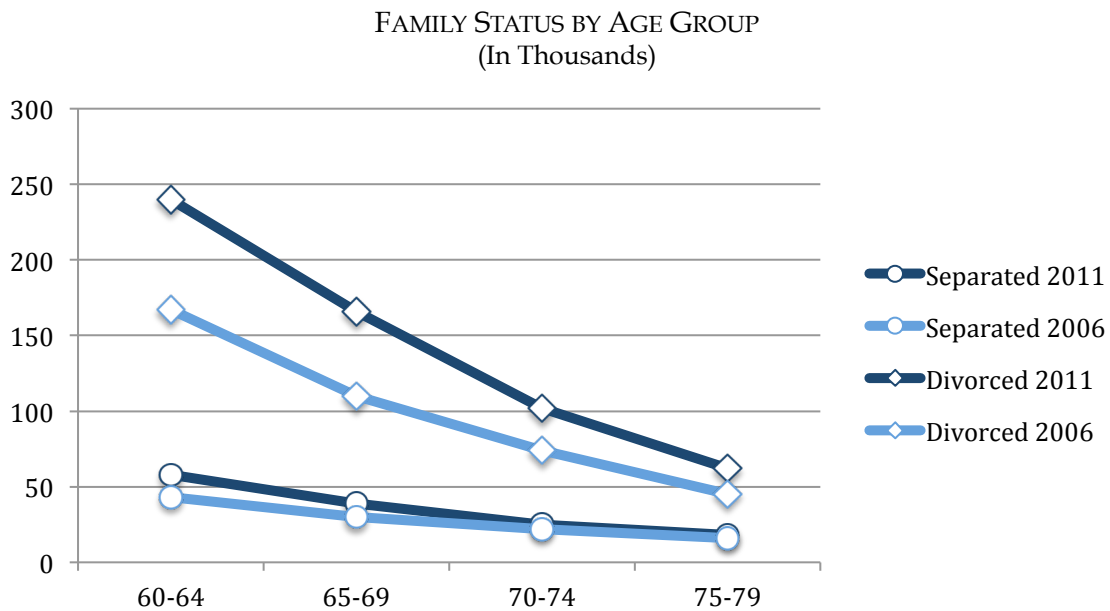
⁶ *Divorce Act*, RSC 1985, c. 3 (2nd Supp.).

was projected to be 37.6%, and the 50-year divorce rate was projected to be 43.1%.⁷



Source: Statistics Canada, various

Despite the fact that the overall divorce rate is generally declining, the growing population of people aged 60 and older means that more people in 2011 were divorced or separated than in 2006.



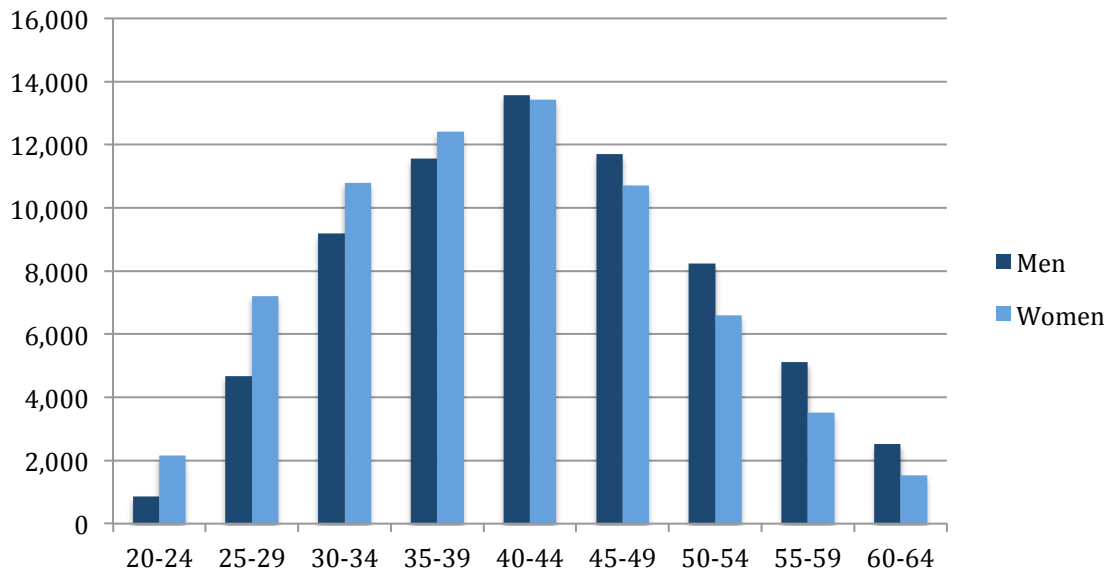
Source: Statistics Canada, catalogue no, 98-312-XCB2011041

⁷ *Marital Status: Overview, 2011*, Statistics Canada 2013, p. 13.

Not only are more older persons divorced or separated, more are forming new married or unmarried spousal relationships. In 2011, 14% of those aged 65 and older had been married more than once and 19% had been involved in more than one unmarried relationship. People aged 55 to 64 were even more likely have had two or more unions during their lifetimes.⁸

Although most people divorce between ages 35 and 49, a significant number divorce later in life and, given the number of boomers yet to turn 65, are yet to enter the court system for their divorce.

NUMBER OF DIVORCES IN 2004 BY AGE OF SPOUSES AND GENDER



Source: Statistics Canada, CANSIM, table 101-6507

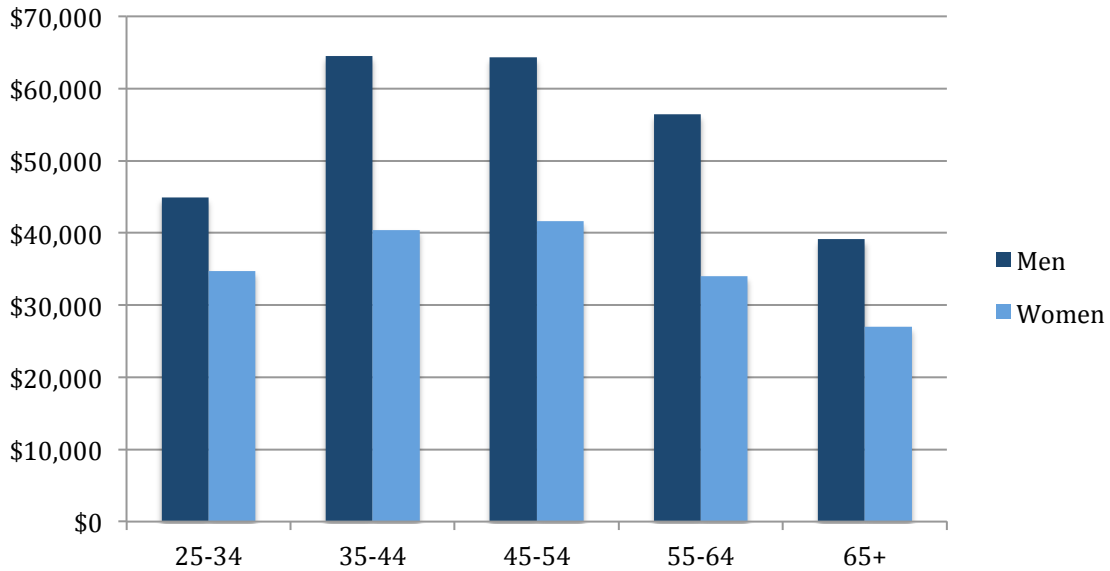
The economic consequences of an aging population are likely obvious, especially if we are unable to shift people’s expectations as to their retirement from the workforce.⁹ The social consequences may be less obvious: more people are separating and divorcing; more people are living alone; more people require care and assistance with their day to day lives; and, more people live with mental and physical disabilities. According to Statistics Canada, the functional health of most people declines rapidly after age 65, with severe disability occurring at about age 77 and the average person living with some level of disability for about ten and a

⁸ *Emerging Trends in Living Arrangements and Conjugal Unions for Current and Future Seniors*, Statistics Canada 2014, pp. 6 and 7.

⁹ When the Canada Pension Plan was introduced by the Pearson government in 1965, the average life expectancy for men turning 65 that year was around age 59, making the plan eminently affordable. For those born in 2007, however, men are expected to live to about age 79 and women are expected to live to about age 83, and in 2011, the most common age of death was 85. (Statistics Canada, CANSIM, table 102-0521, catalogue no. 84-537-XIE; *Disparities in Life Expectancy at Birth*, Statistics Canada 2011, p. 2; *Ninety Years of Change in Life Expectancy*, Statistics Canada 2014, p. 4).

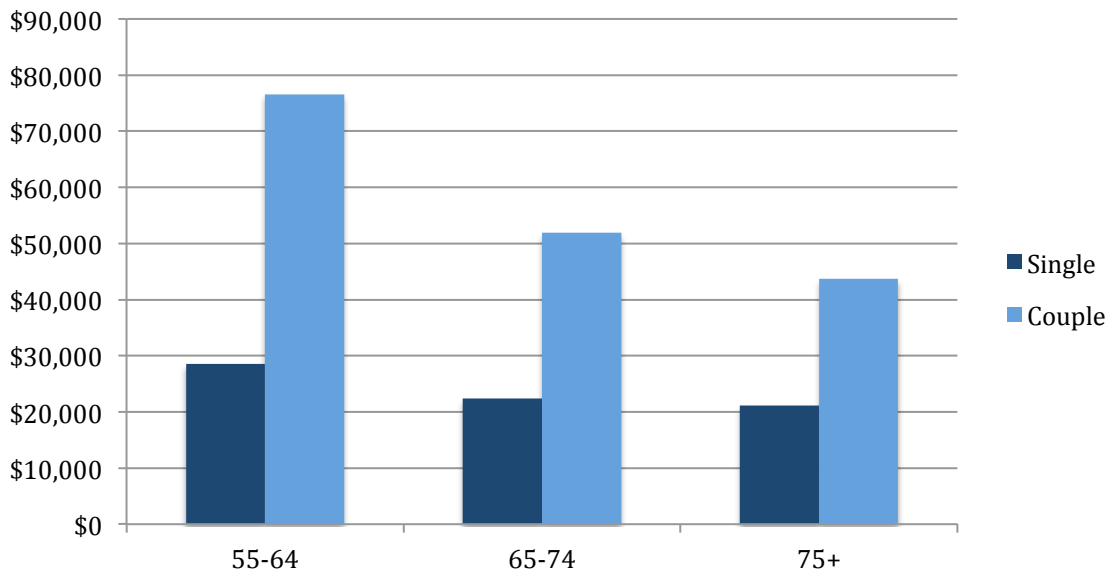
half years.¹⁰ More people are also living on diminished incomes and in poverty, particularly women and those living on their own.

