

THE PROBATER

VOLUME 23, NUMBER 2, September 2017



HULL & HULL LLP
Barristers and Solicitors

FAMILY LAW CONSIDERATIONS FOR THE DRAFTING SOLICITOR

By David Morgan Smith

OVERVIEW

The statutory entitlements of spouses, be they married or common law, are well known to drafting solicitors. So, for instance, a client who wishes to cut her husband out of her Will would be well advised that to do so would expose the estate to the surviving spouse's right to: (i) elect and make application under the *Family Law Act* ("FLA")¹ and (ii) apply for dependant's relief under Part V of the *Succession Law Reform Act* (SLRA)².

A more complex enquiry is undertaken by the drafting solicitor who chooses to advise his or her married client (presumably outside of a joint retainer) of the effect that a separation or divorce could have on an estate plan. While the conventional practice tends to recommend that clients revisit their estate plan after a separation or divorce, this advice is not always followed. If the discussion of the contingency of separation and divorce is undertaken, three kinds of assets (among others) merit special consideration: (i) Joint Accounts, (ii) Pension Benefits, and (iii) Life Insurance.

JOINT ACCOUNTS

If a surviving spouse chooses to elect and make application under the *FLA* rather than take his or her entitlement under the Will, the process of determining equalization of net family property can be complicated when the spouses held joint accounts.

Subsection 14(a) of the *FLA* provides that property held by spouses in joint accounts shall be intended, in the absence of proof to the contrary, to be owned

jointly. The presumption may be rebutted by the spouse who seeks to have such monies excluded from net family property.³

In the recent Ontario Superior Court of Justice case of *McLean v. Dahl*,⁴ a husband sought a declaration that he was the sole owner of proceeds in a joint bank account in the amount of \$94,565 at the date of separation.

The Court considered the following facts in arriving at a determination that the presumption of joint ownership was not rebutted:

1. Both parties used the account as they saw fit; however, it was their practice to consult one another if major purchases were to be made;
2. When the parties decided to grant a sizeable loan to friends, the funds came from the joint account. When the funds were repaid to the wife alone, she returned them to the joint bank account;
3. When the parties decided to work on their marriage, they agreed to put these funds into a joint account on the condition that both their signatures were required to make a withdrawal; and
4. The spouses discussed major transactions using these funds and shared the tax liability for income on these funds.

PENSION BENEFITS

As an estate planning tool, legal and financial advisors often impress upon their clients the

Continued on back

benefits of designating beneficiaries of certain instruments such as RRSPs, TFSAs, and life insurance policies. In the absence of a beneficiary designation, the proceeds will fall into the estate and attract Estate Administration Tax and be available to creditors of the Deceased, possibly thwarting the objectives of the estate plan.

Pensions, however, are a special case. Section 48(7) of the *Pension Benefits Act*⁵ is remedial in nature and contemplates the necessity to provide safeguards for surviving spouses, including common law spouses. In short, if a beneficiary is not designated on the death of a member of a pension plan, the proceeds do not fall into the estate; rather, the surviving spouse is entitled to the asset.

In *Burgess v. Burgess Estate*,⁶ the Ontario Court of Appeal considered whether a former wife of the deceased was entitled to receive all of the benefit available under the deceased's deferred profit sharing plan for which she was the sole designated beneficiary, or whether she was entitled only to one-half of the benefit in accordance with the parties' separation agreement, which read as follows:

"Except as specifically provided, neither the Husband nor the Wife will make a claim to a share in any pension of the other, including but not limited to any company pension plans, registered retirement savings plans and registered home ownership plans, provided that the Wife shall be entitled to one-half of the benefits under the Husband's deferred profit sharing plan."⁷

As a result of the express and specific wording of the separation agreement, the Court concluded that the former wife was restricted to receiving half of the benefit.

Accordingly, in order for a spouse to contract out of a benefit, the Court would appear to require specific and express language to such effect. A general release will not be sufficient.

LIFE INSURANCE

In the event of separation or divorce, it is standard practice for the spouse making support payments to make an irrevocable beneficiary designation of life insurance for the support recipient. This obligation may be assumed by way of separation agreement or Court Order.

In *Dagg v. Cameron Estate*,⁸ the Ontario Court of Appeal has clearly pronounced on the relationship between such a beneficiary and a different support claimant under the *SLRA*.

An irrevocable designated beneficiary of life insurance has a first charge against the insurance proceeds to the extent of the support obligations owing under Court ordered support. If the spouses contracted in a Separation Agreement that the irrevocable benefit of an entire policy amount passes to the surviving spouse, it appears that such contractual entitlement entirely precludes the rights of any other support claimant.

SUMMARY

It is difficult when advising clients to contemplate every possible contingency, particularly those which veer into other areas of law that may be outside of the wheelhouse of the drafting solicitor. Family law considerations, however, clearly overlap with estates law both at the planning stage and at the outset of the administration of an estate. While the best advice is for clients to revisit their estate plan after any major life event, there are many cases where the Courts have had to consider situations where this advice was not followed.

¹ *Family Law Act, RSO 1990 c F3* ["FLA"].

² *Succession Law Reform Act, RSO 1990, c s 26*.

³ *Belgiorgio v Belgiorgio, 2000 CanLII 22733 (ON SC)*.

⁴ *McLean v Dahl, 2017 ONSC 1288 (CanLII)*.

⁵ *Pension Benefits Act, R.S.O. 1990, c. P.8*.

⁶ *Burgess v Burgess Estate, 2000 CanLII 16989 (ON CA)* ["*Burgess v Burgess Estate*"].

⁷ *Burgess v Burgess Estate, ibid at para 10*.

⁸ *Dagg v Cameron Estate, 2017 ONCA 366 (CanLII)*.



HULL & HULL LLP

Barristers and Solicitors

Trust Experience™

Editor: Suzana Popovic-Montag

141 Adelaide St. W., Suite 1700

Toronto, Ontario M5H 3L5

Tel: (416) 369-1140 Fax: (416) 369-1517

spopovic@hullandhull.com | www.hullandhull.com

Please note that all back issues of *The Probater* are available in full text on our website:

www.hullandhull.com