

## Where Two Interests Diverge

Can a beneficiary designation in an insurance policy be overridden? Does a power of attorney allow the attorney to change a beneficiary designation in an insurance policy? Is someone other than a named beneficiary ever entitled to the proceeds of an insurance policy? These are questions that the Ontario Court of Appeal was asked to grapple with in a recent court case.

**The Background**

Stephanie and Michael were married for 26 years. During their marriage, Stephanie raised their two children and supported Michael’s career as he rose to the top spot at a major publishing firm. In 1991, Michael left Stephanie. The two entered into a separation agreement that, among other things, obligated Michael to designate Stephanie as the named beneficiary of a \$100,000 insurance policy. He was to maintain Stephanie as beneficiary for at least four years. The parties’ agreement also stated that the amount, if any, of life insurance which Michael would be required to provide subsequently was an issue to be determined in a variation proceeding.

In 1992, Michael married Anne with whom he had three children. Following that marriage, Michael made a will and powers of attorney. He appointed Anne his executrix and his attorney. Seven years after their marriage, Michael was diagnosed with Alzheimer’s disease. He died in 2007 and Stephanie received the \$100,000 death benefit from the insurance policy.

The beneficiary designation on the insurance policy had not been changed and Michael had continued to pay the premiums. Although their separation agreement had been varied on two occasions with respect to spousal support, nothing specific was ever discussed regarding the life insurance.

**The Lawsuit**

Anne was upset about the payout to Stephanie and brought a motion claiming that she and not Stephanie was entitled to the \$100,000. Anne argued that Stephanie had been unjustly enriched, and that there was no juristic reason for Stephanie’s enrichment. She pointed to Stephanie and Michael’s long estrangement as well as the separation agreement, wherein Stephanie relinquished all rights to Michael’s assets, to support her position.

She also argued that had she known Stephanie was the named beneficiary, she would have used Michael’s power of attorney to change the designation or stop making the premium payments.

**The Decision**

Both the motions judge and the appellate court concluded that as the named beneficiary, Stephanie was entitled to the \$100,000 payout. In coming to this conclusion, both courts considered a number of legal points.

*Beneficiary Designation*

On the issue of the beneficiary designation, the courts recognized that the general rule is that a beneficiary designation in a life insurance policy is conclusive and that to make a change, the insured must do so by contract or by a declaration pursuant to the *Insurance Act*. However, general expressions of the sort contained in releases in a separation agreement do not amount to such a declaration. Further, it is only in exceptional circumstances that the general rule should be ignored.

*Unjust Enrichment*

One such exception would be a case of unjust enrichment. As the name suggests, unjust enrichment occurs when one party is enriched at the expense of another. Generally, the latter will

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have made a substantial contribution to the property of the former but will not have received any corresponding compensation. Specifically, the courts will intervene to prevent unjust enrichment when:

- a) there has been an enrichment;
- b) a corresponding deprivation; and
- c) there is an absence of any juristic reason for the enrichment.

Anne claimed that during Michael's final year, she had paid the \$1,161 premium from her own funds. While neither court made a specific determination regarding this argument, the Court of Appeal did note that this amount was a very minor contribution to the cost of the policy, which had been paid for over the course of 17 years, and questioned whether deprivation of such a minor sum – in comparison both to the total cost of the Policy and the amount of the death benefit of \$100,000 – in the circumstances of this case, would warrant the imposition of a constructive trust

### *Duties of an Attorney*

Instead, both courts focused on the question of whether or not there was a juristic reason for Stephanie receiving the money. Anne maintained there was none, contending that she could have used Michael's power of attorney to designate herself the beneficiary, cancel the policy or cease making the premium payments.

Both courts dismissed this argument on the ground that Anne did not have a right to take these actions since to do so would have been a breach of her fiduciary obligations as Michael's attorney.

Section 32 of the *Substitute Decisions Act, 1992* sets out the duties and standard of care of an attorney who has been charged with guarding a donor's property:

*A guardian of property is a fiduciary whose powers and duties shall be exercised and performed diligently, with honesty and integrity and in good faith, for the incapable person's benefit.*

Anne was obliged not only to act solely for the benefit of Michael but to put her own interests aside when exercising

her role as Michael's attorney. Therefore, changing the beneficiary designation to herself would have contravened the prohibition against using the power for her own benefit, as Michael had not expressly consented to such a change. Further, there was nothing in the evidence to suggest that a change in the beneficiary designation, cancellation of the policy or a cessation of the premium payments would have been for Michael's benefit.

### **What Can Be Learned**

It is not unusual for one spouse to be required to make the other spouse the beneficiary of an insurance policy as part of a separation agreement. Therefore, it is important to stay on top of the "rules" and time limits surrounding this obligation. It is also useful to confirm with the concerned parties if you have chosen to extend your obligation in order to avoid costly misunderstandings down the road.

Another useful lesson to be gleaned from this case is the nature of the duties of an attorney appointed under a power of attorney for property. There must be a clear understanding by the attorney that the interests of the donor and the interests of the attorney, even though the two may be married, are in many instances quite different and that it is incumbent upon the attorney to use the power only for the benefit of the donor and not for his or her own profit, benefit or advantage.

Our firm works in the areas of Family Law and Estates Law. If you would like more information or assistance with your planning we would be pleased to assist you. 

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time hours that were required or permitted. Ms. Fresco's real complaint is not that the policy is illegal, but that the policy was applied in an illegal manner so as to require or permit class members to work unpaid overtime."

In other words, the potential claims of individual employees were more individual in nature and therefore would be better decided by individual lawsuits.