AVERAGE INCOME BY AGE GROUP AND GENDER IN 2011



Source: Statistics Canada, CANSIM, table 202-0407

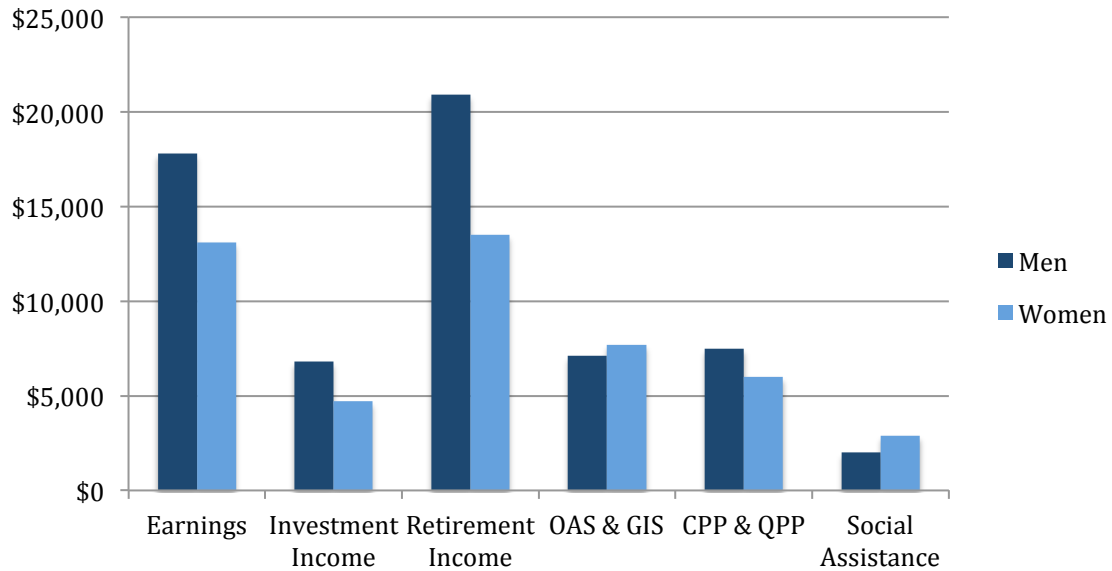
AVERAGE INCOME BY AGE GROUP AND LIVING ARRANGEMENT IN 2006



Source: Statistics Canada, CANSIM, table 111-0034

¹⁰ *Ninety Years of Change in Life Expectancy*, Statistics Canada 2014, pp. 7 and 8.

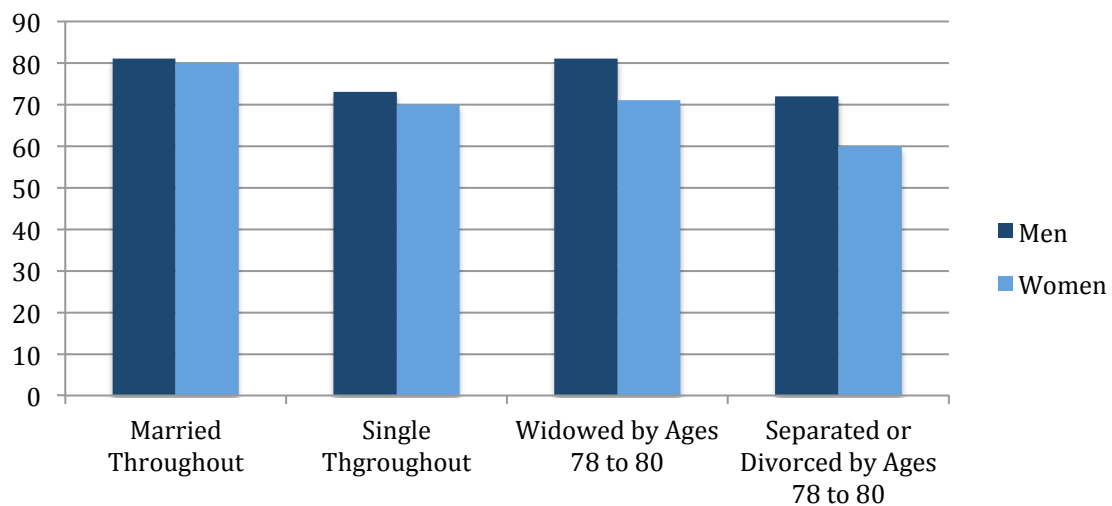
INCOME OF PERSONS 65 AND OLDER BY SOURCE AND GENDER IN 2011



Source: Statistics Canada, CANSIM, table 202-0407

The financial impact of separation or divorce is worse for older women than it is for older men. A 2012 study conducted by Statistics Canada compared family income at ages 54 to 56 with income at ages 78 to 80, and found that: separation or divorce has a larger negative effect on income than being widowed; and, while separation or divorce had some effect on men's income, it has far more of a significant impact on the income of women.

PROPORTION OF INCOME RECEIVED AT AGES 78 TO 80 OF INCOME RECEIVED AT AGES 54 TO 56 (By Percentage)



Source: *Income Replacement Rates Among Canadian Seniors*, Statistics Canada 2012, pp. 13 and 14 (middle quintile)

There are now more Canadians aged 65 and over than there have been at any previous time, and the proportion of older persons in the Canadian population is going to increase significantly in the coming years as 7,460,000 baby boomers leave their early 60s. The divorce rate in Canada rose markedly with the reforms introduced with the 1985 *Divorce Act*, when the first boomers were entering the peak ages for divorce, and theirs is the first generation for whom divorce is a normal life event, free of the stigma previous generations had associated with marriage breakdown.

As significant numbers of people are now divorcing later in life, the courts should expect an increasing volume of family law cases involving people aged 65 and older. Cases involving persons of retirement age raise special concerns about the distribution of income and assets, many of which will be discussed later in this paper, and a special sensitivity to the needs of women who have lower incomes than men in general and are disproportionately affected by separation and divorce.

II. UNEXPECTED FINANCIAL CONSEQUENCES OF GREY SEPARATION

We are all very familiar with the issues that arise when spouses who are not seniors separate. We may not be as sensitive to the issues that can arise when seniors separate. Worries about the cost of extracurricular activities and post-secondary education for children are supplanted by worries about cost of care and other health-related expenses.

Consider spouses who have been married for a lengthy period and who have accumulated their property together during their marriage. One spouse has an employment pension accrued entirely during the marriage. Extended medical/dental benefits are associated with the pension. The parties have equal entitlement to property (whether through division of assets or through an equalization payment) and, because of equal division of the employment pension and Canada Pension Plan, will have equivalent incomes. On the surface, this appears to be a very straightforward case to resolve. But perhaps one spouse has high medication costs due to health issues. Perhaps that spouse is now in a position of having to replace care that was previously provided by the other spouse prior to separation.

Depending on the terms of the pensioned spouse's benefits plan, the other spouse may lose coverage under the benefits plan when he or she ceases to be a spouse. Some plans even terminate coverage upon separation. The non-pensioned spouse faces the prospect of having to purchase replacement benefits coverage. If the non-pensioned spouse is unable to secure such coverage or if the coverage is particularly expensive, that spouse leaves the marriage in a worse position than the pensioned spouse notwithstanding the equality of property and income.

Consideration may then have to be given to whether it is appropriate to provide the non-pensioned spouse with a sum of money, the purpose of which is to pay for replacement coverage or for medical or other health care costs if coverage is unavailable. It may be impossible to fully compensate the non-pensioned spouse but some compensation is surely better than none. How then to accomplish this?

One possibility is unequal division of property or variation of the equalization payment in those jurisdictions where the ability to vary exists. For example, British Columbia's *Family Law Act* allows the court to divide family property unequally based on any factor that may lead to significant unfairness.¹¹

¹¹ *Family Law Act*, SBC 2011, c. 25, s. 95(2)(i). Similarly, section 7 of New Brunswick's *Marital Property Act*, SNB 2012, c. 107 provides for division of marital property in unequal shares if

Manitoba's *Family Property Act* allows the court to alter an equalization payment if equalization would be grossly unfair or unconscionable having regard to any extraordinary financial or other circumstances of the spouses.¹² If variation is not available¹³ or if the threshold for variation is exceptionally high, another possible solution might be an order of lump sum spousal support to recognize the disadvantage accruing to the non-pensioned spouse from the breakdown of the marriage.

Cost of care is another reality for seniors that courts may increasingly have to grapple with. There is a wide variety of options for care available to seniors, ranging from government-subsidized home support (generally a few hours per week of homemaking, meal preparation, and/or personal care services), privately funded in-home care (ranging from a few hours of assistance to full-time care), assisted living facilities, respite care facilities, and residential long-term care facilities, both publicly and privately funded.

There is, of course, also a wide variety of costs for these various options not only as between types of services but as between provinces and territories for the same type of services. Consider, for example, publicly funded long-term care facilities. Some provinces, such as British Columbia, Saskatchewan and New Brunswick, assess cost of care in such facilities based on a person's income to a certain maximum monthly cost. In British Columbia, the maximum cost is \$3,157.50 per month.¹⁴ In Saskatchewan, the maximum is \$1,995 per month.¹⁵ Other provinces, such as Ontario and Alberta, set daily rates for care. In Ontario, the maximum monthly rate for a standard room is \$1,732, for a semi-private room is \$2,066.21, and for a private room is \$2,438.81.¹⁶ In Alberta, those rates are, \$1,508, \$1,638 and \$1,893 respectively.¹⁷ Private pay long-term care facilities cost significantly more.¹⁸

division in equal shares would be inequitable having regard to a number of factors, including the duration of cohabitation during the marriage.

¹² *Family Property Act*, C.C.S.M. c. F25, s. 14(1).

¹³ For example, in Ontario, section 5(6) of the *Family Law Act*, RSO 1990, c. F.3 allows the Court to vary the equalization payment if equalizing net family property would be unconscionable but that section has no application if the spouses have equal net family property: *Berdette v. Berdette*, 1991 CanLII 7061 (O.C.A.). Moreover, the purpose of s. 5(6) is to remedy unconscionable conduct on the part of a spouse and is therefore only available in exceptional cases: *Czieslik v. Ayuso*, 2007 ONCA 305.

¹⁴ www2.gov.bc.ca/gov/topic.page?id=4FEC0F570BC04692810548267D09577E&title=Long-Term%20Residential%20Care

¹⁵ www.health.gov.sk.ca/special-care-charges

¹⁶ www.ontario.ca/health-and-wellness/find-long-term-care-home

¹⁷ www.health.alberta.ca/services/continuing-care-accommodation-charges.html

¹⁸ Anecdotally the writer, in her own practice, has encountered private pay rooms ranging in cost from \$5,000 to \$9,000 per month, and sometimes more depending on the level of care required by the resident.

Nor is the cost of a room the end of the matter. The resident will generally be responsible for personal expenses such as clothing, vision care, dental care, hairdressing, telephone, cable television.

A spouse's choice about the kind of care he or she will enjoy and perhaps the kind of care the spouses contemplated before their separation, e.g. care in a private pay facility versus public pay, a private room versus a standard room, may be adversely affected by the separation. Who should bear the burden of that? If there is no spousal support obligation because the only available income is pension income that has been divided equally, is it fair to ask that the other spouse share some of the burden through redistribution of property, particularly when the other spouse may have future care needs of his or her own? This is a question with no easy answer.

