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PROFESSIONAL NEGLIGENCE IN FAMILY LAW

There was a time when family law lawyers thought their area of practice was immune from a claim of professional negligence. That is no longer so. Regrettably we are all susceptible to human error no matter how careful we attempt to be. Given the greater complexity of the law and a more informed and sometimes more aggressive consumer of legal services, family law lawyers now have greater exposure than ever before. In Ontario we have seen both a rise in claims and an increase in the number of potential claims being reported by lawyers to the insurer. According to the Law Society of Upper Canada for the claim year June 1987 to June 1988 the total number of family law claims has increased by 46%. It is difficult to know whether this is as a result of the greater complexity of family law or whether it is a part of a general trend in claims against lawyers. Whatever the reason, we must today be more vigilant in the way we practice family law.

In this paper, I propose to highlight areas in which we as practitioners must exercise care and due diligence so as to avoid professional negligence. I am grateful to my colleague, Phil Epstein, of the Ontario Bar for his ideas and a paper he prepared for the CBA-Ontario in 1975 appropriately entitled "What Can I Say After I Say I'm Sorry (Family Law Professional Negligence)".

1. Independent Legal Advice

All of us as lawyers have found ourselves in the situation where a friend or a relative is entering into a contract or a transaction where the transaction requires independent legal advice because the party requiring advice is assuming some risk or liability. In these situations we do the

work but we are rarely paid (or not paid enough for the time spent). Quite often we do not open a file and consequently have no record of the event or even the contract itself. We find ourselves in the predicament where the bank manager next door who sends a lot of good work also sends the spouse for independent legal advice. The contract is a relatively simple one where a willing spouse (in happier times) is anxious to accommodate another spouse in a venture where risk or liability is assumed. Again we never charge enough but worse yet we may not open a file or keep any memoranda or correspondence. One logically rationalizes that the fee simply does not merit the extra work. Although I have fallen into this trap in the past, I know that I will not in the future. The consequences are simply too great. If you have not opened a file or kept any memoranda you will be unable to recall the event. In these circumstances it is also difficult to give proper advice because the parties are anxious to get on with their business, you do not have all the information and the client often does not hear the advice you have given. My advice is stay away from the work - the risks are too great. If you intend to do this work because of an important source of referral or because you want to do someone a favour, do yourself a favour too, do a good job - open a file, obtain all the relevant information, write a reporting letter to the client, prepare a memorandum to the file, keep a copy of the contract and get paid for it all too. You may need the money to hire a lawyer to protect you against your former client.

2. Acting for Both Parties

Several years ago the Law Society of Upper Canada launched an education programme or professional negligence. I was asked to be involved in the family law campaign and the single area that the Law Society in Ontario wanted to target in family law was making lawyers aware that they cannot act for

both parties in the preparation of a separation agreement or other domestic contracts (cohabitation agreements for non-married individuals and marriage contracts). According to the Law Society this is the area where there is a dramatic rise in claims. A lawyer who acts for both sides is in a conflict of interest because the parties to a separation agreement are adverse in interest. Again lawyers tend to fall into the trap of attempting to accommodate both spouses who have been long time clients of the firm or give in to the pressure of clients who assure them that there are no problems. The clients will often say they have agreed to everything. Lawyers in smaller communities often argue they are urged to act for both parties and feel compelled to do so to maintain good client relations. Again the risk is too great and my advice is do not do it. Ultimately you will not only lose both clients but your "shirt" as well. Parties to a separation agreements are, as I have said, adverse in interest. They do not have mutuality of interest because someone is getting something that the other is giving up. Although not a family law case, in the Alberta case of **Ferris v Dusnak** (1983) 50 A.R. 297 (Q.B.), a solicitor was held negligent for acting for both sides in a loan transaction and for failure to advise one of the two parties to seek independent advice. At p. 302 MacDonald J. states :

> Even if the parties tell the solicitor that they have made a deal, and just want the documents put in place, the solicitor would act improperly if he did not secure independent legal advice for the unsophisticated lender, and indeed advise him not to proceed with that investment.

