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"The Ongoing Obligations Of The Estate Planning Retainer With Husband And Wife"

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The Ongoing Obligations Of The Estate Planning Retainer With Husband And Wife

Introduction

The generally non-contentious approach to estate planning can lull a lawyer into forgetting that friendly familial situations can turn sour. When things do not work out as the clients intended, negligence, issues the disciplinary rules and ethical considerations which apply to all lawyers suddenly may impose themselves into an otherwise peaceful setting.

Many of these problems arise because, by the very nature of an estate planning practice, and in particular when a lawyer represents both a husband and a wife. More often than not, estate planning clients are married couples. While occasionally spouses have different lawyers plan their estates, the majority retain one lawyer to prepare both spouses' documents.

The nature of the retainer itself is often overlooked and may as a result give rise to negligence issues.

Retainer Generally

The case law provides that there is no need for a formal retainer in order for the solicitor-client relationship to be constituted.[1] A retainer has been defined as a "contract whereby in return for the client's offer to employ the solicitor, the solicitor expressly or by implication undertakes to do certain things."[2] The difficulty that arises with estate planning solicitors and with solicitors in any event, is the question of when the retainer is at an end. It is recommended that the solicitor should formally in writing confirm that the work has been completed and that the retainer is an end.[3] The central issue is of course that if this is not done or cannot be done, liability may ensue if a client is under the impression that the solicitor is still acting and looking out for the client's interest.[4]

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[1] Hogue v. Montreal Trust Co. of Canada (1994), 138 N.S.R. (2d) 97 (S.C.); Mierzwinski, [1982] 1 S.C.R. 860. See also Hines v. Willians, (2002) WTLR 299 at p. 305 and 308.

[2] Graham Green, ed., Cordery's Law Relating to Solicitors , 7th ed (London; Butterworths, 1981) at p.49. See also Jackson and Powell on Professional Negligence (3rd ed) (London; Sweet and Maxwell, 1992) at p. 309.

[3] Campion and Dimmer Professional Liability in Canada, (Carswell) at p.7-10

[4] Ibid at p.7-10. See also 120 Leaseholds Inc. v. Thomson, Rogers (1995), 43 R.P.R. (2d) 79 (Ont. Gen. Div.) additional reasons at May 12, 1995, document Toronto 92-CQ-19141 (Ont. Gen. Div.).

Frequently, in a solicitor's practice it is appropriate to prepare "mirror wills" for a husband and wife for whom you act. The wills provide for all of each others assets to pass to and they are identical in all respects.

The debate that has carried on throughout the estates bar is what does the solicitor who wrote the will do if one of those spouses come back to that solicitor and requests that solicitor to make changes to the prior "mirror will", which affects the surviving spouse adversely.

Does the solicitor tell the other spouse?

This is an ethical dilemma that may give rise to a negligence claim and there is no simple answer.

Where There Are No Prior Instructions

The solicitor is clearly in a position of conflict between the spouses and unless the solicitor has received prior instructions from both clients as to how to deal with this situation, that solicitor may have a difficult decision to make.

The following is an outline of the relevant rules of professional conduct.

Rules of Professional Conduct

2.03(1)- a lawyer at all times shall hold in strict confidence all information concerning the business affairs of the client acquired in the course of the professional relationship and shall not divulge any such information unless expressly or impliedly authorized by the client or required by law to do so.

2.04- Avoidance of conflicts of interest:

Definition

2.04(1)- In this Rule

A "conflict of interest" or a "conflicting interest" means an interest

(a) that would be likely to affect adversely a lawyer's judgment on behalf of, or a loyalty to, a client or prospective client, or

(b) that a lawyer might be prompted to a preferred to the interests of a client or prospective client.

Definition

Avoidance of conflicts of interest:

(2) a lawyer shall not advise or represent more then one side of a dispute

(3) a lawyer shall not act or continue to act in a matter where there is or is likely to be a conflicting interest unless, after disclosure adequate to make an inform decision, the client or prospective client consents.

