THE LINK

CONNECTING YOUR BUSINESS AND PERSONAL LEGAL NEEDS

DUNCANCRAIG LLP
LAWYERS MEDIATORS

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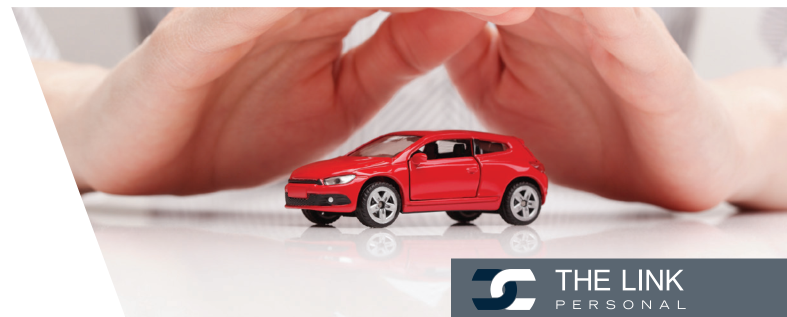

SECTION B: ACCIDENT BENEFITS

Pat Feehan

Under Section B of the Alberta Standard Automobile Policy (S.P.F. No. 1) if an individual is injured in an automobile accident, assistance with medical and treatment expenses is likely available. Benefits are provided on a no-fault basis meaning that an individual is entitled to benefits even if they are responsible for the accident.

Individuals involved in an automobile accident are covered by these benefits through the automobile policy of the driver of the car that the injured individual was in, whether as driver or as passenger. Also if a pedestrian is injured by an automobile, the Section B provisions of the vehicle owner's policy will apply. There are three subsections of Section B accident benefits:

- Medical benefits;
- Death and disability benefits; and
- Benefits for accidents occurring outside Alberta in a no-fault jurisdiction.

Medical Benefits

Section B provides coverage for all reasonable expenses incurred within 2 years from the date of the accident because of injuries suffered in the accident, up to a limit of $50,000.

Death Benefits

If the accident results in a fatal injury to an individual, certain sums are payable under Section B to a surviving spouse, adult interdependent partner, or dependent relatives of that individual. This includes the payment of a principal sum, which varies depending on the individual's age and family role on the date of the accident, and the individual's relationship to surviving relatives.

Total Disability

If, because of an automobile accident, an individual is totally disabled from working, they are entitled to the payment of a weekly benefit. Total disability is defined as the prevention from performing any and every duty of your job. To qualify for this benefit, the injured individual must have either:

1. Been employed at the time of the accident or,
2. If 18 years or older, worked for 6 out of the 12 months preceding the date of the accident.

Total disability payments are only payable while the individual is totally disabled from their job. If they return to work, even part-time, benefits are usually terminated. For disability payments there is a one week waiting period which no benefits are payable. After that week, benefits are calculated at 80% of the injured individual's gross weekly earnings to a maximum of $400 per week, to a maximum of 104 weeks. If an injured individual does not meet either of the two criteria listed above, they are still entitled to $135.00 per week for a maximum of 26 weeks.

Benefits for Accidents Occurring Outside Alberta in a No-Fault Jurisdiction

If a person suffers an injury in an accident in a jurisdiction other than Alberta, that person may be entitled to even greater benefits than are prescribed in the policy. They may need to consult with a lawyer from the jurisdiction where the accident took place.

FAMILY BUSINESS SUCCESSION PLANNING

BRIDGING THE KNOWLEDGE GAP AND EMPOWERING THE NEXT GENERATION

Rhonda Johnson

You have worked hard to build your business. Through years of sacrifice and sometimes learning the hard way, you have amassed considerable wealth. Along the way, you have made sure that your kids have had every opportunity possible, but now it is time to hand over the reins and let them continue what you started. Maybe they aren't quite ready to "snatch the pebble from your hand." This is a very good reason to start thinking about family business succession planning early.

Sometimes Mother (and Father) do Know Best, at Least When it Comes to the Family Business

We often meet with business owners who are getting ready to hand over control of the family business to their adult children and pass along considerable wealth. Frequently, and understandably, they have reservations about the kids inheriting a large sum and significant responsibility all at once. Their fears range from worry that unscrupulous people will take advantage of them to wanting to protect the business so that it continues to produce revenue for future generations (e.g. the grandkids).

Trusts and Family Business Transitions

One way to bridge this gap and give the parent some comfort while also supporting the next generation is to use a trust mechanism. In Alberta, you can set up a trust to hold the shares in the business, and the parent(s) would work with the children to gradually pass along not only wealth but also financial literacy and acumen. The intention is to provide additional support to empower the next generation to continue along a successful business path.