Another facet of the "choice" issue is the support payor's ability to choose what kind of care he or she should have in the face of the support obligation. What if the support amount mandated by the *Spousal Support Advisory Guidelines*,¹⁹ coupled with the property received upon marriage breakdown, allows the support recipient to more or less maintain the marital lifestyle without having to encroach upon capital but prevents the payor from having the desired kind of care unless the payor encroaches upon capital?

As we know, the model upon which the Advisory Guidelines is predicated is an income-sharing one rather than a budget-based one. A payor's expenses are of little relevance, even if they are expenses related to illness/disability. While there are exceptions to the Advisory Guidelines and those exceptions include illness/disability,²⁰ it is illness/disability of the recipient that is contemplated. Perhaps this is because it is assumed that a disabled spouse does not generate income that results in liability for support. This is not necessarily an accurate assumption in the case of a retired spouse who has a pool of retirement savings, business interests that generate income, or, increasingly rarely, a generous pension and whose disability is age-related.

A concrete example may help to illustrate the issue:

Disabled payor has \$100,000 in income from pensions, RRIFs, and redemption of preferred shares received in an estate freeze. Payor and recipient are each 72 years of age and have been married for 25 years. Recipient has annual income of \$20,000 generated from pensions and investment returns from property received as a result of the marriage breakdown. Disabled payor wishes to live in a private pay facility, the cost of which is \$5,500 per month. The support ranges produced by the

¹⁹ *Spousal Support Advisory Guidelines*, Department of Justice 2008.

²⁰ Set out at section 12.4 of Chapter 12 of the Advisory Guidelines.

Advisory Guidelines are \$2,510, \$2,929, and \$3,347, leaving payor with net disposable income of \$5,138, \$4,862, or \$4,578. Given the other personal expenses that payor must pay for in addition to the residence cost, care in the private pay facility is out of the question without encroaching on capital.

Even where the payor is prepared to go to a public pay care facility, he or she may be on a waitlist to get into the desired public pay facility and will have to incur private pay costs in the interim.

As noted by the authors in the Overview to the Advisory Guidelines at section 3.4.3, the formulas are meant to apply to the majority of cases but they are never binding and departures are always possible on a case-by-case basis where the formula outcomes are found to be inappropriate. Of course, there are some jurisdictions in which the Advisory Guidelines tend to be treated as virtually binding. How receptive the judiciary will be to carving out an exception based on a payor's illness/disability in the circumstances described above remains to be seen.

These are issues that courts have not yet had to grapple with in any material way. Demographics may change that.

III. RETIREMENT BENEFITS

The two primary sources of benefits for older Canadians are the Canada Pension Plan,²¹ a public pension plan that provides benefits linked to the recipient's contributions, and Old Age Security, a social security program that provides a fixed schedule of benefits to persons age 65 and older. Both are managed by the Ministry of Human Resources and Skills Development and run through Service Canada.

These federal benefit programs, like many others, are administered by the Canada Revenue Agency. This seems a reasonable arrangement, given that most benefits are indexed to annual income. The CRA, however, speaks a special language all its own, and some definitions are necessary.

"Adjusted net family income"

A family's adjusted income is its total T1 Line 236²² net income minus any Universal Child Care Benefits or Registered Disability Savings Plan²³ payments, but including any UCCB or RDSP repayments.

"Common-law partner"

For the purpose of federal benefits, common-law partners are unmarried couples who have lived in a conjugal relationship for at least 12 continuous months. Where benefits relate to the death of a person, the couple must have been living together at the time of the person's passing.²⁴

"Separation"

The CRA deems separation to have occurred where spouses or common-law partners have lived separate and apart for 90 days or more without reconciling.²⁵ Once the 90-day period has passed, the effective date of the parties' separation is the date they began to live separate and apart.

²¹ CPP is the mandatory public pension plan administered throughout Canada except in Québec, where the Québec Pension Plan applies. A worker's public pension plan contributions are made based on the place of employment not the place of residence, as a result of which a worker may accumulate both CPP and QPP credits and potentially be entitled to pension benefits under both plans.

²² Line 236 is a taxpayer's gross income from T1 Line 150 less certain prescribed deductions, such as RRSP contributions, spousal support payments and child care expenses.

²³ The RDSP is a tax-deferred savings plan available to persons eligible for the disability tax credit.

²⁴ *Canada Pension Plan*, RSC 1986, c. C-8, s. 2(1).

²⁵ The CRA's website says the following in its page on marital status at www.cra-arc.gc.ca/bnfts/mrtl/menu-eng.html:

"You are separated when you start living separate and apart from your spouse or common

“Spouse”

For the purpose of federal benefits, “spouse” has its narrow ordinary meaning of a person who is married.

Except as noted, all figures in this paper are drawn from the 2013 tax year and apply to the period between July 2013 and June 2014.

A. The Canada Pension Plan

CPP²⁶ retirement benefits are authorized by the *Canada Pension Plan* and are available to anyone who has made at least one pensionable contribution. CPP retirement benefits may be shared between cohabiting spouses and common-law partners, and CPP pensionable contributions may be divided between separated spouses and common-law partners. CPP benefits include the CPP Disability Benefit, discussed above, survivor’s benefits available to spouses and to common-law partners who are cohabiting at the time of death, and a death benefit.

CPP is funded by employee payroll deductions, based on a percentage of income up to a maximum amount, with matching employer contributions.²⁷ The deduction rate and maximum insurable earnings amount varies from year to year; in 2013, the deduction rate was 4.95% to a maximum earnings limit of \$51,100.00, resulting in a maximum employee deduction and employer contribution of \$2,356.20 per year or \$196.35 per month. Self-employed persons pay the employer’s contribution, for a total deduction rate of 9.9% and a maximum contribution of \$4,712.40.

CPP benefits are taxable income reported at Line 114 of the general T1 Income Tax and Benefit Return. Income tax will not be deducted at source unless the recipient completes a Request for Income Tax Deductions Form.²⁸ CPP benefits are not subject to deductions for further CPP contributions, EI premiums or provincial health care premiums.

CPP benefits are income for purposes of the Child Support Guidelines. CPP benefits are also income for the purposes of the Spousal Support Advisory Guidelines,²⁹ however since CPP pensionable contributions are divisible family

law partner because of a breakdown in the relationship for a period of at least 90 days and you have not reconciled. A separation of less than 90 days is not considered a separation for the purpose of child and family benefits. Once you have been separated for 90 days, the effective day of your separated status is the day you started living separate and apart.”

²⁶ www.servicecanada.gc.ca/eng/isp/cpp/cpptoc.shtml

²⁷ www.servicecanada.gc.ca/eng/isp/pub/factsheets/cpps survivor/information_cpp.shtml

²⁸ www.hrsdc.gc.ca/cgi-bin/search/eforms/index.cgi?app=prfl&frm=isp3520cpp&ln=eng

²⁹ Lump-sum death benefits and children’s benefits available to the survivors of deceased CPP recipients excepted.

property, attention must be paid to the double-recovery problem that can arise where a spouse is asked to pay spousal support on income derived from a pension that has already been split with the spouse seeking support.³⁰

Applications for CPP benefits are made through Service Canada.³¹

1. The Basic CPP Retirement Benefit

The CPP retirement benefit is a monthly payment available to persons age 60 and older. As a result of changes taking effect in 2011 and 2012, the amount payable is reduced for persons electing to take their pensions before reaching age 65, as early as age 60,³² and increased for those electing to take their pensions after age 65 up to age 70.³³

The amount of the basic monthly benefit is roughly equivalent to 25% of the recipient's average monthly pensionable earnings,³⁴ subject to adjustments to

³⁰ See the decisions of Mr. Justice Graesser in *Abbot v. Abbot*, 2010 ABQB 585 and Madam Justice Bruce in *Chalmers v. Chalmers*, 2009 BCSC 517. See *Boston v. Boston*, 2001 SCC 43 at para. 65 for a brief discussion of the circumstances in which double-recovery might be permitted.

³¹ www.servicecanada.gc.ca/eng/home.shtml

³² Before 2012, persons wishing to take their pensions earlier than age 65 were required to meet the "work cessation test" and prove that they had stopped working or that their income was less than the monthly CPP maximum benefit. This test is no longer required. Instead, as a result of changes introduced by the *Economic Recovery Act*, S.C. 2009, c. 31, the amount of the benefits clawback, formerly 0.5% of the recipient's maximum benefit per month before turn age 65, will reach 0.6% by 2016:

Year	Monthly Clawback	Annualized Clawback
2012	0.52%	6.24%
2013	0.54%	6.48%
2014	0.56%	6.72%
2015	0.58%	6.96%
2016	0.6%	7.2%

Under the new scheme, therefore, someone retiring at age 60 in 2016 will receive 36% less per month ($7.2\% \times 5$ years) than they would have received retiring at 65.

³³ Further to the same changes, the recipient's maximum benefit per month of retiring after age 65 reached 8.4% in 2013:

Year	Monthly Increase	Annualized Increase
2011	0.57%	6.84%
2012	0.64%	7.68%
2013	0.7%	8.4%

³⁴ *Canada Pension Plan*, s. 46. A recipient's total pensionable earnings are calculated using an incomprehensible formula set out at s. 51; unadjusted pensionable earnings are calculated using a much simpler formula at s. 53 and are the lesser of the aggregate of the recipient's salary and wages for a year or the recipient's maximum contribution for that year.

accommodate contribution interruptions occasioned by parenting responsibilities, disability and so forth.³⁵ The benefit is adjusted every January³⁶ to keep pace with increases in the cost of living, as measured by the Consumer Price Index.³⁷ In 2013, the average monthly benefit paid was \$596.66 and the maximum potentially payable was \$1,012.50.

2. Survivors' Benefits

CPP survivor's benefits consist of:

- a) a single lump-sum death benefit, paid to the estate of the deceased contributor, in the maximum amount of \$2,500.00;³⁸
- b) a flat-rate monthly children's benefit paid to children until age 18, or until age 25 if in full-time attendance at school, in the amount of \$228.66;³⁹ and,
- c) an ongoing pension paid as a flat rate plus 37.5% of the deceased contributor's CPP retirement benefits where the survivor is between 45 and 65 years old⁴⁰ or 60% of the contributor's benefits if the survivor is age 65 or older, subject to a reduction based on any CPP retirement benefits paid to the survivor.⁴¹

To be eligible for any of these benefits, the contributor must have made CPP contributions for at least three years. Eligible surviving children must be the natural or adopted children of the deceased. An eligible surviving spouse is the married spouse of a deceased contributor or the common-law partner of the contributor, providing that the partners were not separated at the time of the contributor's death.⁴²

³⁵ *Canada Pension Plan*, s. 46. In calculating the amount of a recipient's basic pension, the plan drops out: periods of no or low earnings while caring for children under the age of seven; periods of low earnings after age 65; periods when the recipient was eligible for CPP Disability Benefits; and, 15% of the recipient's lowest earning years. See www.servicecanada.gc.ca/eng/isp/cpp/cppinfo.shtml#a6.