I would also refer you to another non-family law case, **Pinney v Tripp** [1922] O.W.N. 429 where an assignment of a mortgage was set aside because one of the parties to a family arrangement did not have independent legal advice. In the Alberta case of **Crown v Crown** [1981] 2 W.W.R. 666 (Q.B.) a wife signed a separation agreement under which she gave up her rights

to a matrimonial home and to support. The agreement was set aside because the agreement was explained to the wife by a lawyer retained by the husband. The wife did not sign any acknowledgment and it was held she did not have independent legal advice. Accordingly the agreement was set aside. At p. 672 Carter J. in that decision states :

> ... lawyers should refuse to act for both parties, however scrupulous they are about explaining to the husband or the wife what their rights may be.

Although marriage contracts are negotiated in friendlier times and less acrimonious circumstances than separation agreements, the same risks apply. Act only for one party to the agreement. Make sure the other has independent legal advice.

3. Refusal to retain counsel

In domestic contracts there is yet another family law classic. You have been retained by one spouse, the other spouse refuses to retain counsel and insists on attending at your office to sign the agreement. In this situation you must again protect yourself against the non-client later asserting that you provided legal service or advice. To protect yourself I would recommend a statement in writing which confirms: (1) that you advised the person to seek independent legal advice; (2) that you do not act on the individuals behalf; (3) that you provided no legal advice; and (4) that the agreement is being signed freely and voluntarily.

My advice to you is to spare yourself the potential for future aggravation, do not see the other spouse. It is better that you send the person down the street. In doing so, you may not be doing your friend down the street a favour either. Instead you may be setting your colleague up for a

negligence claim for failure to properly advise his client because the individuals in these situations do not listen and they usually do not have enough information to give proper advice. Tomorrow your friend down the street will send his client's spouse up the street to you.

4. Custody & Access

In today's mobile society you must ensure that your client's rights are not overlooked when entering into an agreement or advocating a position on your client's behalf in the course of litigation. If the custodial parent wishes freedom to move with the child you must ensure that there is no restriction on movement out of the jurisdiction. Conversely, if acting for an access parent you should obtain your client's instruction on restricting mobility and explain the consequences to regular visitation as well as the consequential travel cost factor if the child moves with the custodial spouse. In jurisdictional provisions it is only when you expressly provide that the child will not be removed from the jurisdiction will the removal from the jurisdiction clearly constitute an offence for which the other party can be charged. The search for children improves the possibility of retrieval if you involve the criminal process.

5. Support and Support Related Provisions

(a) Inadequate financial disclosure

In order to properly and completely advise a client on support full and complete disclosure is a pre requisite. Again, when preparing domestic contracts we often find ourselves in the situation where a client instructs us that financial disclosure is not necessary and insists that disclosure not be pursued.

If you act for a client in circumstances where they do not want to obtain financial disclosure, it is important to obtain the client's instructions in writing so that you can meet a possible claim. To negotiate an agreement without having full particulars of the incomes and assets of the parties is professionally negligent.

(b) **Releasing claim to support**

Given the decisions in **Farquar v Farquar** (1983), 35 R.F.L. (2d) 287 (Ont.C.A.) **Richardson v Richardson** (1987), 7 R.F.L. (3d) 304 (S.C.C.), **Pelech v Pelech** (1987), 7 R.F.L. (3d) 225 (S.C.C.) and **Caron v Caron** (1987), 7 R.F.L. (3d) 274, the lesson is very clear that spouses who either forego support or agree to time limited support are at a later time not going to be able to alter the course of their earlier decision. The spouse who enters into such an agreement must be clearly aware of the future consequences.

(c) **Duration of support**

The term of support payment must be clear. There must be a clear commencement date and no confusion about the date of termination. Make sure your client understands the implications.

In dealing with child and spousal support the payments may be during the lifetimes of the parties, during the lifetime of the recipient spouse or for some other terms. In the case that spouse support may terminate upon remarriage, on cohabitation or some other terms. In the case of child support, support may terminate upon the child reaching a certain age, the child ceasing to reside with the recipient spouse, the child

ceasing to attend school, the child completing a certain level of education, the child becoming employed on a full-time basis, the child marrying or some other terms. You should also carefully consider whether attending a university away from home affects entitlement to support.

The terms selected must be clear and the implications clearly understood by the client.

There should be also clarity and distinction not only between the amount of child support and spousal support so that there is no ambiguity about duration. Expressing one monthly sum for the spouse and children will inevitably lead to litigation if a child ceases to be entitled to support.