In our experience, using this kind of trust vehicle has been an effective method for one generation to pass along wealth in a positive way but with controls in place to provide safeguards until the adult children are comfortable (and fully ready) to take on full responsibility for the family wealth and business operations. We understand that you don't want to "control from the grave," but at the same time you want to make sure the next generation can take the wealth you've built and do something constructive with it, and they may not be knowledgeable enough (yet) to do that.

Our *Estate Solutions* group frequently works with business owners to provide these "walk before you run" trust structures. What we do is help the parent/business owner to set up a family meeting where we explain to the children why the parents want to use a trust as a transition vehicle. This may include outlining the potential pitfalls and a process for learning how to navigate them properly.

Memorandum to Trustees

Next, we explain how the trust is designed to work and answer any questions. We also help the family members discuss and mediate difficult issues. By providing a supportive structure to brainstorm creative solutions for sticking points and being available to answer questions as they arise we have found this helps everyone see the benefits of the process. We also provide what is called a Memorandum to Trustees that sets out how the trust works and outlines some of the parents' philosophy of wealth stewardship. This document gives the adult children a reference they can return to if future questions arise. Further, our role does not fall away as soon as the ink is dry on the trust. We remain available to provide support.

Transitioning Wealth

Transitioning wealth using a trust is a powerful tool that lets you set up a structure to deal with what can be difficult issues. When coupled with the family meeting concept it allows for transparency and can help the adult children realize that they aren't being "told what to do" as much as being given an opportunity to learn the ropes with a safety net in place. In other words, the intent is to be helpful, not controlling and to create a situation that builds trust and responsibility that allows the next generation to succeed while the old guard steps back. We have found this method very satisfying for our "parent" clients because it has the benefit of safeguarding the family wealth and the children's wellbeing.

Another benefit of this method of transitioning wealth in this way is that it does not dictate to the next generation what their future plans must be. Instead, it allows flexibility for a change in focus, if that is what the children want. For example, a family fortune built in the tire business could well morph into a property development company or franchise. The advantage of using this trust vehicle is that the next generation will have learned business basics and management skills that can be applied to whatever venture they choose.

If you think a succession plan involving a trust may be useful in your situation, we would be happy to answer your questions and explain how the structure might work to your benefit.

PENSIONS AND DIVORCE

WHAT TO CONSIDER WHEN A MARRIAGE ENDS

Carolyn Seitz

The end of a marriage also means the end of expectations about your future finances and addressing how to divide the property you accumulated together as a couple. Whether both you and your ex have worked your way up within a company or in government or worked at all during your union, the issue of pension splitting will arise. Initial considerations when dealing with pension splitting include:

1. Was there was a valid prenuptial or cohabitation agreement in place during your marriage?
2. Were you legally married or living common law during part or all of the time you were together?
3. Whether there are both federal (CPP) and private pension plans involved and where a private pension plan is involved, the type of plan and where it is administered?
4. Did you take time away from your career to fulfill parental responsibilities and what was the impact on your retirement savings?

If you are a parent who took time out of your career to raise children, you probably expected that the pension of the working spouse was going to be shared to balance the impact of raising children on your career (and your retirement fund).

Typical Scenarios Might Include:

- Delaying your career development to allow your spouse to capitalize on his or her career building opportunities.
- Passing up a significant work opportunity because it would have required your spouse to change jobs.
- Accommodating a spouse whose job required significant travel or business development duties that required them to be away from home during normal parenting times.
- Being the parent committed to coaching, transportation duties, or fundraising activities for children involved in elite sports or extracurricular activities.

In most cases, parental tasks are not evenly divided and there is an expectation that the financial benefits resulting from the time the non-participating spouse puts into his or her career will be shared, including any pension assets accrued during the marriage.

Private Pension Division Challenges

The valuation and division of pension assets can be quite complex particularly if there are multiple funds involved. There may also be issues concerning the status of who can apply for division. In Alberta, you will be considered a "pension partner" of the member spouse if you are legally married to the pension member and have not been separated for more than 3 years, or if you have lived in a marriage-like (common law) relationship with the pension member for more than 3 years. Being a pension partner means that you are the beneficiary of any death benefit related to the pension and that, on retirement, the pension member cannot elect a pension other than joint life without your consent. On separation you can claim a share of family property (e.g., pension earnings). Where the pension at issue is a defined-benefit pension, you will need to seek a valuation at the time of separation and divorce and you will need to confirm what pension legislation and regulations apply to the method that must be used to calculate its value.

