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Life Insurance as Security for Support Obligations

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Insurance professionals and other advisors are familiar with the concept of using life insurance to secure spousal support obligations. In a recent decision of the Ontario Superior Court of Justice, the court, on a motion for summary judgment, determined that a clause in a separation agreement requiring the deceased to obtain a life insurance policy for his former spouse's benefit was a "standalone" clause fully enforceable against the deceased's estate, and, furthermore, that it was not subject to the "clawback provisions" of Section 72 of the *Succession Law Reform Act*.[1]

Birnie v. Birnie

Mr. Birnie died in August of 2017 at age 61. Mr. Birnie had entered into a separation agreement with his first wife, Mrs. Birnie, in 2004. As part of their separation agreement, Mr. Birnie was required to take out a life insurance policy in the amount of $500,000, for which Mrs. Birnie was to be named the irrevocable beneficiary. Mr. Birnie, however, never obtained the life insurance policy.

Mr. Birnie had remarried by the time of his death and named his new spouse as estate trustee of his estate.

After the death of her ex-husband, Mrs. Birnie brought an application seeking $500,000, plus cost of living adjustments, from Mr. Birnie's estate.

Mr. Birnie's wife, Ms. Larmer, as estate trustee for Mr. Birnie's estate, responded that the life insurance policy was only intended to secure spousal support payable by Mr. Birnie pursuant to the terms of the separation agreement and that Mrs. Birnie was not entitled to the sum of $500,000, but instead to the portion of funds required to "secure" payment of spousal support, with the balance remaining assets of Mr. Birnie's estate. Furthermore, Ms. Larmer asserted that the $500,000 sought by Mrs. Birnie was subject to the claw-back provision of Section 72 of the *Succession Law Reform Act*, such that the amount would have been available to fund an award on an application for dependant's support.

The court applied general principles of contractual interpretation in analyzing the clause of the separation agreement pertaining to Mr. Birnie's obligation to obtain a life insurance policy benefitting Mrs. Birnie. It was clear to the court that, if it was indeed a standalone provision creating an obligation independent of the other terms of the separation agreement, Mrs. Birnie would be entitled to the sum of $500,000, without the estate receiving any interest in this amount for which life insurance ought to have been obtained by Mr. Birnie.

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[1] *Birnie v. Birnie*, 2019 ONSC 2152.

Citing the Supreme Court of Canada's decision in *Consolidated-Bathurst v. Mutual Boiler*,[2] the court noted the importance of the intention of the parties entering into the separation agreement in interpreting the contract (at para 34):

> Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result.

In determining the intentions of Mr. and Mrs. Birnie, the court gave consideration to three key factors:

1) The absence of any language in the separation agreement expressing the intention that the insurance policy act simply as security for the support obligations;

2) The full and mutual release of rights in one another's estates, as Mr. and Mrs. Birnie wished to provide for the orderly and complete settlement of their affairs, including division of their property, at the time of separation; and

3) The absence of a "draw down" clause whereby Mr. Birnie could reduce the value of the life insurance that he was required to obtain as a result of his lifetime support obligations owed to Mrs. Birnie decreasing over time.

Whether the term of the separation agreement requiring Mr. Birnie to obtain life insurance was a "standalone" term or the life insurance was instead to act solely as security for support obligations was considered to be highly relevant to the issue of whether the sum of $500,000, if payable by the deceased's estate, was subject to the clawback provisions of the *Succession Law Reform Act* (at para 52):

> [I]n order to be subjected to *SLRA* clawback, an insurance clause in a Separation Agreement must be intended to act solely as “security”. A concession that the insurance is intended to act as “security” does not rise to the level of conceding that insurance is intended to act solely as security. Indeed, “stand alone” clauses can presumably have a variety of purposes including “security” for spousal support. … [W]hile it is clear that the insurance clause was intended by all to act in part as “security” … [the evidence] does not assist me in determining whether that was the “sole” purpose of same.

Summary judgment was considered to be an appropriate mechanism for the determination of the contractual relationship of the parties. Interpreting the insurance clause "as mere security" for spousal support, the court held, would have been inconsistent with the parties' intentions. Instead, it was determined that Mrs. Birnie was entitled to the full $500,000 for which Mr. Birnie

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[2] [1980] 1 S.C.R. 888.

was contractually required to obtain life insurance pursuant to the separation agreement. As such, Mrs. Birnie was a protected creditor under Section 72(7) of the *Succession Law Reform Act* and, accordingly, the $500,000 payable to her was to be exempt from the clawback provision of Section 72(1)(f).