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“The Estate Planning Retainer – Acting for Husband and Wife”

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THE ESTATE PLANNING RETAINER: ACTING FOR HUSBAND AND WIFE

INTRODUCTION

More often than not, partners embark upon a process of joint estate planning, regardless of whether they are in common law, first time or subsequent marriage situations. Consequently, they typically consult solicitors jointly, at least at first instance, leading, of course, to joint retainers. Given the generally non-contentious nature of joint estate planning, and the partners' belief in the permanency of their relationship, one can easily be lulled into a false sense of comfort.

When these friendly, familiar situations take a turn for the worst, however, as they are known to do, human nature leads one to seek to lay blame. In such situations, and particularly when things do not work out as expected, issues of solicitor's negligence, discipline, rules of practice and moral and ethical considerations arise and invade what were previously mutually acceptable and, indeed, desirable, estate plans.

Add to this, then, the possibility of disappointed beneficiaries, especially children from former relationships, and one creates a recipe for disaster. Or, at the very minimum, frustrated expectations, whether of the surviving partner, the testator, the testatrix or his or her intended beneficiaries.

Other times, in the interests of minimizing legal fees, beneficiaries with a similar financial interest in an estate or trust can retain counsel jointly, with the belief that there is "strength in numbers". Again, a lawyer may be lulled into forgetting that even such friendly, fiscally-responsible situations can turn sour. When conflicts do arise during the course of the retainer, it may be that difficult decisions will have to be made.

The nature, scope and duration of the retainer itself is often overlooked, and may as a result give rise to negligence issues. As a counsel of caution, however, we strive to avoid these very kinds of situations.

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, however, 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, as a result, the retainer is at 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 interests.⁴

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 other’s assets to pass to the other, and they are identical in all respects.

The debate that has carried on throughout the estates bar is this: What does the solicitor who drafted the will do if one of those spouses comes back to that solicitor and requests him or her to make changes to the prior “mirror will”, which affects the other spouse adversely? Does the solicitor have an obligation to tell the other spouse?

This is an ethical dilemma that may give rise to a negligence claim; unfortunately, 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.

¹ *Hoque 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. Williams*, (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.).

THE RULES OF PROFESSIONAL CONDUCT

The following is an outline of the relevant Rules of Professional Conduct.⁵

2.03 CONFIDENTIALITY

Confidential Information

2.03 (1) A lawyer at all times shall hold in strict confidence all information concerning the business and 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 loyalty to, a client or prospective client, or
- (b) that a lawyer might be prompted to prefer to the interests of a client or prospective client.

Avoidance of Conflicts of Interest

- (2) A lawyer shall not advise or represent more than 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 informed 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,

⁵ Law Society of Upper Canada; current as of June 2009

because new circumstances or information may establish or reveal a conflicting interest. It is clearly an ongoing obligation.

Joint Retainer

(6) Except as provided in subrule (8.2), where a lawyer accepts employment from more than 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 may have to withdraw completely.

...

(7) Except as provided in subrule (8.2), where a lawyer has a continuing relationship with a client for whom the lawyer acts regularly, before the lawyer accepts joint employment for that 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 advice about the joint retainer.

(8) Except as provided in subrule (8.2), where a lawyer has advised the clients as provided under subrules (6) and (7) and the parties are content that the lawyer act, the lawyer shall obtain their consent.

What to do?

Faced with the ethical dilemma of being asked to make changes to a mirror will but not advise the other spouse or partner, the solicitor can, of course, refuse to draw the new will. However, from a practical perspective, 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 may jeopardize the existing

business relationship as a result. Moreover, this option does not solve the problem of whether or not the solicitor has an obligation to inform the other spouse of what is being contemplated. If the solicitor informs the other spouse of the change, there is the possibility that the solicitor will be sued for breach of trust and negligence, or for acting in conflict of interest.

As a result of the difficulty arising from such a situation, in February of 2005, Convocation of the Law Society of Upper Canada amended Rule 2.04 of the Rules of Professional Conduct to add a Commentary to Rule 2.04(6) respecting joint retainers for spousal wills.

The Commentary provides as follows:

Although this subrule does not require that, before accepting a joint retainer, a lawyer advise the client to obtain independent legal advice about the joint retainer, in some cases, especially those in which one of the clients is less sophisticated or more vulnerable than the other, the lawyer should recommend such advice to ensure that the client's consent to the joint retainer is informed, genuine, and uncoerced.