(d) **Cost of Living Clauses**

In our economy cost of living or escalation clauses often find their way into domestic contracts or support orders. The effect of a cost of living clause provision or the lack of one must always be explained to a client. The cost of living clause in an agreement must not be vague and the client must understand the formula and the result of it. Always be sure that the cost of living clause relates to the date which forms the base of a calculation as well as the date when the adjustment is to occur. In preparing agreements I would suggest including a calculation example in the body of the agreement or attaching examples as schedules.

If you are using an escalation clause, particularly in an agreement, it is very important that the payor's

base income is clearly expressed. The options can be the payor's gross income from all sources, income from employment, net income, taxable income, or after tax income. They are all very different and result in a very different result. If you are drafting an escalation clause in an agreement there must be a provision that the payor will provide a copy of income tax returns to the payee on a certain date.

6. Income Tax Implications

Whether settling matters in an agreement or arguing the issues of support or property division the lawyer must be mindful of income tax consequences. Your client must understand the implication of income tax and must be told the amount of tax that will be due. If the client unexpectedly receives a call from Revenue Canada the next surprise call will be from your irate client. Be sure you understand what is deductible and what is taxable under the Income Tax Act. If there is any potential for mobility for the parties you must also make sure your client is aware that the income tax laws of another jurisdiction will apply and insofar as Canada is concerned there may be withholding of funds for Canadian income tax from the recipient of support. Property transfers between spouse come with their own income tax problems including attribution, deemed dispositions and capital gains. It is your role as counsel to bring these issues to the attention of the court. In settling an agreement implications of income tax must be examined and explained.

7. Property

When it comes to assets the major property that a husband and wife have is their home. Dealing with the issues of the matrimonial home requires great care.

Again, when you are preparing an agreement that provides for exclusive possession of the matrimonial home, it must be clear when the right to possession terminates. Your client may not be content upon learning that the agreement you prepared allows a former spouse to remain in possession after former spouse has remarried or entered into a cohabitation arrangement. If exclusive possession was meant to accommodate children again your client will be less than happy if the former spouse still has the right to remain in possession after the children have left. You must also consider income tax consequences when dealing with title of the matrimonial home. If the transferror spouse was in arrears of income tax there is a possibility that the Income Tax Department may exercise a lien against the equity. I would therefore suggest that the separation agreement contain not only an acknowledgement that the transferror spouse is not in arrears of income tax and that there be an indemnity clause so as to protect the client who takes title in the event income tax is owing.

When dealing with exclusive possession the agreement must clearly set out which spouse has the obligation to maintain the house and property. This will not only relieve you of immediate problems but also disputes at the time the proceeds are being divided. Is the spouse in possession entitled to be repaid for the principal payments on the mortgage while in exclusive possession or entitled to any compensation for repairs, taxes or other expenditures.

Also under the income tax category I would suggest it is important to provide that as long as the parties are spouses the party who has exclusive possession of the house will ensure that the matrimonial home remains a principal residence as defined in the **Income Tax Act**. Another clause should also provide that if the spouse changes the use of the matrimonial home or does not designate it as a principal residence, the

spouse with exclusive possession will indemnify the other spouse if there is any tax liability.

There is also the occasion when title in the matrimonial home is transferred to one spouse and the other takes back a mortgage to secure an interest in the home. I would suggest that agreement should also provide that the mortgage would not only come due on the sale of the property but also when the spouse was in possession, cohabits with another person or remarries.

More and more we are seeing the matrimonial home being traded off for other assets in a division of property. Even though it is a transaction between spouses it is important to do a search on title to ensure that there are no transactions registered against the property or that there are no executions outstanding against the transferror. The client does not understand the nature of transfer of title and you cannot rely upon the client's instructions. If you do not practice in real estate I would suggest turning the conveyance over to a lawyer who has real estate experience and will conduct a proper search of title. If a client gives you instructions that do not conform to your better judgment, get those instructions in writing as well as a note to the file.

In dealing with the distribution of the sale proceeds of the matrimonial home it is important that there be no ambiguity. It is not sufficient, for instance, to say that a spouse will get a percentage of the net or gross proceeds of the sale of a property. You must clearly specify what will be deducted in order to arrive at the amount to be distributed. Bear in mind real estate commissions, mortgages, repairs, any applecrates to affect the sale, surveys and any other specific items your client wants you to consider.

