TAB 18

Risk Management in a Family Law Practice

Yvonne Bernstein
Claims Manager
Lawyers' Professional Indemnity Company (LawPRO)

The Six-Minute Family Law Lawyer

The Law Society of Upper Canada | Barreau du Haut-Canada

Continuing Legal Education

Risk Management in a Family Law Practice

Yvonne Bernstein
Claims Manager
Lawyers' Professional Indemnity Company

Introduction

Over the years, a great deal has been written and said about risk management and loss prevention in the context of family law. This paper does not purport to provide a full analysis of the subject; rather, it highlights some of the current issues which practitioners should be aware of.

Background

It is helpful to assess risk management issues in the context of the current claims climate. Over the past few years, the LAWPRO claims portfolio has been remarkably stable in terms of the total number of claims reported. This is to a large extent attributable to the robust real estate market in Ontario and the widespread use of title insurance in real estate and mortgage transactions. These factors have contributed to a sharp decline in the number of real estate claims. At the same time, we have seen a significant increase in the number of litigation claims. Family law claims have remained at a fairly consistent level.

The practice of law has become increasingly more complex. A healthy economy and the increase in real estate values have resulted in greater wealth for some clients, which in turn means that more family law files involve higher support and equalization payments. Not surprisingly, we have seen a corresponding increase in the dollar value of claims over the same period of time.

Complex claims are more difficult and more expensive to defend. It is not unusual to see claims in which defense costs have the potential to erode the available policy limit under the primary policy. Many practitioners do not carry excess insurance coverage.

Clients often have high, if not unreasonable, expectations and, for the most part, limited loyalty. Judicial expectations are also high. The standard of practice sometimes appears to be one of perfection. There is an increasing emphasis on reporting requirements. This

is particularly troublesome in the area of family law since many practitioners do not report in writing to their clients.

When we look at the underlying causes of family law claims we see a noticeable difference as compared to all other areas of practice. Poor communication/client management/practice management issues account for 53% of family law claims, compared to 30% of claims in other practice areas. Failure to know or apply the law accounts for 20% of family law claims compared to 7% for all other practice areas. These differences are attributable to the complexity of family law practice which intersects with a multitude of other practice areas including wills and estates, real estate, income tax, and to the challenge of dealing with clients who are often anxious, upset, depressed and therefore not thinking clearly.

Against this backdrop, I propose to highlight some of the current risk management issues and trends which emerge from developments in the law and from a review of claims reported to LAWPRO.

Starting at the Beginning

Professional liability insurance is the most basic and often overlooked risk management tool. Few lawyers give much thought to the details of their insurance coverage, nor do they take stock of their files in order to assess whether they carry sufficient insurance.

The primary policy provides **practising members** of The Law Society of Upper Canada who are engaged in the practice of law and are not exempt from the payment of insurance premium levies pursuant to By-Law 16 of the Law Society Act with coverage of $1 million per claim, subject to an aggregate of $2 million per policy period. Coverage under the policy is reduced by defense, investigation and indemnity payments. **Non-practising members** have lifetime run-off coverage of $250,000 per claim and in the aggregate, reduced by defense, investigation and indemnity payments.

Both practising and non-practising members should evaluate whether the primary policy provides sufficient coverage. This can only be determined by taking stock of the files you have worked on and are working on. Excess insurance is available through LAWPRO and numerous private insurers.

Practising members can select, at the time they apply for coverage, the deductible options that best meet their needs. Deductibles range from nil to $25,000 and can apply to defense costs and/or to indemnity payments. Again, it is important to assess the level of protection you wish to have. Run-off coverage is subject to a mandatory deductible of $5,000 applicable to defense costs and to indemnity payments.

Time Management and Attention to Detail

Mistakes often occur when settlements are being negotiated or drafted under time constraints. The scenario is a familiar one: You are at a settlement conference, it is the end of the day, the judge is about to leave, and there is intense pressure to settle and to "paper the deal" before everyone leaves. Minutes of Settlement are signed and everyone is relieved that the case has been resolved. The appropriate Order is finalized. Sometime later, a problem emerges.

Here are some examples of the problems we have seen recently: omitting a termination date for the payment of spousal support; mistakenly providing that the termination date for spousal support would be several years later than verbally agreed to; mathematical errors in calculating spousal support or equalization payments, and; inconsistent clauses resulting in ambiguity with respect to the correct terms of the settlement.

Depending on the circumstances, many of these errors can be repaired, although at a cost. Most of these errors could have been avoided had the lawyers not succumbed to the pressure exerted on them. It is prudent practice to carefully proofread documents before they are finalized.