³⁶ www.servicecanada.gc.ca/eng/isp/pub/factsheets/cpicpp.shtml

³⁷ www40.statcan.gc.ca/101/ind01/13_3956_2178-eng.htm?hili_none

³⁸ *Canada Pension Plan*, s. 58(1.1)

³⁹ *Canada Pension Plan*, s. 42(1). Payments cease when the child stops attending full-time school or turns 25, whichever occurs earlier.

⁴⁰ *Canada Pension Plan*, s. 58(1)(a)

⁴¹ *Canada Pension Plan*, ss. 58(1)(b), (2)

⁴² *Canada Pension Plan*, s. 42(1)

3. Sharing Retirement Benefits

Spouses and cohabiting common-law partners who are both 60 years old or older may apply to assign their CPP retirement benefits between themselves to reduce their tax burden.⁴³ Where only one person is a CPP contributor, the contributor's benefits will be divided;⁴⁴ where both are contributors, the pension accumulating during the period of the parties' cohabitation is equalized.⁴⁵ The gross amount payable under either circumstance is the same as if the benefits had not been assigned.

4. Splitting Pensionable Credits

Spouses and common-law partners may apply to have the pensionable credits accumulating during the period of their cohabitation⁴⁶ equalized between them. Spouses may apply on the making of a divorce order or a declaration of nullity, or earlier upon the first anniversary of their separation;⁴⁷ common-law partners may apply upon the first anniversary of their separation and must apply within four years of separation, following which the former partner's consent is required.⁴⁸

The splitting of CPP credits is mandatory upon the application of a spouse or a common-law partner within the prescribed time periods. The *Canada Pension Plan* provides that the minister is not bound by the directions of a court order or written agreement as to the division (or not) of pensionable credits,⁴⁹ unless:⁵⁰

- a) provincial legislation expressly permits parties not to equalize their pensionable credits; and,
- b) an agreement "contains a provision that expressly mentions this Act and indicates the intention of the persons that there be no division of unadjusted pensionable earnings under section 55 or 55.1."

At present, the only provinces with such legislation are Alberta,⁵¹ British Columbia,⁵² Saskatchewan⁵³ and Québec.⁵⁴

⁴³ *Canada Pension Plan*, s. 65.1

⁴⁴ *Canada Pension Plan*, s. 65.1(7)

⁴⁵ *Canada Pension Plan*, s. 65.1(9)

⁴⁶ *Canada Pension Plan*, s. 55.1(4)

⁴⁷ *Canada Pension Plan*, ss. 55.1(1)(a), (b)

⁴⁸ *Canada Pension Plan*, s. 55.1(1)(c)

⁴⁹ *Canada Pension Plan*, s. 55.2(2)

⁵⁰ *Canada Pension Plan*, s. 55.2(3)

⁵¹ *Family Law Act*, S.A. 2003, c. F-4.5, s. 82.2

⁵² *Family Law Act*, S.B.C. 2011, c. 25, s. 127(2)

⁵³ *Family Property Act*, S.S. 1997, c. F-6.3, s. 38

B. Old Age Security

OAS⁵⁵ benefits are authorized by the *Old Age Security Act*⁵⁶ and are presently available to Canadian citizens and residents who are 65 years of age or older.⁵⁷ OAS benefits include the Guaranteed Income Supplement, an allowance available to the married spouses and common-law partners of OAS recipients, and a survivor's allowance available to the spouses and partners of deceased recipients.

OAS is funded from the federal government's general revenues and does not require direct contributions from recipients.

All OAS benefits are adjusted every quarter⁵⁸ to keep pace with increases in the cost of living as measured by the Consumer Price Index.⁵⁹

The basic OAS pension is taxable income reported at T1 Line 114. GIS benefits and Allowance income are taxable federal benefits reported at T1 Line 146. Income tax will not be deducted at source unless the recipient completes a Request for Income Tax Deductions Form;⁶⁰ OAS benefits are not subject to deductions for CPP contributions, EI premiums or provincial health care premiums.

With a limited exception relating to the spousal allowance, OAS benefits are income for purposes of the Guidelines and the Advisory Guidelines.

Applications for OAS benefits are made through Service Canada.⁶¹

1. The Basic OAS Pension

The basic OAS pension⁶² is paid monthly and indexed to income. It is available to persons who have lived in Canada for at least 40 years after age 18 regardless of income;⁶³ persons who do not meet this requirement but have lived in Canada

⁵⁴ www.rrq.gouv.qc.ca/en/vie_a_deux/rupture/conjoints_maries/Pages/vous_voulez_renoncer_partage.aspx

⁵⁵ www.servicecanada.gc.ca/eng/isp/oas/oastoc.shtml

⁵⁶ R.S.C., 1985, c. O-9

⁵⁷ *Old Age Security Act*, s. 3(1). In the 2012 federal budget the government announced that the age of eligibility would increase from 65 to 67 over six years, beginning in 2023.

⁵⁸ *Old Age Security Act*, ss. 7(2) and 27

⁵⁹ www40.statcan.gc.ca/l01/ind01/l3_3956_2178-eng.htm?hili_none

⁶⁰ www.hrsdc.gc.ca/cgi-bin/search/eforms/index.cgi?app=prfl&frm=isp3520cpp&ln=eng

⁶¹ www.servicecanada.gc.ca/eng/home.shtml

⁶² www.servicecanada.gc.ca/eng/isp/pub/oas/oas.shtml

⁶³ Other periods of residency may qualify an applicant for the full pension, see www.servicecanada.gc.ca/eng/isp/pub/oas/oas.shtml#three.

for at least 10 after turning 18 will be eligible for a partial pension equal to the full pension reduced by one-fortieth (0.025%) for each year of their residence in Canada less than 40 years. The basic OAS pension is subject to repayment indexed to net income before adjustments⁶⁴ in excess of \$71,592.00.⁶⁵

In 2013, the maximum potentially payable was \$546.07.⁶⁶ As of June 2013, eligible persons may defer receipt of OAS benefits for up to 60 months in exchange for modestly higher benefits there after.⁶⁷

2. The Guaranteed Income Supplement

The GIS⁶⁸ is a monthly benefit available to OAS recipients with combined family incomes below the following amounts in 2013:⁶⁹

- a) \$17,088.00, for single, widowed or divorce recipients,
- b) \$22,560.00, for couples who are both OAS-eligible, or
- c) \$40,944.00, for couples of whom only the recipient is OAS-eligible.

Family income is calculated excluding OAS benefits and certain other benefits⁷⁰ but including income from CPP retirement benefits, private pension plan benefits, RRSP income, interest on savings and so forth.⁷¹ The GIS is reduced for non-OAS income in excess of \$3,500.00 per year.

Although GIS benefits are included in a recipient's taxable T1 Line 150 income, and are therefore income for the purposes of the Guidelines and Advisory Guidelines, the taxable amount reported at T1 Line 146 is deducted from taxable income at T1 Line 250, leaving the benefits received effectively untaxed.⁷²

⁶⁴ T1 Line 234

⁶⁵ Any amount repayable is entered at T1 Line 422 in the calculation of total income tax payable, see www.cra-arc.gc.ca/tx/ndvdl/tpcs/ncm-tx/rtrn/cmpltng/ddctns/lns409-485/422-eng.html and www.cra-arc.gc.ca/tx/ndvdl/tpcs/ncm-tx/rtrn/cmpltng/ddctns/lns206-236/235/s-eng.html.

⁶⁶ www.servicecanada.gc.ca/eng/services/pensions/oas/pension/index.shtml

⁶⁷ www.servicecanada.gc.ca/eng/services/pensions/oas/changes/deferral.shtml

⁶⁸ www.servicecanada.gc.ca/eng/isp/pub/oas/gismain.shtml

⁶⁹ <http://www.servicecanada.gc.ca/eng/services/pensions/oas/payments/index.shtml>

⁷⁰ *Old Age Security Act*, s. 13

⁷¹ *Old Age Security Act*, s. 2

⁷² www.cra-arc.gc.ca/tx/ndvdl/tpcs/ncm-tx/rtrn/cmpltng/rprtng-ncm/lns101-170/146-eng.html

In 2013, the maximum monthly GIS benefits payable were as follows:⁷³

- a) single, widowed or divorced, \$764.40;
- b) couple, spouse eligible for OAS pension, \$506.86;
- c) couple, spouse not receiving OAS pension, \$764.40; and,
- d) couple, spouse receiving OAS allowance, \$506.86.

3. The Spousal Allowance

The spousal allowance⁷⁴ is a monthly benefit available to persons who are Canadian citizens or reside in Canada,⁷⁵ and whose married spouse or common-law partner is eligible for both the basic OAS pension and GIS benefits.⁷⁶ Eligible recipients must be 60 to 64 years of age (and therefore be ineligible for OAS benefits themselves), and have lived in Canada for at least 10 years after turning 18.

Applicants will be required to provide prove of citizenship or residence and proof of their married or common-law relationship, either by marriage certificate or statutory declaration.⁷⁷

The spousal allowance is reported at T1 Line 146 but is deducted from taxable income at T1 Line 250, leaving the allowance effectively untaxed.

The spousal allowance is income for the purposes of the Advisory Guidelines, however, as the allowance terminates within three months of the recipient's separation from the OAS-eligible party the allowance will therefore not be available as income for the purposes of the Advisory Guidelines in connection with that spouse or partner.

The amount payable, if any, is indexed to the family's combined income from all sources other than OAS to a maximum of \$31,584.00. In 2013, the maximum monthly benefit was \$1,198.58.⁷⁸

⁷³ www.servicecanada.gc.ca/eng/services/pensions/oas/payments/index.shtml

⁷⁴ www.servicecanada.gc.ca/eng/isp/pub/oas/allowance.shtml

⁷⁵ *Old Age Security Act*, s. 19(2)

⁷⁶ *Old Age Security Act*, s. 19(1)

⁷⁷ www.servicecanada.gc.ca/eng/isp/pub/oas/allowance.shtml

⁷⁸ www.servicecanada.gc.ca/eng/services/pensions/oas/payments/index.shtml

4. The Survivor's Allowance

The survivor's allowance⁷⁹ is a monthly benefit available to persons whose married spouse or common-law partner has died and who have not entered into a new married or common-law relationship.⁸⁰ Eligible recipients must be Canadian citizens or legal residents,⁸¹ be 60 to 64 years of age, and have lived in Canada for at least 10 years after turning 18.

Applicants will be required to provide prove of citizenship or residence, proof of their married or common-law relationship, either by marriage certificate or statutory declaration, and proof of their spouse or partner's death.⁸²

The survivor's allowance is reported at T1 Line 146 but is deducted from taxable income at T1 Line 250, leaving the allowance effectively untaxed.

The amount payable, if any, is indexed to the recipient's income from all sources other than OAS to a maximum of \$23,016.00. In 2013, the maximum monthly benefit was \$1,198.58.⁸³

C. Related Provincial Programs Administered by the CRA

The CRA administers a small number of provincial programs that provide additional benefits to older Canadians. These benefits share the common quality of being non-taxable and accordingly are not income for the purposes of the Guidelines; they will however be included in the calculation of income under the Advisory Guidelines.