The commentary with respect to Rule 2.04(3) provides that a lawyer should examine whether a conflict of interest exists not only from the outset but throughout the duration of a retainer because new circumstances or information may establish or reveal a conflicting interest. It is clearly an ongoing obligation.

Joint Retainer

(6) before a lawyer accepts employment from more then one client in a matter or transaction, the lawyer shall advise the clients that

(a) the lawyer has been asked to act for both or all of them,
(b) no information received in connection with the matter from one can be treated as confidential so far as any of the others are concerned, and
(c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and they have to withdraw completely.

Existing Client- Continuing Relationship

(7) Where a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment from the client and another client in a matter or transaction, the lawyer shall advise the other client of the continuing relationship and recommend that the client obtain independent legal advise about the joint retainer.

(8) Where a lawyer has advised the clients as provided under sub rules (6) and (7) and the parties are content that that lawyer act, the lawyer shall obtain their consent

The solicitor can of course refuse to draw the new will; however, this is not a very satisfactory solution as the client will just get another solicitor down the

street to draw the will and the first lawyer of course may jeopardize the existing business relationship. However, this option does not solve the problem as to whether or not the solicitor has an obligation to inform the other spouse of the wish or wishes of the other spouse.

If the solicitor informs the other spouse of the change, there is of course the problem that the solicitor will be sued for breach of trust and negligence or acting in conflict of interest.

Planning for the Severing of a Mirror Will

In some respects, you, as solicitor, can plan in advance for this possibility and can avoid some of the problems to which this conflict may give rise.

The following is a list of some of the considerations that counsel can look to when they are meeting with a husband and wife to draw up mirror wills and these suggestions should be recorded in the notes that are taken and should, as a counsel of perfection, be referred to in your reporting letter:

1. The option of asking the couple to see their own counsel when drawing wills is of course available; however, in my view this is neither a realistic nor a practical solution.

2. When the couple come to see you, you shall advise them that their wills can be changed by either of them at a later date and that they should consider entering into an agreement not to change their wills without the consent of the other.

3. The solicitor should advise both clients that he or she is acting jointly for both of them, that the information between them is not confidential and if a conflict arises in the future, the solicitor is obliged to advise the other spouse.

4. It is a good idea to remind the clients that in the event of one of the spouses dying, it may be that the surviving spouse will want to change his or her will and review some of the scenarios with respect to the possibility of a second marriage. While these issues are sometimes difficult to raise with your clients, many people do not consider the possibility that the surviving spouse may want to revise their affairs in the event of the other spouses death.

The problem with all of these solutions is of course that the vagueness of this problem causes difficulties.

There is a strong argument that the original solicitor will remain functus to each of these clients in that event and that unless she makes it perfectly clear that she is obliged to tell the other spouse in the event of a change to the will, the solicitor may be sued by the other spouse for conflict of interest. The practitioner will be faced with difficult and potentially expensive problems if this condition of disclosure is not made.

Solving the Lawyer's Dilemma

When considering the fiduciary duties of a solicitor, it is not sufficient to simply consider your clients' interests. It is necessary to consider as well those parties who will be affected by your work and your duty of care to third parties.

In the field of estate planning, solicitors frequently consider themselves to be the "family" solicitor. This means that not only are the interest of mothers and fathers involved in estate planning matters but the interests of children, grandchildren and other relatives must also be considered.

In many cases, this resembles a forest of family representation involving diverse interest which are not easily recognizable and which interests change from time to time.

Matters become more complicated when prior marriages and children born from such marriages are involved.

Not infrequently, one of the spouses, after having the estate plan included in a will or trust, will consult the solicitor and request a change which the spouse insists that the solicitor not disclose to the other spouse.

It is also not unusual for a child to give the "family solicitor" instructions to prepare a will for his parent giving a greater benefit to that child than other siblings or children of a prior marriage.

How about this. "My father will qualify for increased social benefits if you will prepare a deed of his farm to me which he wants me to have."

In such circumstances, the solicitor must recognize the problem and conflicts that exist and consider how he will deal with the problems they create when they eventually arise.

