



Family Law News

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Insurance Clauses – Be Careful, They Can Come Back to Haunt You!!

In my experience, the insurance clauses that we include in separation agreements are often the ones we pay the least amount of attention to when negotiating or drafting a separation agreement – they are often right at the bottom of the priority pile, down there with standard release clauses or 90 day cohabitation clauses in importance to clients. How do you explain them to your clients? Do you really understand how they work and their impact if one party dies? How do you make your client appreciate how important they can be in the future?

In the final review of the agreement, clients are so focused on getting through what they think are more important and immediate paragraphs. By the time you get to the insurance clauses, they start to get that glazed-over look and just want to finish things as quickly as possible. As a result, often little attention is paid to insurance clauses and their meaning. We often gloss over them and tell clients that they are included to secure spousal or child support. We may think we understand their effect and impact. Think again!!

In *Turner v. DiDonato*, a March 18, 2009 decision of the Ontario Court of

Appeal, the intent and effect of insurance clauses in separation agreements were considered. It is the kind of case that will leave you with that feeling in the pit of your stomach – that dread, when you think of the many agreements that you have drafted with insurance clauses and more importantly, when you try to remember how you explained the clauses to your clients.

The facts in *Turner v. DiDonato* are pretty straightforward. Mr. and Mrs. DiDonato entered into a separation agreement that set out that the husband had to pay spousal support to the wife until she turned 65. Mr. DiDonato remarried and then died when he was 58. The first Mrs. DiDonato was 56 at the time of his death. When he died, there was only \$43,507.15 of life insurance in place. The agreement provided for \$100,000 worth of insurance.

The following is the insurance obligation that was contained in the separation agreement:

2. HUSBAND’S LIFE INSURANCE

(1) The husband owns or has an interest in a London Life policy of life insurance through his employment at Ontario Hydro in the amount of approximately \$220,000.00.

(2) The husband warrants that he has not borrowed against the policy and that the full face value of the policy is available.

(3) The husband shall irrevocably designate under this policy: the wife as the sole beneficiary of \$100,000.00, Mark DiDonato as the sole beneficiary of \$50,000.00 and the wife in trust for Riccardo DiDonato as the sole beneficiary of \$50,000.00. The husband shall file these designations with the insurer as provided by the *Insurance Act*. The husband will give the wife a true copy of these designations within fourteen (14) days from the execution of this Agreement.

(4) The husband shall maintain the policy and shall maintain each of the aforementioned as beneficiary as set out in paragraph 12(3) hereof as long as the husband is obligated to support such beneficiary as provided in this Agreement following which the husband may then deal with the applicable portion or portions of the policy as he wishes and the wife will then sign any document necessary to change or revoke the applicable designation or designations of beneficiary.

(5) At the wife’s request, the husband shall annually provide proof that the policy remains in effect and that he has not transferred it, borrowed against it, or pledged it as security.

(6) If the policy of insurance is no longer available to the husband through his employment, he shall immediately obtain replacement insurance (ensuring that there is no gap in coverage beyond his control) for the amount referred to in paragraph 12(4) hereof, and shall maintain the replacement policy for the period referred to in paragraph 12(4) hereof, and shall designate the beneficiary in accordance with the terms of paragraph 12(3) hereof.

(7) If the husband defaults in payment of the premiums, the wife may pay any premiums and may recover them from the husband, together with all her costs and expenses, including her solicitor and client costs with respect to collection of the above.

(8) If the husband dies without his insurance in effect contrary to the Agreement, his obligation to contribute to the support of the wife and children shall be a first charge on his estate.

Look familiar?? How many agreements have you drafted that have included this particular clause? If you have practised as long as I have, no doubt hundreds. Panicking yet?

The issue for the trial judge was whether the obligation to maintain \$100,000 was mere security for the husband's companion obligation to pay spousal and child support or whether it constituted an independent obligation. Mrs. DiDonato brought an application against the estate and his second wife in her personal capacity, claiming entitlement to the shortfall

in the insurance proceeds based on an independent obligation. The trial judge agreed with her and awarded her the difference up to the \$100,000. Ms. Turner, the second wife, appealed.

Ms. Turner argued before the OCA that the policy wasn't intended as an independent obligation but only as security for the support obligations in the agreement. As both parties agreed that \$43,507.15 was equal to or greater than the value of Mr. DiDonato's obligation to pay support at the time of his death, the second wife argued that wife number one shouldn't be entitled to anything more from the estate. Further, the first wife admitted in response to a Request to Admit that she was advised by her lawyer and believed that the insurance was in place to secure the support obligation. Ms. Turner argued that wife number one received a windfall beyond the bargain between the parties. A reasonable argument – you think? Not according to the OCA. They agreed with the trial judge who found that the clause was a separate independent obligation and in failing to ensure there was \$100,000 available, Mr. DiDonato was in breach of the agreement.

The OCA stated that the wording of the agreement does not support Ms. Turner's interpretation that it was only in place to secure the support obligations – that there was no direct link between the insurance clause and the support clause. They found that if linking the two obligations was the intention of the parties, it should have been expressly stated in the agreement.

At paragraph 35, Justice Epstein stated:
I further note that the language of paragraph 12 is inconsistent with Ms.

Turner's contention that the life insurance policy was merely intended to be security for Mr. DiDonato's diminishing spousal support obligations at the time of his death. As is apparent from the various components of paragraph 12, the Agreement specifically precludes Mr. DiDonato from adjusting the amount of insurance designated in favour of Ms. DiDonato to account for diminishing future support obligations or for any other reason. If the parties intended the insurance policy merely as security for the support payments, and nothing more, it would be unreasonable to preclude Mr. DiDonato from adjusting the face value of the policy as the total value of his outstanding support obligations declined.

Therefore, if you intend to link the insurance clauses directly to the obligation to provide support, you have to be explicit and spell it out clearly. The wording in an insurance provision such as the one outlined in this case creates a separate independent obligation to provide the stated amount of insurance independent of the support obligation contained in the separation agreement.

Further, Justice Epstein found that the trial judge did not err in failing to consider Mrs. DiDonato's admissions regarding her understanding of the insurance obligation i.e. she believed it was to secure support. She stated that the contract was clear and not ambiguous and as such, the intention of the parties had no place in the interpretive exercise. The appeal court also agreed with the trial judge that the result was not a windfall to

Mrs. DiDonato, that she was simply given what she had originally bargained for i.e. a \$100,000 life insurance policy and not just security (even though she admitted that she believed it was for security). Even if Mr. DiDonato died on the day before Mrs. DiDonato turned 65, according to the Ontario Court of Appeal, she would still be entitled to the entire \$100,000.

The lesson from the OCA: be very careful in drafting i.e. security vs. an independent obligation, ascertaining your clients' intentions, explaining these clauses clearly to your client and most importantly, confirming it all in writing. We all have to spend a lot more time and pay far greater attention to these clauses at the time of drafting and negotiating the separation agreement – if we don't, we may end up spending a lot more time than we contemplated in dealing with LawPro!!! ■

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