1. Newfoundland and Labrador

The Newfoundland and Labrador Seniors' Benefit is a non-taxed annual payment of \$1,036.00 in 2013 available to single, widowed or divorced persons age 65 and older, and to couples of whom at least one person is age 65 or older and has an income of \$28,654.00 or less.⁸⁴ The maximum benefit is paid up to an adjusted family net income of \$28,645.00 and is phased out for income in excess of this amount to \$37,522.00.

⁷⁹ www.servicecanada.gc.ca/eng/isp/pub/oas/allowsurv.shtml

⁸⁰ *Old Age Security Act*, s. 21(1)

⁸¹ *Old Age Security Act*, s. 21(2)

⁸² www.servicecanada.gc.ca/eng/isp/pub/oas/allowsurv.shtml#a

⁸³ www.servicecanada.gc.ca/eng/services/pensions/oas/payments/index.shtml

⁸⁴ www.cra-arc.gc.ca/bnfts/rldt_pgrms/nl-eng.html#nlsb

2. Ontario

The Ontario Senior Homeowners' Property Tax Grant is an annual cash grant available to low-income persons who pay property taxes and are age 64 and older.⁸⁵ The maximum amount payable is the lesser of \$500.00 and the amount of property taxes payable, and is reduced by 3.33% of adjusted family net income in excess of \$35,000.00 for persons who are single, widowed or divorce, or \$45,000.00 for persons who are married or in a common-law relationship.

⁸⁵ www.cra-arc.gc.ca/bnfts/rltd_pgrms/fq_shptg-eng.htm

IV. ASSETS WITH BENEFICIARIES

When spouses (particularly older spouses) separate, assets that often don't get enough attention are those assets that allow for designation of a beneficiary to receive benefits upon the death of the person making the designation, namely pension survivor benefits, life insurance, and RRSPs/RRIFs (the "Designation Assets").

Separating spouses are usually more focused on the immediate concerns of who gets the house, how much should the equalization payment be, how much should spousal support be and how long should it be paid. They overlook the Designation Assets, do not understand what needs to be done to effectively deal with them, or misapprehend the effect of their legal arrangements (whether a separation agreement, Minutes of Settlement, or a court order) on those assets. The failure to deal with the Designation Assets can and often does result in a bitter dispute after the death of a spouse between the former spouse and other potential beneficiaries (most commonly a new spouse) over entitlement to the Designation Assets.

While it is incumbent on counsel for the parties to be aware of the issues that can arise in relation to Designation Assets and understand how to deal with them, it is also important for the judiciary to be aware of these issues. The parties may be before the court in the context of a settlement conference or the court may be asked to pronounce an order by consent that deals with the Designation Assets (see, for example, *Tarr Estate v. Tarr*, 2014 BCCA 315⁸⁶). Drawing the parties' attention to these issues at the outset hopefully avoids consumption of scarce judicial resources in the future by the designated and would-be beneficiaries. What follows is a sampling (by no means exhaustive) of the disputes that have arisen in relation to the various categories of Designation Assets and some thoughts about them.

A. Life Insurance Cases

- *Hall Estate v. Hall*, 1985 ABCA 31: Estate versus former spouse. Deceased died shortly after making a separation agreement under which former spouse released the deceased and his estate from all claims, including claims to any property. Former spouse remained the designated beneficiary of a life insurance policy when deceased died. No evidence that the deceased intended to alter the beneficiary designation. The

⁸⁶ The divorce order included the terms, by consent, that each spouse would retain for his or her own use absolutely, free of any claim by the other, all pension and pension rights and RRSPs currently in his or her own name and more specifically, that each would retain his or her own pension and benefits under the specific pension plan in issue.

release in the separation agreement did not constitute a declaration for the purposes of the Insurance Act. What is required is clear language divesting the spouse of an interest as beneficiary, e.g. reference to a specific policy. Former spouse prevails.

- *Martindale Estate v. Martindale* (1998), 162 D.L.R. (4th) 475 (B.C. C.A.): Deceased's sister versus former spouse. Per separation agreement, each spouse released "all interest in the estate of the other and all right to benefit from or administer the estate of the other...". Deceased thought she had organized her affairs so that her sister "would get everything" but had not, in fact, changed the beneficiary under the insurance policy. Former spouse is found to hold insurance proceeds in trust for deceased's estate on the basis that it would be against good conscience to allow him to keep the proceeds in face of the separation agreement⁸⁷. Sister prevails.
- *Richardson Estate v. Mew*, 2009 ONCA 403: Former spouse versus second spouse. Separation agreement provided that deceased was required to maintain former spouse as beneficiary of insurance until a certain date and that his further obligation, if any, to maintain the insurance would be determined in conjunction with a support variation application. The deceased and former spouse subsequently made two agreements amending the support obligation but said nothing further about the insurance. The deceased did not alter the beneficiary designation and continued to pay the premiums. He ultimately became incapable due to Alzheimer's. Second spouse claimed the deceased intended to change the beneficiary designation and his failure to do so was due to inadvertence. The court held that rectification of the policy was not appropriate because of the absence of clear evidence of an intention to change the beneficiary. Nor was there unjust enrichment: the beneficiary designation was the juristic reason for the former spouse to receive the insurance proceeds. The general release language in the separation agreement was not sufficient to deprive a beneficiary of rights under the insurance policy and was not sufficient to constitute a declaration under the Insurance Act. Former spouse prevails.
- *Chanowski v. Bauer*, 2010 MBCA 96: Former spouse versus current spouse. Husband dies 13 years after separation with first spouse still named as beneficiary. Current spouse argued that deceased thought he had changed beneficiary to her and relied upon his increase of the insurance

⁸⁷ *Martindale* did not refer to the Supreme Court of Canada's decision in *Soulos v. Korkontzilas*, [1997] 2 SCR 217, which sets out the requirements for a "good conscience" trust - a constructive trust imposed on the basis of wrongful conduct rather than unjust enrichment. It is open to argument that *Martindale* is incorrect, in light of *Soulos*, a fact acknowledged but not resolved by the British Columbia Court of Appeal in *Ladner v. Wolfson*, 2011 BCCA 370.

amount post-separation in support of this. Court noted that general expressions or clauses in separation agreements ought not to be construed as depriving a beneficiary under an insurance policy and do not amount to a declaration within the meaning of the *Insurance Act*. However in some cases where the intention of the deceased can be ascertained, a remedial constructive trust can be imposed. In this case there was no clear evidence that the deceased had an intention to change the beneficiary. In the absence of such evidence, neither the doctrine of constructive trust nor rectification applied. Former spouse prevails.

- *Love v. Love*, 2013 SKCA 31: Former spouse versus son of spouses. Husband intends to change beneficiary of life insurance from ex-wife to son. Incorrectly fills out forms and does not sign them but it is clear he did not want wife to remain beneficiary. Court rejects trust argument founded on *Martindale* but finds it is appropriate in the “extraordinary” circumstances of the case to rectify the error made by the deceased in filling out the forms. Son prevails.

B. RRSPs

- *Hemmerling v. Hemmerling*, 2000 ABQB 808: Former spouse versus current spouse. Minutes of Settlement provided that former spouse received an equalization payment to compensate her for the deceased’s RRSP and that she would not make a claim against the RRSP. The fact that the parties entered the Minutes was evidence of an intention to sever all financial connections between them. To maintain a claim to the RRSP proceeds was a breach of the Minutes. Current spouse prevails.
- *Gaudio v. Gaudio*, 2005 CanLII 14574 (ON S.C.): Estate of deceased (mother and siblings as beneficiaries) versus former spouse. By way of separation agreement, former spouse gave up claims to a share of deceased’s estate. Former spouse remained the beneficiary of group life policy and RRSP. These assets pass to a beneficiary outside of the estate and, therefore, the general release clause did not apply to them. Furthermore, clear language in the agreement required to take away the beneficiary’s rights. Finally, no evidence of an intention on the part of the deceased to change the beneficiary, distinguishing the case from *Martindale*. Former spouse prevails.
- *Campbell Estate v. Campbell*, 2011 ONSC 5079: Estate of deceased versus former spouse. Deceased dies less than 2 months after separation agreement signed, having already made a new will naming a new beneficiary but not changing RSP designations. Separation agreement provides that each spouse will keep that spouse’s RRSPs and gives up entitlement under the other’s Will or upon intestacy. The court finds the

terms of the separation agreement constitute a revocation of the designations for the purpose of the governing legislation or, alternatively, that the terms operate as an estoppel against the wife's claim to the RRSPs. Estate prevails.

- *Tarr Estate v. Tarr*, 2013 BCSC 1994: Former spouse versus current spouse. In addition to the terms in the court order⁸⁸, separation agreement includes waiver of rights to the other's estate. Contrary to the current spouse's argument that the failure to change the beneficiary designation was an oversight, there was no evidence that the deceased mistakenly believed he had revoked the designation in favour of the former spouse or that he did not want to maintain her as beneficiary⁸⁹. As CEO of a credit union, the deceased knew how to change RSP beneficiary designations. Unlike *Hemmerling*, there was no evidence that the former spouse had been compensated for her interest in the deceased's RRSP. Former spouse prevails.

C. Pension Survivor Benefits

- *Tarr Estate v. Tarr* (Appeal), *supra*: Former spouse versus current spouse. Held that, on the proper interpretation of pension legislation in BC, a post-retirement survivor benefit is an asset distinct from monthly pension benefits and once a spouse is designated the beneficiary of a post-retirement survivor benefit, that benefit is an asset vested in the beneficiary spouse. A statement in a separation agreement that each spouse retains that spouse's pension benefits *reinforces* the beneficiary spouse's right to retain the post-retirement survivor benefit. It is only through clear and unequivocal language that the benefit may be taken away from the beneficiary spouse. Former spouse prevails.
- *Carrigan v. Carrigan Estate*, 2012 ONCA 736: Former spouse versus current spouse. Deceased was separated from his first spouse and had been in a common-law relationship for 8 years at the time of his death. However, first spouse and their children remained the designated beneficiaries of his pre-retirement pension death benefit. On the proper interpretation of the pension legislation in Ontario, the common-law spouse did not qualify as a "spouse" if there was still a legal spouse but the legal spouse was not entitled to the benefit in her capacity as spouse due to the separation. The fall-back was the beneficiary designation,

⁸⁸ See footnote 86.

⁸⁹ Given that the RRSP in question was only \$5,500 it is, in fact, plausible that the deceased overlooked it.

which gave the death benefit to the first spouse and their children⁹⁰. Former spouse prevails.

- *MacEachen v. Minnikin*, 2014 NSSC 47: Former spouse versus current spouse. Current spouse advances an unjust enrichment claim against former spouse receiving monthly pension benefit. Separation agreement, which was incorporated into the corollary relief judgment, allowed husband to change designation on his pension if he remarried but he did not change the designation before he died, notwithstanding his remarriage. He did change the beneficiary designation in relation to his life insurance to benefit the current spouse. The court concluded that there was no evidence proving the husband had an intention to change the pension beneficiary designation. Former spouse prevails.

