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Family Law Considerations for the Wills and Estates Practitioner

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Separation Agreements and Life Insurance – Pitfalls and How to Avoid Them

Family Law Considerations for the Wills and Estates Practitioner

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**SEPARATION AGREEMENTS AND LIFE INSURANCE -
PITFALLS AND HOW TO AVOID THEM**

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INTRODUCTION

The following paper looks at cases within the last few years as to how life insurance/enurement claims securing support in Separation Agreements survive the payor's death. This paper does not purport to be an exhaustive look at the caselaw but focuses on specific cases and findings by the Courts therein.

Ensuring there is proper security for the payment of ongoing life and/or spousal support is one of the most difficult practice areas in family law. The untimely death of a payor spouse can have devastating consequences to his/her former spouse and children. Ensuring that a payor spouse fulfills his/her contractual obligations in that regard is essential. As outlined in the following cases, clauses in Separation Agreements which Counsel intend to protect the recipient spouse and/or children may in fact not have that effect. Further, the consequences of the same are often not known until many years later. It is important to ensure that:

1. The Agreement accurately reflects the parties' intentions;
2. The Agreement is clear as to each party's respective obligation surviving death;
3. The payor spouse is advised as to his/her obligation to provide and maintain the security;
4. The recipient spouse is aware of his/her obligation to ensure the security is in place and maintained; and,
5. Counsel for the parties have explained the obligations, the risk associated with the same, and the fact that it is the **client's responsibility** to ensure the obligations are met on an ongoing basis.

The foregoing is most effectively done by giving careful thought to the drafting of the Separation Agreement and ensuring Counsel's advice is well documented in correspondence.

(Specific thanks to Catherine Spafford and Sam Rollans for their assistance with this paper)

CASE STUDIES AND PRACTICE POINTS

Perry v. Perry, 2009 ABQB 687 [*Perry*]

Relevant Facts:

- The husband died intestate in 2008.

- He had not removed his first wife as beneficiary under his group life insurance policy; she was seeking a declaration from the Court entitling her to said life insurance proceeds.
- The husband's current wife argued the life insurance proceeds should be payable to the husband's estate and divisible under the *Intestate Succession Act*, RSA 2000, c I-10.
- The husband had separated from his first wife in May 2001 and divorced in May 2003. He married his second wife two months later in July 2003.
- The husband had one son from the first marriage and two children from the second marriage.
- The husband and his first wife entered into a Parenting, Support and Property Agreement dated December 17, 2002 ("the Agreement"). The Agreement provided specifically as follows:

The Husband shall maintain a life insurance policy on his life at his expense with a death benefit of ONE HUNDRED THOUSAND (\$100,000.00) DOLLARS with the wife as the sole irrevocable beneficiary in trust for the child, for so long as the husband has to pay child support obligations under this Agreement or any court order and FIFTY THOUSAND (\$50,000.00) DOLLARS with the wife as the sole irrevocable beneficiary for so long as there is a spousal support obligation under this Agreement or any court order. The husband shall provide a copy of the policy to the wife upon signing this Agreement.

- The Agreement contained the usual releases with respect to property and other claims.
- The husband sought to terminate his spousal support obligations to his first wife in December 2003; in his Affidavit in support of the application, he also requested that any life insurance in place to secure the spousal support should also be terminated. Spousal support payable to the first wife was terminated by the Court in February 2004.
- The husband died in 2008.

Issue:

The first wife took the position that she was the named beneficiary under the life insurance policies and was entitled to the insurance proceeds. The second wife took the position that the termination of the spousal support, and the request to terminate the life insurance securing the spousal support, demonstrated the husband's intention **not** to benefit his first wife.

Could the court could find that there was a declaration by the husband on the evidence, necessitating a rectification of the policy and the imposition of a trust on the insurance proceeds?