Surely, a thorough discussion with the testator or grantor is the least one could expect.

While elaborate retainers or engagement letters are not usually warranted, where potential conflicts exist, it would seem that a satisfactory answer would be to include in a reporting letter paragraphs along the following lines:

> "You have jointly requested me to prepare your wills in the form enclosed after a full consideration of your respective assets and wishes.
>
> At the time of taking instructions for these wills, I advised each of you together that as between both of you, any confidences which you have reposed in me relating to either or both of your wishes are held by me on the understanding that if any conflict of interest is disclosed to me respecting either of your interests I am bound to disclose that conflict to the other of you.
>
> In other words, there are no secrets between the three of us affecting either of you respecting these wills and the dispositions in connection with your estate and I am bound to discuss with each of you any subsequent changes either of you may wish to make."

In considering whether you can act for both the husband and wife, you should ask yourself the following questions:

1. Did the husband and wife come to you jointly and ask you to prepare their estate plans?

2. Did one of the parties come to you and say, "I would like you to prepare wills and trusts for me and my spouse?"

3. Have you already represented either the husband or wife in another capacity? Is there any relationship between your firm and one of the spouses which might affect your ability to treat the spouses equally?

4. Is either the husband or wife a relative of another client of yours whose interest may be affected?

5. Did either of the spouses tell you that it is not necessary for you to talk to his or her spouse as to what he or she wants?

6. Have you considered any fiduciary duty of yours which may arise with respect to some third party to whom you owe a duty either of care or disclosure?

By recognizing conflicts and fiduciary duties, considering their implications and dealing with them in a reasoned way a solicitor can avoid becoming a target for a claim arising out of breach of fiduciary duty.

Dividing Executors' Compensation Among Co-Executors

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Dividing Executors' Compensation Among Co-Executors

Introduction

When an estate is complex, or there is a life interest that needs to be balanced against the residual interest, a testator may have appointed more than one executor/trustee in his or her Will. What then happens with the compensation fee?

In Ontario the Rule has always been that no matter how many co-trustees there may be, the total compensation is calculated in the same manner as if there had been one executor, and is shared amongst them. Accordingly, the same compensation is awarded whether there is one executor or 6 executors.

To determine the amount of compensation, we look to Section 61 of the *Trustee Act*[1] which is the basis of the entitlement of a fiduciary in Ontario to be paid for efforts taken on behalf of the estate. Section 61 of the *Trustee Act* provides that compensation is based on a "fair and reasonable allowance for his care, pains, and trouble and his time expended in or about the estate". While the statute does not set out guidelines saying how compensation should be calculated, "tariff guidelines" or "usual percentages" are applied.

Given the wording of section 61, one might query whether the rule of shared compensation is unreasonable. In Widdifield on Executors' Accounts, 5th edition, F.D. Baker was of the opinion that if the testator arranged for a committee of executors knowing the extra work involved but anticipating a better result, it seems fair that he should expect his estate to pay for the services.[2] However, in Widdifield 6th edition, Margaret Rintoul has put forth the opposite opinion – that the existence of several trustees does not justify a higher executor's fee than the normal percentage calculations.[3]

Advising Co-Trustees

Currently, only one lump sum of executor's compensation is awarded to the trustees and those trustees must either determine how to split the compensation amongst themselves, or apply to the Court to apportion the compensation.

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[1] Trustee Act RSO 1990 c.T.23

[2] F.D. Baker, *Widdifield on Executors' Accounts*, 5th edition (Toronto: Carswell, 1967) at p.339.

[3] Carmen S. Theriault, *Widdifield on Executors and Trustees*, 6th edition (Toronto: Carswell 2002)

When advising co-trustees at the beginning of the estate administration, it is a good idea that there be a full discussion of the issue of compensation before the administration begins to avoid a dispute over fees at a later date.

Where an individual is serving as co-executor with a corporate trustee, it is often the position of the corporate trustee that as it will likely assume primary responsibility for many of the executors' tasks, it should be entitled to the greater share of the compensation fee awarded. In many situations the individual trustee is actively participating in decision making, while the corporate trustee has the day-to-day management of the trust fund. In such circumstances, many trust companies will insist on taking all compensation rewarded with respect to the revenue account, and will agree to a fee split of the compensation awarded on the capital account.