D. Miscellaneous Thoughts

In order to overcome a beneficiary designation to a former spouse, there must be:

- a) clear language in an agreement, Minutes of Settlement, or order revoking the spouse's entitlement as beneficiary; OR,
- b) unequivocal evidence that the deceased did not intend to maintain the former spouse as beneficiary

A beneficiary designation in favour of a spouse is a juristic reason negating any suggestion of unjust enrichment.

A designation as beneficiary is a right or interest distinct from an entitlement to the designation asset itself. So a waiver of a claim to a Designation Asset does not address a beneficiary designation.

If insurance and RRSPs have a designated beneficiary, they pass outside the estate and, therefore a waiver of an entitlement to share in the other spouse's estate should have no effect on the former spouse's right to receive those assets if the former spouse remains the designated beneficiary.

⁹⁰ Following this decision, Ontario's *Pension Benefits Act*, R.S.O. 1990, Chapter P.8, was amended so that, effective July 24, 2014, if a pension plan member dies leaving a legally married separated spouse and a common law spouse, the latter receives the pension benefit, whether it is the pre-retirement death benefit or the post-retirement joint and survivor pension: www.fsco.gov.on.ca/en/pensions/members/Pages/carrigan-standby.aspx

V. DECIDING TO RETIRE

There is no legal requirement in Canada that one become gainfully employed,⁹¹ although life will doubtless prove extremely difficult for anyone who cannot count themselves among the indolent rich or isn't prepared to live wholly off the land. There is similarly no legal requirement that someone who is gainfully employed remain in that condition until death, and accordingly most Canadians expect to retire at some point in their lives. Making the choice to retire and deciding when to retire, however, depend on one's continuing ability to support oneself and one's dependents.

Where an older couple has or is contemplating separation, the issue of supporting oneself and one's dependents becomes a great deal more complicated, primarily because living together is highly cost effective while living apart is not. The income that may have been enough to support one mortgage, one phone bill, one gas bill, one cable bill and one grocery bill may not suffice to cover two sets of living expenses, particularly when the costs of continuing health care are taken into account. Situations like this raise two difficult possibilities for the court as well as the couple in question:

- a) that a cohabiting couple may be unable to separate and live apart, particularly if the family is living on a fixed income, has usually high debt obligations or unusually high health care costs; or,
- b) that, in the case of both separated and cohabiting couples, a spouse may be unable to retire, whether the spouse wishes to retire or not.

The first scenario may have a significant and undesirable impact on the parties' quality of life; it may be intolerable in the event family violence is a concern. Before deciding that a couple has no choice but to "live together apart," a choice Statistics Canada says is made by about 1 in 13 people,⁹² consideration should be given to the federal benefits available to older persons as the rates available to single or separated persons are generally higher than those available to couples. Equalization of the couple's Canada Pension Plan pensionable credits should be considered, along with the potential payments from split private pensions, the division of RRSP, TFSA and other retirement planning accounts, and whether any of the matrimonial property can be usefully converted to an annuity.

The second scenario pits an income-earning spouse's entitlement to choose to retire against that spouse's obligation to provide for the needs of the other spouse, and it is this scenario that the present section of this paper addresses. It

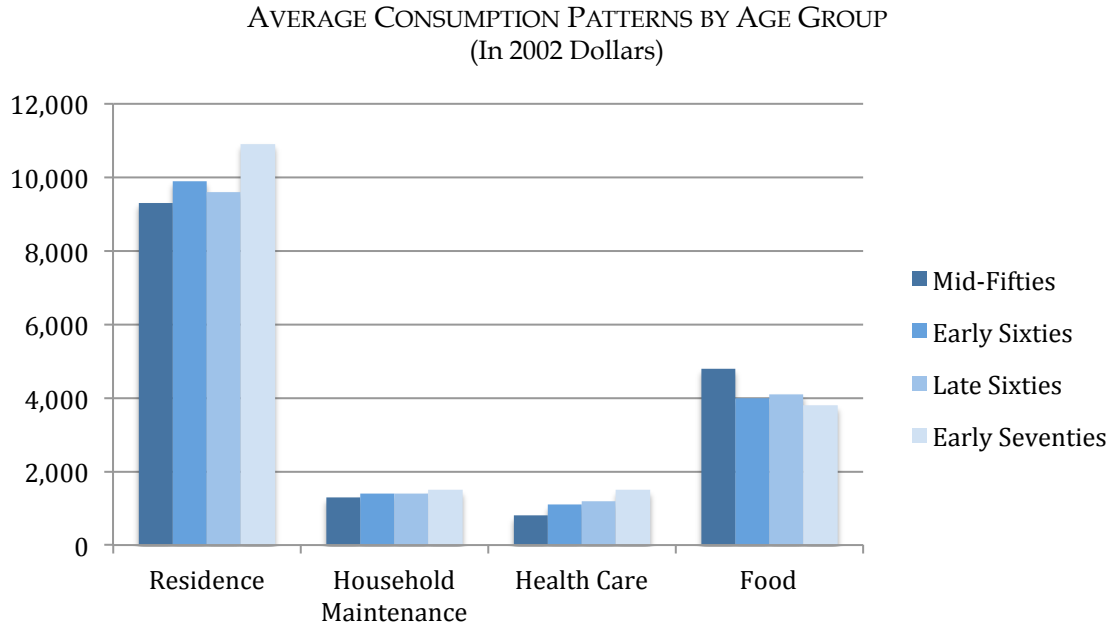
⁹¹ Subject, of course, to the obligations set out at s. 215 of the *Criminal Code*, RSC 1985, c. C-46.

⁹² *Living Together Apart*, Statistics Canada 2013, p. 2.

may be the case that an income-earning spouse simply cannot retire without wreaking financial havoc on both parties and must remain in the workforce.

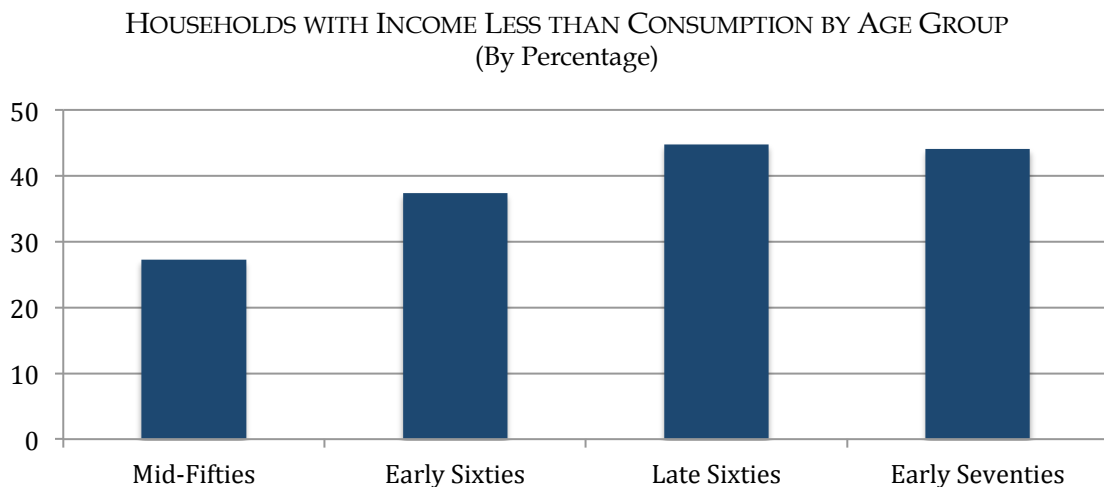
A. Income and Expenses

Although many expenses diminish as people age, such as the amount spent on food, alcohol, tobacco and recreation, other expenses increase, most notably the cost of health care and maintaining a home.



Source: *Consumption Patterns Among Aging Canadians*, Statistics Canada 2011, p. 24

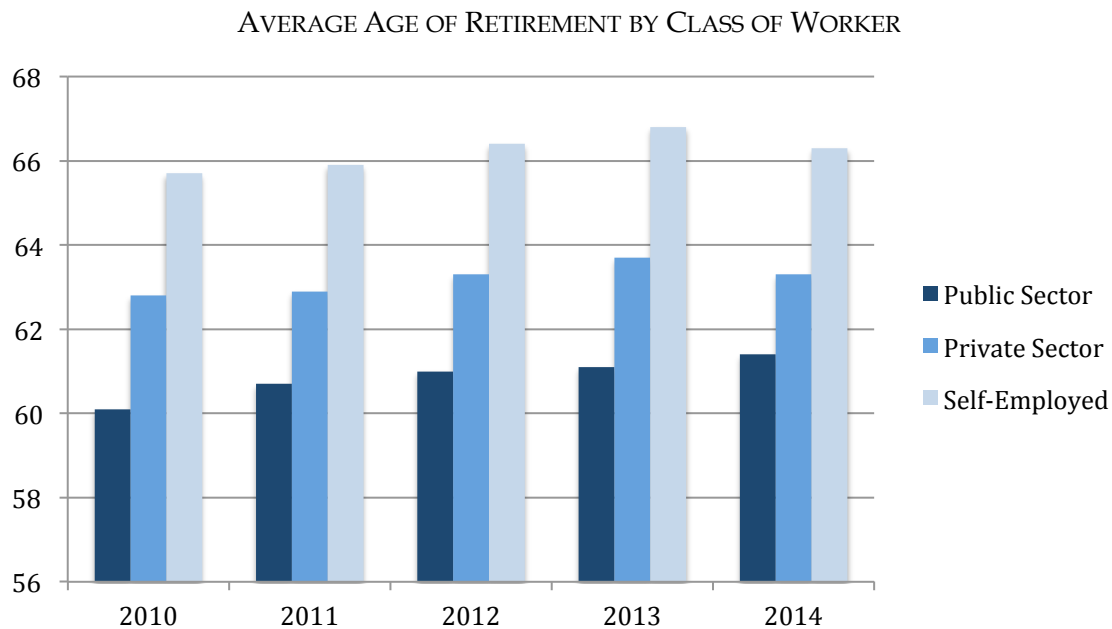
When the decreasing income of older persons is taken into account, the number of households that spend more than they earn correlates with increasing age.



Source: *Consumption Patterns Among Aging Canadians*, Statistics Canada 2011, p. 21

B. The Reasonableness of Retirement

The ability of an income-earning spouse to retire ultimately rests on the reasonableness of that decision in light of the income and income-earning assets available to the couple before the court and the cost of the spouses' current and foreseeable necessary expenses. Statistically speaking, most Canadians retire at some point between age 61 and 66, depending on the nature of their employment; however, while the average age of retirement may shed light on the reasonableness of a spouse's decision to retire, the behaviour of Canadians taken as a whole is otherwise irrelevant to the circumstances of the particular family before the court.