8. Pensions

The greatest source of grief for us as practitioner is dealing with pensions on marriage breakdown. In Ontario, under the **Family Law Act, 1986**, "property" is broadly defined to include a spouse's pension. When a divorce is granted or a marriage is annulled or the spouses separate, each spouse's net family property is determined and the spouse who has the lowest net family property is entitled to an equalization claim from the other spouse equal to one-half the difference between the net family property of each. Therefore, the value of spousal pension benefits must be added to the spouses' property for determining the equalization claim. We as lawyers must be very cautious in obtaining these evaluations. We must also proceed very cautiously in dealing with a spouse's entitlement to pension benefits. You must be sure that the client understands that there is a right to share in the pension. If a client instructs you not to proceed with an evaluation, make sure that you get those instructions in writing.

It is also imperative that you understand the pension benefit plan you are dealing with and the options available to the client in effecting the split whether that is pursuant to a domestic contract or a court order. As a lawyer you must understand the plan and be sure that the scheme of division is acceptable not only to the parties but to the administrator of the plan. There are also income tax implications in dealing with pensions that you must explore and make sure the clients understand. It is also important that the payor spouse understands that even after the pension is split the payor will still be liable to pay support when his only source of income is pension income unless the agreement or order specifically provides otherwise.

Your client must also understand the spousal right to claim the division of Canada Pension Plan credits. Spouses

should understand that even though an agreement may contain a release to Canada Pension Plan credits, that release may be unenforceable.

9. Release Clauses

In preparing agreements it is important that release clauses be clear and lend finality to agreement between the parties. I have appended to this paper some releases which we use in our offices and which may be of interest to you.

10. Marriage Contracts

Marriage contracts are relatively new to the practice of family law. It is the area of family law that I like least because of the concern I have for my own liability when I am acting. Marriage contracts are, in my estimation, replete with risks. They are always prepared under time pressures, no matter how early you begin to negotiate. The parties, usually the woman, will sign anything to spare the embarassment of postponing the wedding. The parties are usually under other pressures relating to the wedding plans to give careful attention to their financial future or to understand the implications fully. One of my colleagues in Ontario refuses to continue to negotiate marriage contracts unless they are signed three weeks before the wedding date. I have heard others say they do not do marriage contracts!

There is also the gnawing factor that this is a contract for the rest of the lives of the parties governing their assets, incomes, circumstances and eventualities that no one can predict. How can you intelligently contract with respect to property or support that does not exist at the day of the contract. One only need to look at the Quebec marriage contracts, where they have existed for decades, to realize how relevant those arrangements of yesteryear are today.

11. Signing the Documents

If your client is signing an agreement, minutes of settlement or any other related documents I would strongly suggest that that document be signed and witnessed in your presence so there can be no dispute later as to whether the client understood the document. I make it a practice in my office to always go over the agreement with the client when it is being signed. We go through the agreement clause by clause and ensure that the client understands each part of the agreement thoroughly. This is now a habit with me and I know that if I have attended to witnessing the client's signature, that I have also explained the agreement, clause by clause.

If you believe that your client is signing an agreement which is not in the client's best interest I would strongly suggest that at the same time the agreement is being signed by your client, the client sign an acknowledgement that you have advised against entering the agreement and that the agreement is being signed, notwithstanding your good advice.

12. Ascertaining Property

I cannot stress how important it is to make careful inquiry into all the assets the spouses owned or acquired during the marriage. I have attached as a schedule to this paper the Ontario Supreme Court Financial Statement which I believe provides an excellent checklist for canvassing the assets that spouses may have owned during the course of their marriage.

13. Conduct of Litigation

Do not be complacent simply because your matter goes to trial and is resolved by a judgment or an order. It is up to you on the client's behalf to put your client's case before the

court and to not only understand your client's position but to make sure that the judge has all the facts. Without the facts judges cannot make informed decisions. If you do not provide all the relevant information to the court on your client's behalf you are negligent.

Throughout the course of litigation there is an absolute duty on a lawyer to communicate to the client all offers. A number of cases in Ontario have indicated that offers received by lawyers are not passed on to the client often times because the lawyer has made a judgment call on his client's behalf. It is perhaps better practice to not only send a copy of the offer to the client but also have the client endorse an acceptance or rejection of the offer. This ensures that the client not only understands the offer but also understands the consequences. It has also been suggested that a failure to make an offer to settle at the earliest possible opportunity may constitute professional negligence.