Court Apportionment of Fees

When co-trustees cannot agree on how to share the compensation, they may look to the Courts for help in determining how the fees are to be split. While Courts have been reluctant to get involved in apportioning the executors' compensation, the Courts have always recognized that the power of a Probate Court to grant compensation to executors for their work as representatives of an estate carries with it the right of the Court to apportion when there is more than one representative.[4]

There are various ways the Court can assist in determining the division of the trustee's compensation. Quite commonly, the Court is asked to determine the division of compensation within the Passing of the Accounts Application itself.[5]

Another option is by way of an application for advice and directions from the Court.

The issue can also be determined in the context of a binding judicial mediation or arbitration.[6]

There is little case law dealing with the issue of the Court's apportionment of executor compensation fees. However, it is clear that in most instances the commission is apportioned among the co-executors according to their ability, the work done and the time expended by them.[7]

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[4] Re Scott Estate (1958), 41 M.P.R. 323
[5] Re Beaumont Estate (1994) Carswell Ont 2848
[6] Re Wawrinchuk Estate (1996) Carswell Alta 83 (Surrogate Court of Alberta)
[7] Re Williams (1902) 1 O.W.R. 534 (Ont CA)
Re Scott Estate (1958), 41 M.P.R. 323 (PEISC)

In *Re Williams*[8] it was determined that as the one executor had handled significantly larger money transactions and had done apparently six times the administration business as the other, the commission was apportioned three quarters to him and one quarter to the other trustee. The Court also took into consideration the fact that the estate had the benefit of the former's professional ability without the additional expense.

In *Re Manzar*[9], the Court took into consideration that the trustee had been forced to manage the family company for nearly a year and was not paid any commission for doing so, and accordingly he was allowed a higher percentage than the co-executrix.

In *Sproule vs. Montreal Trust Co. (no. 2)*[10] the Appellate Division rendered an award of compensation for care and management for the individual executor and the corporate executor Montreal Trust Co. Unable to agree on the compensation split, the parties applied to the Court to direct division. The Surrogate Court had originally made an award of the one compensation fee, and determined that of that fee, $75,000.00 would to the professional corporate trustee and $50,000.00 to the widow trustee. On appeal, the care and management fee was reduced to $30,000.00 taking into account the guidelines set out in *Re Atkinson Estate.*[11] In determining how that fee would be split between the two executors, the Court expressed its belief that by naming the corporate executor to act with his widow, the testator had in mind the wisdom of appointing an executor who would not be fixed with a personal attachment to the trust units, or to any asset, and who would be free to discharge its responsibility to the estate with an independent and dispassionate outlook. The testator's reliance on the corporate executor was shown by a clause in his Will whereby he expressed a desire that the corporate executor do the clerical and accounting work and keep the records. The Court ultimately awarded $10,00.00 to the widow and $20,000.00 to the corporate trustee.

In apportioning the compensation, the Court will also take into consideration the fact that one trustee may be more active at one stage of the administration, while the other trustee becomes more active at a different stage of the administration.

Re McDonald Estate, [1925] 4 D.L.R. 743 (Alta CA)

[8] Re Williams (1902) 1 O.W.R. 534 (Ont CA)

[9] Re Manzer, 42 N.B. R. 257

[10] Re Sproule vs. Montreal Trust Co. (no. 2) (1979), 95 DLR (3d) 458 (ALTA CA)

[11] Re Atkinson Estate, [1952] 3 DLR 609, Affirmed, [1953] 2 S.C.R.41

In the more recent Re *Beaumont Estate*[12] decision, the Court was asked, as part of its Passing of Accounts Application, to divide the executors compensation between a solicitor/executor, and a layperson executor who were administering the trust in a life tenancy scenario. In making the division, the Court broke up the administration of the estate into two periods, the first time period being during the life interest in which the estate and funds were invested, and the second period being a distribution of the estate to the residual beneficiaries after the life tenant died.