Unless this decision is appealed this case is over, at least as far as it being a class proceeding. However, Ms. Fresco and other employees in her situation have not been precluded from filing individual actions. 

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# Saying You're Sorry Just Got Easier

*Saying sorry for a mistake or wrongdoing is the right thing to do.*

**Attorney General Chris Bentley**

Earlier this year, Ontario became the fourth province to enact a law making certain apologies inadmissible as evidence of fault or liability in civil court. The goal of the legislation is to encourage sincere apologies from alleged wrongdoers.

This change to Ontario law opens the door for those involved in incidents such as a motor vehicle accident or medical mistake to apologize without fear that it will lead to an admission of wrongdoing that can later be used against them in a lawsuit.

In this very short piece of legislation, entitled *The Apology Act*, an apology is defined as:

- *An expression of sympathy or regret*
- *A statement that a person is sorry*
- *Any other words or actions indicating contrition or commiseration*

*whether or not the words or actions admit fault or liability or imply an admission of fault or liability in connection with the matter to which the words or actions relate.*

The Act goes on to indicate the effect an apology will have on a person's potential liability for a specific matter. The apology

- a) does not, in law, constitute an express or implied admission of fault or liability by the person in connection with that matter.
- b) does not, despite any wording to the contrary in any contract of insurance or indemnity and despite any other Act or law, void, impair or otherwise affect any insurance or indemnity coverage for any person in connection with that matter.
- c) shall not be taken into account in any determination of fault or liability in connection with that matter.

There are certain exceptions to this "no liability" rule. Specifically, the Act does not apply:

- In the context of criminal law.
- If the apology is made during a civil proceeding.
- If a person acknowledges liability in respect of a claim for payment of a liquidated sum or the recovery of personal property.

Time will tell what positive effects this new law will have on litigation in Ontario. 

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## The CIBC Overtime Case: An Update

In the fall of 2007, we told you about a class action lawsuit against the Canadian Imperial Bank of Commerce (CIBC). The lawsuit, led by CIBC teller Dara Fresco, alleged that CIBC non-management employees are forced to work unpaid overtime since they are assigned heavy workloads that cannot be completed within standard working hours.

In order for this case to proceed as a class action, it had to be certified as such by the court.

After two years, this action has come to a halt. Madam Justice Joan Lax of the Ontario Superior Court heard the motion for certification and dismissed it. In her decision she stated, "...it is my conclusion that this is not a proper case for certification and that a class proceeding is not the preferable procedure for resolving the claims of class members for unpaid overtime. While some of the certification requirements could be satisfied, the action lacks the essential element of commonality."

For a lawsuit to be certified as a class proceeding the following conditions must be met.

1. The pleadings or the notice of application must disclose a cause of action.
2. There must be an identifiable class of two or more persons that would be represented by the representative plaintiff.
3. The claims of the class members must raise common issues.
4. A class proceeding would be the preferable procedure for the resolution of the common issues.
5. There is a representative plaintiff who would fairly and adequately represent the interests of the class and who has produced a plan for the proceeding.

Although Fresco's case met four of the five conditions, Justice Lax ultimately concluded that number 3 was not met. "Any losses that Ms. Fresco or class members may have suffered were not caused by an allegedly illegal policy, but rather by a failure independent of the policy to compensate for over-

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# Changes to the Law You Should Know About

Over the past number of months several laws have seen some significant changes. What follows is a brief recap of those changes.

## Access to Adoption Records

If you were adopted in Ontario or if your child was placed for adoption you can receive information from your birth and adoption records if the adoption was registered in Ontario. The information includes identifying information, like the original name of an adopted adult or the name of a birth parent. In the past this information was not available.

However, adopted adults and birth parents also have the option to protect the privacy of their post-adoption birth information.

To get more information go to [www.ontario.ca](http://www.ontario.ca) and under *Popular Topics* you will find a link to the *Adoption Information Search*.

## Newborn Registration Service

If you live in Ontario you can now register the birth of your baby online with the government's *Newborn Registration Service*. Use this 3-in-1 service to register a baby under the age of one, apply for a birth certificate and apply for a Social Insurance Number, all at the same time. Go to [www.ontario.ca](http://www.ontario.ca) and go to *Life Events* under *Popular Topics*.

## Impaired Drivers

Under the Criminal Code it is a crime to drive with a blood alcohol level over .08. As of May 1, 2009, Ontario drivers can now have their licence automatically suspended for 3 days and be fined \$150 if their blood alcohol is over .05. This is known as the warn range. Subsequent offences carry increasing penalties, including longer suspensions and having to fit a breathalyzer ignition lock to one's automobile.

New drivers must register a 0 blood alcohol level. Failure to do so will lead to a roadside suspension, a 30 day licence suspension and a fine upon conviction.

The Criminal Code provisions dealing with impaired driving have also been amended. No longer is it sufficient to merely present the evidence of a toxicologist who testifies that an accused's blood-alcohol concentration must have been lower than the breathalyzer indicated, based on the body weight and the alcohol consumption of the accused. The law now requires the defence to also present evidence suggesting the breath-testing device wasn't working properly or that there was operator error.

## Cell Phones

Beginning October 26, 2009, Ontario is banning hand-held cellular phones and other devices while driving. Initially police will be educating drivers, however, on February 1, 2010, police will start issuing tickets. Drivers may face fines up to \$500.

Drivers will be permitted to use cellphone headsets and voice dialing. GPS units are also acceptable if mounted on the dashboard.

## 2010 Rent Increase

The maximum rent increase landlords can request for 2010, without applying to the Landlord Tenant Board, is 2.1%. 

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## PRACTICE AREAS

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