If a client has made an offer and wishes to withdraw that offer it is important to promptly communicate the withdrawal to the other lawyer. Otherwise, you as the lawyer runs the risk that the offer may be accepted.

The client should also understand fully that the offer to settle will have implications with respect to costs. This will avoid your client taking the position at the end of the trial that the consequences of an offer made by the other side was not understood.

14. Mediation

In family law mediation is one of the buzz words in the 80's. A lot of family law lawyers are doing mediation without being aware that the negligence insurance they carry for

the practice of law may not apply. Clients are often confused about the role of the lawyer who is giving mediation service. They frequently confuse what the mediator is doing with legal advice. If you are doing mediation make sure you enter a contract with the couple that they understand and that clearly sets out that you are firstly, performing your function as a mediator and secondly, you have encouraged the clients to seek independent legal advice throughout the process.

Just so that there is no confusion in your role in the mediation contract, I would also set out what the process entails so that there can be no confusion of your role.

15. Wills

Clients must be informed of the effect of a divorce or remarriage on a will. They should also be aware that during separation the provisions of wills continue to apply. It is clear authority that the beneficiaries may have a cause of action against the solicitor if the will fails to meet the intention of a testator.

16. Preservation Orders

Perhaps in no other area is emotion as high as it is in family law. The client most often expresses (usually under some emotional frenzy) a fear that the other spouse will dissipate assets. The frequent complaint against a lawyer is that the lawyer failed to pursue the issue or failed to obtain an order or to register an order preserving the asset where there was some risk that a spouse could or would dispose of a property. You must explore the dissipation possibility and obtain clear instructions whether to proceed for an order. Registering that order may give the client added protection.

Similarly, if a client who is disposing of an interest in property tells you that he or she is disposing that property in the midst of divorce or separation there may be some risk to you if you do not ascertain whether his or her spouse has an interest in this property. There may be a third party claim against you.

17. Minutes of Settlement

As family law practitioners we often find ourselves on a motion, or on a pretrial, or at the court room door able to settle a matter in part or in its entirety. Minutes of settlement are usually prepared. These minutes of settlement are usually signed under some pressure from a judge or from a client, both of whom do not want to proceed with the matter. Because of the haste with which minutes of settlement are sometimes prepared and a certain level of anxiety, it is important that you do not miss an important item. Although some counsel will sign minutes of settlement on their client's behalf, the better practice is to have the minutes of settlement signed by your client and then witnessed. Following this procedure the minutes of settlement in Ontario become a domestic contract within the meaning of the **Family Law Act.** If this is to be a final settlement, it is very important that the minutes of settlement contain all the relevant release clauses. Without the necessary release clauses you may leave the door open to a claim that all of the issues were not disposed of in the minutes.

18. Limitation Period

Although limitation periods in family law are few they do exist. There are time periods for filing of pleadings and delivery of documents. All time periods should be properly diarized. You should also bear in mind section 21(3) of the **Divorce Act** which provides that no appeal lies from an order

made under the Act more than thirty days after the day on which the order was made.

19. Maintaining Record

When you find yourself in the midst of a claim the essential issue between you and your client is credibility. I would highly recommend taking instructions in writing or at least confirming them with your client. Make memoranda to the file and always keep your client informed what is happening. The best practice to follow is to have your secretary, immediately upon receipt of any correspondence or pleading, forward all documentation to your client. At the conclusion of the matter it is wise to prepare a reporting letter to the client summarizing the instructions and the steps taken. From a business point of view it is important to keep careful dockets not only of the time but also the work performed. If you render accounts with details of your work periodically, rather than at the end, this also serves to keep your client informed not only of the costs of your retainer but also the steps which you have taken on the client's behalf. All of these may serve as steps to assist you in avoiding a claim.

20. Summary

We are practicing in a time where there are an increasing number of claims against lawyers. Often when a client discovers that he or she cannot get redress from the opposing spouse then they look to the lawyer who acted for them in the course of their problems. Being a little more careful and a little more detailed in your practice may take more time in the present but you as a lawyer may save yourself a great deal of time and money in the future by avoiding a negligence claim.