The Court firstly determined the overall compensation to be paid, and did this on the basis of testing the tariff compensation utilizing the five factors set out in the Re *Jeffery decision*[13], and determined to make the compensation payment using the tariffs.

Having completed that task, the Court then determined that the solicitor/executor had the lion's share of responsibility for the estate management prior to the death of the life tenant and as such split the compensation for this period 75% in favour of the solicitor/executor, and 25% to the layperson executor.

As regards to the division of the account for executors compensation after the life tenant's death, the Court found that even though the work entailed by the co-executors during this period was equal, some allowance should be made for the actual disbursement of funds by the layperson executor to the residual beneficiaries and thus split the compensation on a 60/40 percent basis in favor of the layperson executor.

<u>Providing for Compensation Sharing in the Will</u>

There is nothing preventing a testator from dealing with the issue of the compensation split within the trust document itself. This will make the compensation split binding on the trustees, but probably not on successor trustees.

Where the trust document fixes compensation, section 61(1) of the *Trustee Act* "does not apply and therefore, the amount of compensation is not within the discretion of the Court under section 61(1).[15]

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[12] Re Beaumont Estate (1994) Carswell Ont 2848 (OCGD)
[13] Re Jeffery Estate (1990), 39 E.T.R. 173 (OSC)
[14] Trustee Act 61(5) of the *Trustee Act* reads: "Nothing in the section applies where the allowance is fixed by the instrument creating the trust."
[15] See Re Robertson [1949] O.R.427 (HCJ)

However, to oust section 61, the trust provisions must properly "fix" compensation and must not leave unnecessary ambiguity in the determination of the amount.

As an example, in a recent Decision of Greer J.[16] the question of whether a clause authorizing the trustee to take a "reasonable per diem rate" fixed compensation within the meaning of section 61(5) of the *Trustee Act*. Her Honour found that such wording did not "fix" compensation. In order to fix compensation in the testamentary instrument, she held it must be by way of "fixed amount or liquidated amount".

[16] Re Andrachuk Estate (unreported) Toronto Court File no. 06-23-98

REVOCATION OF BENEFICIARY DESIGNATIONS—TIPS AND TRAPS

by David M. Smith of Hull & Hull Barristers & Solicitors*

- The matter of revoking a beneficiary designation is, despite appearances, not always a simple matter. Recent case law has raised some interesting twists on what is a developing area of estate litigation.

- This brief paper's focus is on the relevant provisions of Part III of the *Succession Law Reform Act* ("SLRA"). The objective is to highlight for the estates practitioner the subtle nuances of this legislation which contains some complexities which are not readily apparent.

- The provisions of Part III of the SLRA relating to the making and revocation of beneficiary designations are sections 51 and 52 which read as follows (underlined words are added for emphasis for the purposes of further discussion):

Making a designation

s. 51(1) A participant may designate a person to receive a benefit payable under a plan on the participant's death,

(a) by an instrument signed by him or her or signed on his or her behalf by another person in his or her presence and by his or her direction; or

(b) by will,

and may revoke the designation by either of these methods

s. 51(2) A designation in a will is effective only if it relates expressly to a plan, either generally or specifically.

- Note: a plan is defined for the purpose of Part III to mean a myriad of financial vehicles but generally relates to Pension Plans, RRSPs and RRIFs

- Note: the SLRA does **not** govern beneficiary designations under all pension plans. The SLRA excludes plans such as RRSPs issued under Part V of the *Insurance Act*.

- Note: an "instrument" is not defined in the Act. The Act does not require that revocation by instrument follow any particular form or formality (*Burgess v. Burgess Estate* (2000) 52 O.R. (3*d*) 61.)

