

## Legal Documentation ~ Courts look for Intention!



**By Brian Madigan LL.B.**

Repeatedly, the Courts are looking to reconstruct the intention of the parties, whether it be a contract between two parties or the intention of the testator in the case of a Will.

The overriding principle seems to be: intention. If the Courts can figure it out, they will honour it and reflect it in their Judgment.

Desmond Burgess got married to June and had four children. He worked for Canadian Tire and participated in the company's deferred profit sharing plan (DPSP). He signed a beneficiary designation in favour of his wife June, should anything happen to him.

Well, actually, nothing happened to him but the marriage "went south". As part of the settlement, June received one-half of the DPSP.

Then, Desmond married Bernadette. But, he forgot to change the Beneficiary Designation. He did make a Will leaving his estate to Bernadette and his four children.

Finally, something did happen to Desmond. And, quite possibly he was lucky to be out of the crossfire! June said she was entitled to the proceeds from the DPSP, and Bernadette claimed she was entitled to the DPSP. So, this was indeed a little bit of a mess.

At trial, the Judge said that Desmond never signed a new Beneficiary Designation, so June should get the DPSP. On appeal, the Ontario Court of Appeal concluded that June had signed away her rights to the DPSP in the Separation Agreement, so the proceeds went to Bernadette.

Here are some comments by the Court:

- The material before the court falls far short of indicating that Desmond intended June to have the "voluntary additional benefit" (of the DPSP).
- As noted, no affiant deposed (comment: no one swore an affidavit) to the intention either of Desmond or of June at or at any time after the separation agreement was executed.
- The affidavits of June, the only survivor, cast no light on the subject of

intention or on the discussions that surrounded the negotiation and execution of that document.

- The only evidence we have of Desmond's intention is what we can appropriately glean from the beneficiary designation in 1987, the separation agreement in 1994 and his last will and testament in 1997.
- In my view, the inescapable inference from these documents is that Desmond intended June's entitlement to be limited to one-half of the benefits under the DPSP and that he intended Bernadette and his children to share equally in the assets of his estate, including the other half of the benefits under that plan.
- A reading of the separation agreement in its entirety confirms an intention by both parties, Desmond and June, to achieve a final resolution of all claims, rights and entitlements each of them might have against the other and against the other's property, other than those – such as the benefits under the DPSP – for which the separation agreement makes specific provision.
- I find compelling the conclusion that the provisions of Art. 19.01 of the separation agreement operated to revoke Desmond's earlier beneficiary designation in favour of June.
- Just as the 1987 beneficiary declaration evidenced Desmond's intention that all of the proceeds under the DPSP be made payable to June, the 1994 separation agreement evidenced his subsequent intention to revoke that designation and to limit June's entitlement to one-half of the benefits under that plan.
- Article 19.01 effectively operated to implement that subsequent intention, in accordance with s.51(1) of the SLRA.

And, here is what that paragraph in the Separation agreement said:

*19.01 Except as specifically provided, neither the Husband nor the Wife will make a claim to a share in any pension of the other, including but not limited to any company pension plans, registered retirement savings plans and registered home ownership saving plans, provided that the Wife shall be entitled to one-half of the benefits under the Husband's deferred profit sharing plan.*

## **COMMENT**

So, you really might wonder at all this! It's very expensive to have two Courts figure out your estate plan and do it for you.

In Desmond's case:

- He should have revoked the Beneficiary Designation immediately
- When he remarried he should have signed a new Designation

However, you will notice that there is a very strong tendency on the part of the Court to try to figure out what the testator intended. Desmond could have signed a document making his intentions quite clear.

The Court here concluded that the only documents pointing to intention were:

- Beneficiary Designation
- Separation Agreement
- Will

It would be very nice to have a simple document evidencing an estate plan that spoke to the question of intention. At this point in time, such a document is not in common practice within the estate planning industry.

But, it would be a lot better than having an ex-wife and a widow fighting over the estate.

If you wish to read more about this case, you can find it: *Burgess v. Burgess Estate (2000) 195 D.L.R. (4th) 615.*

*Brian Madigan LL.B., Realtor is an author and commentator on real estate matters, Coldwell Banker Innovators Realty  
905-796-8888  
[www.OntarioRealEstateSource.com](http://www.OntarioRealEstateSource.com)*