Source: Statistics Canada, CANSIM, table 282-0051

Unfortunately, from the point of view of non-income-earning spouses, the general trend in the case authorities is that the court ought not look behind a decision to retire unless there is evidence that the decision is made in bad faith or, in a somewhat contrary line of authorities, was voluntary.

In *Ross v. Ross* (1994), 7 RFL (4th) 146, the British Columbia Court of Appeal considered the circumstances of a 71-year-old payor of spousal support who sought to retire. The termination of his support payments to his 70-year-old former spouse would force her to sell her condominium, while requiring the payments to continue would force him to continue working. The court held, at paragraphs 15 and 16, that:

“The fundamental question in this case is whether the fact that Mr. Ross is still capable of working at age 71 is a circumstance that should cause this

Court to order that he pay maintenance to Mrs. Ross in a situation where if he does not work their incomes from pensions are equal and she has significantly more in capital assets than he does. ...

“In my opinion, the law does not require Mr. Ross to continue to work after age 71 in order to permit Mrs. Ross to retain her condominium. Mr. Ross may well have a continuing capacity to work at age 71 but neither sub-section 61(2) nor 62(1) of the *Family Relations Act* requires this Court to make an order that would compel him to work by requiring him to pay maintenance to the point that he could not survive on his income without working.”

Although the court perhaps cannot compel a party to continue to work,⁹³ it can consider the reasonableness of a person’s decision to retire to determine whether the decision to retire, and the financial impact of that decision,⁹⁴ is a change in circumstances supporting an application to vary a support obligation.⁹⁵ In *Lemoine v. Lemoine* (1997), 185 NBY 173 (N.B. C.A.), the court held that the “first

⁹³ See *Mirza v. Mirza*, 2006 BCCA 362, *Vaughn v. Vaughn*, 2014 NBCA 6, *Rondeau v. Rondeau*, 2011 NSCA 5 and *Powell v. Levesque*, 2014 BCCA 33. However see also *Bostrom v. Bostrom* (1996), 26 RFL (4th) 120 (B.C. C.A.) in which, in the context of a child support obligation, the court held at paragraphs 12 and 13:

“... The husband has urged that he has worked for a total of 41 years, and at his age he is entitled to semi-retire.

“I am not persuaded to that view. This is a man who rather late in life had two daughters, both of whom are now teenagers. He cannot shun his responsibilities to the two daughters and actively take semi-retirement with those obligations outstanding.”

In *Wyman v. Wyman* (1999), 49 RFL (4th) 447 (N.S. C.A.), the payor’s retirement income was insufficient to meet his needs, those of his current wife and those of his former wife. The court offered these comments:

“... The pension income which will take effect next August is substantially less. So long as Mr. Wyman and his first wife consider themselves retired from the work force, all three will be forced to exist well below the poverty line. It is unrealistic to consider that Mr. Wyman, an unemployed sixty-year-old radio executive living in a small town, could find employment at anything approaching his previous income. But both he and the first Mrs. Wyman appear personable and intelligent and should be employable in some situations, such as sales, at least until they are sixty-five. A small additional income could make a large difference. Both should be seeking work.”

The court provided a similar direction in somewhat stronger terms in *Bellemare v. Bellemare* (1990), 28 RFL (3d) 165 (N.S. C.A.), a case in which the payor was in good health and had retired from the military at the age of 42 after 25 years of service:

“I am satisfied that the husband, if properly motivated, will find employment adequate to produce a total income, together with pension, at least equal to the income which he enjoyed while a member of the Canadian Armed Forces and most likely he will obtain additional income which results in a gross annual income in excess of that which he enjoyed before his unilateral termination. He would require employment at an annualized rate of only about \$22,500.00 with pension to equal his previous income. Given his skills I find this is well within his capacity.”

⁹⁴ See *R.P. v. R.C.*, 2011 SCC 65.

⁹⁵ See *Willick v. Willick*, [1994] 3 SCR 670.

question” that must be addressed on the retired payor’s appeal of the dismissal of his variation application is

“... whether the early retirement of Mr. LeMoine constituted a material change in his circumstances sufficient to form the basis for a consideration of a variation order pursuant to subsection 17(4) of the *Divorce Act* ...”

1. Bad Faith

In *Vennels v. Vennels* (1993), 76 BCLR (2d) 69 (B.C. S.C.), a 55-year-old payor of spousal support accepted an offer of early retirement made by his employer as part of a down-sizing effort and subsequently sought to reduce his support payments. Concluding that the payor’s application was not motivated by an intention to avoid the support order, the court considered his retirement to be a material change in circumstances within the meaning of s. 17(4) of the *Divorce Act*, now s. 17(4.1), for the purposes of his variation application. Likewise, in *Powell*, the court in determining that the payor’s retirement constituted a change in circumstances, held, at paragraph 34, that:

“The evidence did not support the judge’s finding that the appellant took early retirement. Nor was there any evidence that the appellant chose to retire in order to avoid her support obligation or any of her other financial commitments under the Consent Order, all of which she had met.”

The court in *Lemoine* cited *Ross* and *Vennels* for the conclusion that:

“... generally, a supporting spouse cannot be required to continue working. It is only when a spouse is acting in bad faith in order to frustrate the right of a former spouse to support that the Court should look behind the decision to retire ...”

It follows that a decision to reduce one’s workload or retire made in good faith should usually support a conclusion that a material change in circumstances has occurred for the purposes of a variation application, as was the case in *P.M. v. S.M.*, 2011 SKQB 126, particularly if all parties are aware of the income-earning spouse’s intention to retire early⁹⁶ or if the spouse’s retirement was anticipated or foreseeable.⁹⁷

In *J.F. v. F.F.*, 1989 ABCA 306, the payor’s decision to retire at age 65 to avoid the further garnishment of his paycheque to satisfy his arrears of spousal support was found not to constitute a change in circumstances despite his

⁹⁶ See *Cramer v. Cramer*, 2000 BCCA 272 and *Beck v. Beckett*, 2011 ONCA 559.

⁹⁷ See *Matthews v. Matthews* (1990), 29 RFL (3d) 381 (B.C. C.A.).

impoverishment, a decision bolstered by the payor's failure to return to gainful employment. At paragraph 8, the court observed that:

"There is no evidence that J.F. sought any paid employment or made any attempt to return to his prior real estate work. Thus, his apparent impecunious status arises not from any adverse circumstances beyond his control but relates directly to his own decision to retire from paid employment but continue to work for his second wife on almost a full-time basis without any direct remuneration."

In *MacLanders v. MacLanders*, 2012 BCCA 482, the retirement of a payor of spousal support was found not to constitute a material change where the payor had intended to retire but failed to disclose his plans at trial, on the basis that the change in circumstances was known to him at the time of the trial, applying the test in *Willick*.

Note that a decision to retire made in bad faith, for the purpose of avoiding a spousal support obligation can also be used to support the imputation of income to a potential payor at trial.⁹⁸ In *Jordan v. Jordan*, 2011 BCCA 518 the payor's decision to sell a profitable business and take less remunerative work and "retire, or at the very least, to semi-retire," dictated neither by economic or medical reasons but motivated by a wish to escape a spousal support obligation, resulted in the court imputing income to the payor.

2. Retirement Upon Eligibility for Full Retirement Benefits

In *Powell*, the court cited *Ross* for the proposition, at paragraph 33, that:

"... the law does not require payor spouses to maintain spousal support at a level that forces them to continue to work after becoming eligible for full retirement benefits."

Accordingly, the court considered the appellant's retirement at the age of 44, after completing 25 years of service in the military and becoming eligible for full benefits, to be a material change in circumstances supporting an application to vary her spousal support obligation.

3. Voluntary Decisions to Retire

In *Morton v. Morton*, 2005 SKCA 133, a payor of spousal support sought to vary his support obligation following his decision to take a reduced workload at age 57 and retire fully at age 65. Upholding the chambers judge's decision that the

⁹⁸ See *Teeple v. Teeple* (1999), 2 RFL (5th) 464 (O.C.A.).

payor's decision to retire did not constitute a change in circumstances, the court commented, at paragraph 8, that, notwithstanding the conclusion in *Lemoine*:

“Retirement issues of this kind must be resolved by reference to the particular circumstances of each case. In this appeal, those circumstances include: (a) the appellant's retirement is wholly voluntary and not forced by illness, declining competency or uncertain employment prospects; (b) the appellant was 57 when he decided to semi-retire ...”

Likewise, in *Sangster v. Sangster*, 2014 NBCA 14, the court upheld the chambers judge's conclusion that the payor's decision to take early, voluntary retirement at age 56 did not constitute a change in circumstances without evidence as to the reason for his retirement. In *Chase v. Chase*, 2013 ABCA 83, a voluntary retirement at age 60 on the basis of medical reasons was found not to constitute a change in circumstances without evidence to support the claimed medical reasons.⁹⁹

On the other hand, in *Stroud v. Stroud* (1996), 22 BCLR (3d) 184 (B.C. C.A.), the court held that an involuntary retirement which “unexpectedly and materially altered” the payor's capacity to pay spousal support is a material change sufficient to consider the variation of a consent order.¹⁰⁰

C. Options for the Court

The stream of income of an older couple in straitened financial circumstances can rarely be increased other than by working longer and harder, which is plainly not the result sought by a person seeking to retire. If the family is living on a fixed income, the family's net income can be increased by separating, however the increase realized by each individual may not suffice to cover the costs of living independent of one another. If separation is chosen, the financial effects can be devastating, and are usually felt more keenly by women than men.

A judge at a settlement conference may be able to cajole an income-earning spouse to remain in the workforce for a few more years; it is unlikely, I suggest, that the spouse could be ordered to remain employed, even though that may be the only logical recourse that will keep a separated family afloat.¹⁰¹ Absent a result along these lines, older couples should take a look at all of the options available to them. On turning 65, each will be eligible for Old Age Security, and Canada Pension Plan benefits can be applied for as early as 60. Poorer individuals may qualify for the Guaranteed Income Supplement discussed elsewhere in this paper. CPP credits can be equalized to provide the dependent

⁹⁹ See also *Hanson v. Hanson*, 2005 BCCA 119.

¹⁰⁰ See also *Strang v. Strang*, [1992] 2 SCR 112.

¹⁰¹ The practical difference between an order requiring an individual to keep working and an order imputing income to someone without other resources is unclear to me.

spouse with additional income, and OAS and GIS benefits are generally higher for singletons than for couples. Personal retirement savings vehicles like RRSP and TFSA accounts and private pensions are usually divisible family assets that can be divided between spouses. If the couple is income poor but asset rich, assets may be carefully invested in annuities providing monthly payments.

Where a spouse continues to have the capacity to pay spousal support, his or her retirement does not automatically cancel the obligation; spousal support payments can and do continue past retirement.¹⁰² The court in *Vaughn* provided these recommendations for judges considering post-retirement spousal support orders at paragraph 21:

“In my view, a trial judge attempting to set spousal support once a payor spouse has retired must undertake an analysis of the situation, comparing the finances of both parties taking into consideration their means, needs and ability to pay. Trial judges should also consider whether the support ordered was compensatory in nature.”