Revoking a designation

s.52(1) **A revocation in a will is effective to revoke a designation made by instrument only if the revocation relates expressly to the designation, either generally or specifically.**

(2) **Despite section 15, a later designation revokes an earlier designation to the extent of any inconsistency.**

- Note: section 15 of the SLRA states that a will is revoked only by: marriage, a later will, a written declaration made with the formality of a will, or destruction by the testator or another person under his or her presence and direction

(3) **Revocation of a will revokes a designation in the will.**

(4) **A designation or revocation contained in an instrument purporting to be a will is not invalid by reason only of the fact that the instrument is invalid as a will.**

(5) **A designation in an instrument that purports to be but is not a valid will is revoked by an event that would have the effect of revoking the instrument if it had been a valid will.**

(6) **Revocation of a designation does not revive an earlier designation.**

(7) **Despite section 22, a designation or revocation in a will is effective from the time when the will is signed.**

- Note: section 22 of the SLRA states that a Will speaks and takes effect as if it had been made immediately before the death of the testator.

What are the hallmarks of a valid revocation by Will?

- A holograph will that lists all of the testator's assets and references those assets that are RRSPs as such, and proceeds to thereafter list the beneficiaries of the estate to share in the assets does NOT constitute a revocation of a beneficiary designation. (*Laczova Estate v. House* [2001] O.J. No.4992 (Ont. C.A.).

- The person administering a plan must know with sufficient certainty who the designated beneficiary is. There cannot be an "implied" designation. If a number of beneficiaries are to share in the estate, and the assets are listed to include RRSPs, such beneficiaries cannot be said to be beneficiaries of the plan. (*Laczova Estate v. House* [2001] O.J. No.4992 (Ont. C.A.).

s.52(1) **A revocation in a will is effective to revoke a designation made by instrument only if the revocation relates expressly to the designation, either generally or specifically.**

- For a Will to revoke a previous designation made by instrument, there must be a clear reference to the previous designation. "By its very language, s.52(1) renders a revocation in a will that fails to relate expressly to the designation made by instrument ineffective to accomplish that purpose." (*Burgess v. Burgess Estate* (2000) 52 O.R. (3d) 61.)

What is the test for capacity to make a beneficiary designation?

- The test is the same as the test for testamentary capacity to make a Will.

- The onus is on the proponent of the new designation to show that the insured had the necessary mental capacity to understand what he was signing. (*Stewart v. Nash*)

Can an Attorney under a POA Property make a beneficiary designation?

- It seems settled that an Attorney for Property cannot appoint a beneficiary under a life insurance policy or a registered plan as these acts are in the nature of a testamentary disposition.

- Consider the situation in which the donor becomes incapable at the age of 65 and holds an RRSP designating his son as beneficiary. At the age of 69, the RRSP is converted into a RRIF. If the financial institution requires a new beneficiary designation to be made at the time that the RRIF is opened, it would appear that the attorney does not have the authority to make this designation on the grantor's behalf because it is in the nature of a testamentary disposition. Quaere whether an attorney in such circumstances can receive the approval of the court to continue the pre-existing designation. To prevent it would be to permit a change in a testamentary disposition by operation of statute which would likely be contrary to the intention of the donor.

- An Attorney for property in Alberta transferred an RRSP from TD Bank (under which she was designated beneficiary) to TD Evergreen. TD Evergreen did not provide for her continuance as designated beneficiary. The Court found that the transfer of the RRSP was made for want of authority being in the nature of a testamentary disposition. The Court seemed to suggest that the transfer would have been permissible if the attorney's status as designated

beneficiary remained unchanged in that there would have effectively been no change in the testamentary disposition. (*Desharnais v. Toronto Dominion Bank* [2001] BCJ No. 2547 (BCSC).

A brief look at Life Insurance

- The insured under a life insurance policy may make a designation by declaration or by will;

- If the will containing a designation is subsequently revoked, the designation is also revoked;

- An insurance designation is not revoked by marriage or divorce.

- General words of revocation (eg. "I revoke all prior will and testamentary dispositions") will not constitute a revocation of a beneficiary designation.

- In order to effectively revoke a declaration, the insurance contract must be identified or described.

- The form of revocation in a will must be precise enough to leave no doubt that a revocation of the insurance designation is intended. (*Hurzin v. Great West* 29 ETR 51.).