Different Provinces Have Different Rules Regarding Pension Division

If there is a cross-border element in your case, you need to be aware that different provinces have different pension authorities each with their own rules that must be followed to access and evaluate pension information. Additional issues may surface if the pension in question is self-funded or depending on the type of pension involved (defined benefit vs. defined contribution plans).

In Alberta, the Matrimonial Property Act talks about dividing value, not assets. This means you may be able to obtain a valuation of the pension and a determination of the "before tax" value of your share. If there are reasons why you can't divide the pension at source you may be able to seek the value from other assets of the marriage. If you go this route, you will need to consider the impact of taxes.

Options for Transferring Pension Funds

There may be issues around whether you can take a share of the commuted value of your ex's pension plan (a lump sum payout of the present value of the earned pension) or whether there is an opportunity to collect a pension down the road.

The general rule is that your maximum entitlement is half the value of the portion of the pension earned during the relationship. If you are the spouse with the better pension, it may well be worth your while to agree to trade other family assets in exchange for an agreement from your ex that he or she will not seek a share of your pension. The classic "trade" is where one spouse gets to keep the house in exchange for the other keeping their full pension.

AVOIDING COMMERCIAL LITIGATION

Ted Feehan

On the prevention side of commercial litigation, there is plenty of good advice that comes from our experience dealing with the fallout from commercial disputes.

1. Structure your relationship with the right documents

There are a wide variety of issues you need to consider before you get into a new partnership or decide you want to incorporate a company. A Unanimous Shareholders Agreement can protect you if you and your new business shareholder end up not seeing eye-to-eye. Among other things, properly drafted shareholder agreements put in place the agreed method for resolving potential disputes. This saves time, money, and provides a level of certainty that does not otherwise exist.

2. Define the roles of the parties

To avoid disputes between capital and labour shareholders, it is wise to take the time to clearly define the roles and expectations of the parties. For example, one partner has just sold a business or inherited money and has significant capital to invest in a new company but doesn't have the time or the skills to set up and operate the new business. He finds himself a shareholder who has the time and the wherewithal to run the business but no money for start-up capital. This is a classic marriage of capital and labour.

Disputes typically arise when the parties forget to value and appreciate their respective contributions. For example, the first time a dividend is paid out the party contributing labour may think, "I've been putting in 50-60-hour weeks while my capital partner is off traveling the world and getting the same dividend I am." You may think that is not fair if you do not fully appreciate that there would be no business at all without the money that your capital partner brought to the table.

Conversely, the first time a lean year or two goes by and no dividends are paid out, as a capital shareholder you may be thinking, "I've put in $2M and have yet to see a dime but my labour shareholder is collecting a healthy salary, driving a company car and has an expense account." In this case, as the capital partner, you may be undervaluing what it takes to turn an investment into a going concern and turn a profit.

You can side-step this kind of dispute by having a Buy-Sell clause in your shareholder's agreement that clearly defines what each person brings to the venture and what each person expects to get out of it.

3. Include a good buy-sell provision in your shareholder agreement

A buy-sell provision is a key part of a shareholder agreement. This provision defines how shareholders can get out of the business and what they will get for their shares if certain, defined triggering events occur. These provisions also set the price for a company's shares on the occurrence of the triggering event such as death, disability, or retirement for example. The purpose of the clause is to provide an agreed upon pre-determined process for ensuring that departing shareholders receive a fair price, while ensuring a smooth transition of the business to the remaining owners.

Buy-sell provisions also typically provide protections for the remaining shareholders who will be carrying on with the business. This might include things like a right of first refusal or shotgun clauses which are designed to enable existing shareholders to resist the influx of new, unknown parties into their business arrangements.

4. Work out the financing details in advance

A fourth thing to consider carefully in the start-up phase is how you are going to put money into the company. If one shareholder is putting up a lot of money and the other is contributing skills and sweat equity this should not be a 50:50 split because you also happen to be good friends.

One option, as a capital shareholder, is to put money into the company through a shareholder's loan. Instead of going to the bank for a loan the capital shareholder provides the funds evidenced by a promissory note and secured by a general security agreement, effectively making the capital shareholder a secured creditor. Essentially, they are treated as an independent lender but make sure it's appreciated by both sides that If the business goes sideways, the capital shareholder will have first priority over the money.

These four areas are not the only things to consider. Your situation is unique, and an experienced business lawyer will be able to help you take the necessary steps to make sure that your business arrangements reflect your intentions.

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