Where spousal support is ordered and the payor’s retirement is foreseeable, the court may, depending on the circumstances of the parties and the attitude of the payor, also wish to consider making the order reviewable upon his or her retirement. A reviewable order will save the payor from the necessity of establishing a change in circumstances and allow the court to consider the couple’s situation afresh, in the manner suggested in *Vaughn*.

¹⁰² See, for example, *MacLanders, Boston v. Boston*, 2001 SCC 43, *Muzillo v. Muzillo*, 2001 BCCA 44, *S.K.M. v. F.E.M.*, 2012 PECA 3, *McCulloch v. McCulloch*, 2013 ABCA 298, *Pinder v. Pinder*, 2010 BCCA 235, *Meiklejohn v. Meiklejohn* (2001), 19 RFL (5th) 167 (O.C.A.) and *Schmidt v. Schmidt* (1998), 156 DLR (4th) 94 (B.C. C.A.).

VI. CAPACITY IN THE MATRIMONIAL CONTEXT

According to information found on the alzheimers.ca website,¹⁰³

- a) in 2011, 747,000 Canadians were living with cognitive impairment, including dementia;
- b) many diseases can cause dementia;
- c) the most common forms of dementia are Alzheimer's disease and vascular dementia;
- d) some treatable conditions produce symptoms similar to dementia. These symptoms can be reversed with appropriate treatment; and,
- e) 72% of Canadians with Alzheimer's disease are women.

A report titled *2014 Alzheimer's Disease, Facts and Figures*,¹⁰⁴ states that in the U.S., 1 in 9 people (11%) of people aged 65 or older has Alzheimer's disease. For people aged 71 and older, the number increases to 13.9%.

As the population greys and older couples embark on the path of separation and divorce, the number of cases in which mental capacity may be an issue is bound to increase.¹⁰⁵ The issues that arise when a spouse has capacity issues are as follows:

- a) did the spouse have capacity to form the intention to separate?
- b) if there is an intention to separate, is it the product of influence?
- c) when is the relevant time for determining a spouse's intention to separate?

¹⁰³ www.alzheimer.ca/en/About-dementia

¹⁰⁴ www.alz.org/downloads/Facts_Figures_2014.pdf

¹⁰⁵ A useful resource generally on the issue of capacity is the British Columbia Law Institute's *2013 Report on Common-Law Tests of Capacity* (the "BCLI Report"), available online at www.bcli.org/wordpress/wp-content/uploads/2013/09/2013-09-24_BCLI_Report_on_Common-Law_Tests_of_Capacity_FINAL.pdf. See, in particular, Chapters X-XIII, covering respectively capacity to retain legal counsel, capacity to marry, capacity to form the intention to live separate and apart from a spouse, and capacity to enter into an unmarried spousal relationship.

- d) if matrimonial litigation is being pursued by an incapable spouse who does not have capacity to instruct counsel, who is the appropriate litigation guardian?

A. Capacity to Form the Intention to Separate

Different tasks require different standards for capacity. As Gerald B. Robertson states in *Mental Disability and The Law in Canada*:¹⁰⁶

“... legal capacity is task specific; incapacity in one area does not necessarily mean incapacity in another.”

In *Calvert v. (Litigation Guardian of) v. Calvert*, (1997) 32 O.R. (3d) 281 (G.D.),¹⁰⁷ the Court noted at paragraph 56:

“There is a distinction between the decisions a person makes regarding personal matters such as where or with whom to live and decisions regarding financial matters. Financial matters require a higher level of understanding. The capacity to instruct counsel involves the ability to understand financial and legal issues. This puts it significantly higher on the competency hierarchy. It has been said that the highest level of capacity is that required to make a will.”

It is well-established in the jurisprudence that when it comes to matters of marriage and separation, the capacity standard is very low: *Wolfman-Stotland v. Stotland*, 2011 BCCA 175,¹⁰⁸ *Calvert* and, *Banton v. Banton*¹⁰⁹, 1998 CanLII 14926 (ON SC). The British Columbia Court of Appeal in *Wolfman-Stotland* cited with approval the following discussion of capacity in the trial decision of *Calvert* at paragraphs 54 and 55 of that case, cites omitted:

“Separation is the simplest act, requiring the lowest level of understanding. A person has to know with whom he or she does or does not want to live. Divorce, while still simple, requires a bit more understanding. It requires the desire to remain separate and to be no

¹⁰⁶ *Mental Disability and The Law in Canada*, 2nd ed., Carswell 1994 p. 179

¹⁰⁷ Ms. Calvert started losing her cognitive abilities in the year before she articulated the intention to end her marriage and was eventually diagnosed with Alzheimer’s disease. However, she was consistent in articulating her intention to separate for several months after first doing so.

¹⁰⁸ It was agreed that Ms Stotland was incapable of managing her financial affairs. There was unchallenged evidence that she retained the ability to instruct counsel on the financial aspects of her divorce.

¹⁰⁹ Mr. Banton had the capacity to marry notwithstanding that he had been certified financially incapable and was found to be incapable of making a will.

longer married to one's spouse. It is the undoing of the contract of marriage.

"The contract of marriage has been described as the essence of simplicity, not requiring a high degree of intelligence to comprehend. If marriage is simple, divorce must be equally simple. The American courts have recognized that the mental capacity required for divorce is the same as required for entering into marriage."

and concluded, at paragraph 27, that:

"As the authorities make clear, the capacity to form the intention to live separate and apart has been accepted as equivalent to the capacity to enter into a marriage. As the Court stated in *Calvert*, the intention to separate requires the lowest level of understanding. The requisite capacity is not high, and is lower in the hierarchy than the capacity to manage one's affairs."

As a result, to pick one example, one may lack the capacity to make a will yet have the capacity to marry.¹¹⁰

The BC Court of Appeal in *Wolfman-Stotland* accepted that, although the wife did not have the capacity to manage her own affairs, she had capacity to instruct counsel and this was sufficient to establish that she had the capacity to separate.

The fact that a spouse may suffer from delusions about the other spouse that contribute to the desire to separate does not mean the spouse cannot form the intention to separate so long as the delusional spouse nonetheless retains the ability to manage her own affairs and to instruct counsel.¹¹¹

When one spouse contests the capacity of the other to separate, it is important to consider the motives of each of the spouses:

- a) does the spouse who contests the other spouse's capacity to separate control the property in a marriage and is he or she trying to avoid the division of that property or an equalization payment (see *Calvert*)?
- b) does the allegedly incapable spouse have a plausible reason for wanting the separation?

With respect to the reason to seek a separation, in *Babiuk v. Babiuk*, 2014 SKQB 320, the incapable spouse gave evidence that she had been physically abused

¹¹⁰ See *Banton and Re Park*, [1953] 2 All E.R. 1411 (C.A.).

¹¹¹ See *A.B. v. C.D.*, 2009 BCCA 200.

throughout the marriage and wanted to remain separate from her husband. In *Lantzius v. Lantzius*, 31 August 2011, BCSC Action No. E11330, Vancouver Registry, although the wife was confused about several things, including the identity of her counsel and her place of residence, her intention to separate was plausible in light of the husband's confession to her that he had found someone else.

B. Is the Intention to Separate the Product of Influence?

Testamentary capacity can be vitiated by undue influence,¹¹² as can the capacity to marry.¹¹³ There is no reason the same should not apply in relation to an intention to separate.

If the spouse with compromised or questionable capacity is asserting the separation, there may be some relative or other supporter assisting that spouse (encouraging the spouse to separate) who will benefit from the incapable spouse's successful property claim or from the flow of income to the incapable spouse if a support order is made.

C. When Is the Relevant Time for Determining Intention to Separate?

It is not necessary that a spouse have the intention to live separate and apart at the time the divorce is adjudicated. Section 8(3)(b)(i) of the *Divorce Act* provides that:

- (b) *a period during which spouses have lived separate and apart shall not be considered to have been interrupted or terminated*
- (i) *by reason only that either spouse has become incapable of forming or having an intention to continue to live separate and apart or of continuing to live separate and apart of the spouse's own volition, if it appears to the court that the separation would probably have continued if the spouse had not become so incapable*

Therefore, it is sufficient that a spouse had clearly expressed/maintained the intention to separate while capable of doing so even if the spouse later becomes incompetent.¹¹⁴

¹¹² See *Vout v. Hay*, [1995] 2 SCR 876.

¹¹³ See *Feng v. Sung Estate*, 2003 CanLII 2420 (ON SC) and *Barrett Estate v. Dexter*, 2000 ABQB 530.

¹¹⁴ See *Calvert and M.K.O. (by his Litigation Guardian) v. M.E.C.*, 2005 BCSC 1051.

D. Who is the Appropriate Litigation Guardian?

If the spouse is incapable of instructing counsel, a litigation guardian must step in. The leading case regarding the appointment of a litigation guardian is *Gronnerud (Litigation Guardians of) v. Gronnerud Estate*, 2002 SCC 38, a case in which the litigation guardians commenced proceedings for division of property and a dependents' relief proceeding on behalf of their incapable mother against the estate of their father. If successful, the mother's estate would be enhanced to the benefit of the litigation guardians. The division of property would result in the sale of the family farm but the evidence established that, while capable, the mother wanted the farm preserved.

The Supreme Court of Canada in *Gronnerud* affirmed that the principle consideration is who will act in the best interests of the incapable person. Among other things, the evidence must demonstrate that the litigation guardian is both qualified and prepared to act and, in addition, is indifferent to the outcome of the proceedings. To be "indifferent" means:

- a) the litigation guardian has no conflict of interest with the incapable person;
- b) the litigation guardian must be able to provide a neutral unbiased assessment of the legal situation of the incapable person; and,
- c) the litigation guardian must be able to offer an unclouded opinion as to the appropriate course of action.

Although having a close family member as a litigation guardian is acceptable in most cases, there are exceptions. Because the litigation over the dead father's estate was acrimonious and the litigation guardians stood to benefit from the potential enhancement of their mother's estate, they were not indifferent to the result of the legal proceedings and thus were removed.

To similar effect is *M.A.C.L. v. W.A.E.L.*, 2003 BCSC 1205, in which the son of an incompetent wife commenced a matrimonial proceeding against her husband, his father. That the litigation guardian stood to potentially benefit from the litigation and was also likely to be influenced by his brother, who was long estranged from their father, was sufficient to justify his removal. However, see also *Zabawskyj v. Zabawskyj*, 2008 ONSC 19248 and *Owen v. Owen*, 2010 ONSC 2852 in which litigation guardians were not removed simply because of a potential benefit to them if the incompetent person succeeded in the litigation. In *Zabawskyj*, the fact that the son was the sole beneficiary of his father's estate was evidence that he and his father had similarity of interest in defending against the mother's claims in the family trial.

There must be more than a perception of conflict of interest to disqualify or remove a person from being litigation guardian. Rather, some actual conduct or misconduct is required.¹¹⁵

¹¹⁵ See *Shemesh v. Goldlist*, 2008 CanLII 19228 (ON SC).