A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act, 1992*, S.O. 1992, c. 30, to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with subrule (6). Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that if subsequently only one of them were to communicate new instructions, for example, instructions to change or revoke a will:

- (a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;
- (b) in accordance with Rule 2.03, the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; but
- (c) the lawyer would have a duty to decline the new retainer, unless;

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- (i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship, or permanently ended their close personal relationship, as the case may be;
 - (ii) the other spouse or partner had died; or
 - (iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with subrule (8).

This addition to the Commentary brought much needed clarity and direction to the estates and trusts bar.

PLANNING FOR CHANGES TO A MIRROR WILL

In some respects we, as solicitors, 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 or other partners to draw up mirror wills, and these suggestions should be recorded in the notes that are taken. Furthermore, and as a counsel of perfection, they should be referred to in a reporting letter as well:

- 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.
- When the couple come to see you, you ought to 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.
- 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 may be obliged to advise the other spouse.

- 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 to 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 spouse's death.

The problem with all of these suggestions is, of course, that there is no "one right answer" to solve every possible situation.

There is a strong argument that the original solicitor will become functus to each of the clients in that event, and that unless he or she makes it perfectly clear that he or 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 the 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 interests of mothers and fathers involved in estate planning matters to be considered, but the interests of children, grandchildren and other relatives as well. In many cases, this resembles a forest of family representation, involving diverse interests 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 to other siblings or children of a prior marriage.

Or consider this: A client tells you that “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 or she 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 something 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 we can act for both the husband and wife, we should ask ourselves the following questions:

- Did the husband and wife come to us jointly and ask us to prepare their estate plans?
- Did one of the parties come to us and say, “I would like you to prepare wills and trusts for me and my spouse?”

- Have we already represented either the husband or wife in another capacity? Is there any relationship between our firm and one of the spouses which might affect our ability to treat the spouses equally?
- Is either the husband or wife a relative of another client of ours, whose interest may be affected?
- Did either of the spouses tell us that it is not necessary for us to talk to his or her spouse as to what he or she wants?
- Have we considered any fiduciary duty of ours which may arise with respect to some third party to whom we 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.

PRACTICE MANAGEMENT SUGGESTIONS

A. Confidential Client Communications

Dealing with the problem of keeping client communications confidential in a joint retainer situation is easy to solve, at least on the surface. A lawyer cannot keep confidential information given by one client secret from the other client and still keep both clients reasonably informed.

Therefore, both clients should agree at the outset that no communications between the solicitor and either client will be kept confidential from the other. To document this agreement, we may want to include language along the following lines in our reporting letters:

Since there are two of you, the possibility of a conflict between you exists. You acknowledge and understand that, since I am representing both of you, no communication either of you has with me can be kept confidential from the other of you. If a conflict develops between the two of you, I may decline to continue to represent you.

B. Keeping Each Client Reasonably Informed

The problem of keeping each client reasonably informed can be equally troubling. The client contact on an estate planning project is rarely equal. True, there are some cases in which a

married couple comes to each planning session together; however, even in these cases, there are likely to be telephone conferences with one spouse or the other. Also, the clients may participate unequally in planning conferences, and one client may understand the issues less than the other. Finally, one spouse may appear to dominate the other or make decisions on the other's behalf.

How does the estate planner assure that the estate planning document meets the wishes of both clients? One way is to rely more heavily on written communications (although this may in reality protect the solicitor more than it protects the "quiet" spouse). Descriptions of strategic decisions involved in devising the estate plan can be included in retainer or reporting letters as well.

This solution, however, may succeed only in protecting the solicitor, rather than one or both of the clients. Also, the lawyer may be reluctant to discuss some strategies in such a letter. And, of course, there is always the risk that the description of the plan may deviate from the plan itself. Nevertheless, written communication of this sort is one way to attempt to assure that your clients know what they are getting into.

CONCLUSION

As a counsel of caution, a solicitor should explain and document the potential conflict of interest inherent in a joint retainer situation, and outline the scope, nature and duration of the retainer. He or she might also consider in advance the means by which to deal with subsequent requests by one spouse to confidential changes to his or her estate plan, and advise the clients of this. Although the Rules of Professional Conduct certainly provide valuable assistance and guidance to estates and trusts practitioners dealing with joint retainers, each situation will likely require a unique approach.