

But for the Plan

Separation Agreements Subsequent Events May Affect the Original Obligations

Mr. X. entered into a Separation Agreement in 1988. It stipulated that he was to pay his spouse a share of his employment pension when he retired - a “when & if” pension division. He retired 21 years after the agreement was signed, and for various reasons he did not pay his former spouse her share.

Six years after he retired, his former spouse started asking for her share of his pension. The amount owing was approximately \$53,000.00. On top of that, there was a risk that Mr. X’s future retirement income would be reduced by about \$730.00, monthly.

The separation agreement specifically provided that he had a “*fiduciary*” obligation to honour it - that is, an obligation to act with great care and responsibility towards his former spouse. Had his former spouse taken the matter to court for a determination, this obligation would have been considered very seriously by a court.

A very distressed Mr. X. made an appointment with our Windsor Staff Office, and was fortunate to be advised by a very experienced and knowledgeable family law lawyer, Shirley Jackson. Shirley patiently listened to her client’s story, did some research, and determined that he had possible defences.

As Shirley says, Latin words are always intimidating without being abusive.

1. **“Promissory Estoppel”**: His former spouse had told Mr. X. repeatedly not to worry about his pension, and had promised not to enforce the agreement, in consideration of him having made considerable, voluntary contributions to their children. Mr. X. relied on her promise when he decided to retire earlier than he otherwise would have, at age 57. When someone relies, to their detriment, on another’s person’s promise, in order to prevent unfairness a judge may say “**that’s not fair**”, and enforce the promise to prevent the unfairness.
2. **“Laches”** and/or the **Limitations Act** : His former spouse had full knowledge of the date of his retirement - a notice of which was published in the local paper. In fact, she called to congratulate him. So, she knew he retired and then waited 6 years to attempt to enforce the agreement - outside the usual limitation period of 2 years to enforce a contract. And even if a judge might not think that the **Limitations Act** should apply, there is the equitable defence of **laches**, which is sometimes used by a judge to deny a claim if the delay was unreasonable and has prejudiced the other party.

A letter using these words was sent out, and nothing further has ever been heard from the former spouse or her lawyer. The total out-of-pocket cost to Mr. X. was \$65.57.

But for the Plan, Mr. X. may have been out-of-pocket well over \$100,000.00.