Alternative Dispute Resolution Clauses

Many agreements contain clauses stipulating that future disputes will be submitted to mediation and/or arbitration. What happens if one of the parties decides to ignore the terms of the agreement and initiates litigation? This is exactly what happened in *Finch v. Finch* 2003 CarswellOnt 3205 (S.C.J.). The court directed the parties to undertake the dispute resolution process outlined in their agreement and ordered costs against the applicant who chose to ignore the terms of the agreement and resorted to litigation instead.

It is prudent practice to ensure your clients are aware of the ramifications of agreeing to a dispute resolution provision in their agreements. If you are the subsequent lawyer acting for the client, review the agreement before commencing litigation.

Child Support Guidelines and Special Provisions

In March 2004, the Ontario Court of Appeal issued a brief endorsement in a case called *Deiter v. Sampson*, 2004 CarswellOnt 934, 50 R.F.L.(5th)338, dismissing a payor's appeal from an order directing the payment of child support in accordance with the Guidelines. The parties entered into a separation agreement which gave the mother a greater share of the net family property and contained a waiver of spousal support by the payor as well as a waiver of child support by the mother. On the mother's subsequent application for Guideline support, the payor argued that the terms of the separation agreement constituted special provisions which directly or indirectly conferred a benefit to the children.

The Court of Appeal held that the matter of special provisions must be approached objectively and with a child-centered focus. There was nothing in the separation agreement to suggest that the unequal division of net family property was specifically intended to reduce the amount of child support. The payor's position was further compromised by the fact that the parties did not exchange financial statements or net family property statements prior to entering into the agreement. The Court of Appeal concluded that the payor had not discharged the burden of showing that special provisions had been made in the agreement which benefited the children. Furthermore, even if there were special provisions, it was not inequitable to require the payor to pay child support in accordance with the Guidelines.

This decision points to two important messages. The term "special provisions" should send warning bells if you are acting for a payor. Regardless of how carefully the agreement spells out the details of the special provisions and how they directly or indirectly benefit the children, it does not foreclose the possibility that a subsequent order can be made directing the payor to pay Guideline support. It is important to make sure your client is fully informed of the risk, and that it is a risk he or she is prepared to assume. Make sure you are not the party carrying the risk.

The second message has wider application. All too often we see claims involving separation agreements which have been entered into without the benefit of financial statements. It is both expensive and difficult to re-construct the financial position of the parties in order to assess whether the agreement is reasonable.

Income Tax Considerations

We have seen many claims arise when pre-Guidelines orders or agreements are varied. Generally, the problem is that the payor unwittingly loses his or her deduction. Sometimes, the problem is that the recipient must still include the payments in his or her income notwithstanding representations to the contrary. Clearly, this is an area to watch out for. You should be alert to this issue any time you are dealing with a pre-May 1, 1997 support order or agreement.

Some recent reported decisions in this area include: *Coughlin v. The Queen* 2004 TCC 524, *Miller v. The Queen* 2003 TCC 603, and *Kennedy v. The Queen* 2003 TCC 338.

Generally, lawyers assume that any periodic payment to a spouse that is not expressed as being child support will be deductible to the payor. In *Kouladjian c. R.* 2003 CarswellNat 730, 37 R.F.L.(5^{th}) 373, a divorce judgment required the husband to pay $868.33 as child support, $433.33 as spousal support, and a further $750.00 in support, to be applied towards housing expenses. The husband deducted these payments. The Minister disallowed the deduction and the husband's appeal was dismissed by the Tax Court.

In this case, the court found there were two obstacles which the husband could not overcome. The wife had no discretion over the use of the impugned support payments as required by s. 56.1(4) of the Income Tax Act. Furthermore, even if the wife did have discretion over the use of the money, the payments were for the benefit of the children as well as the wife and therefore had to be treated as non-deductible child support.

As James McLeod points out in his annotation, the disturbing aspect of this case is the question of how far the Minister may go in reviewing spousal support that everyone knows will be used to fund shared expenses. Again, this is an issue lawyers should be aware of.

Saying No

Often, lawyers who report claims will start the discussion by saying something along the following lines: "I had a feeling from day one that this client was going to be trouble." In other words, if they could turn the clock back, they would have decided not to accept the retainer.

What are some of the warning signs to watch for? Consider the following:

- The client has changed lawyers more than two or three times.
- The client owes money to his or her previous lawyers.
- The client expresses dissatisfaction with all of his or her previous lawyers.
- The client has unreasonable and unrealistic expectations about his or her case.
- The client places unreasonable demands on you and your staff.
- Every aspect of the client's case is urgent and requires instant attention.
- The client either will not or cannot provide proper financial disclosure.
- The client instructs you to advance positions which you believe to be without merit.

If you identify some of these warning signs, consider whether you should accept the retainer. Sometimes it may be best to just say "no."

Conclusion

An awareness of risk management issues is essential in a family law practice. Many of the points raised in this paper underline the need to protect yourself by documenting the file and confirming instructions. The time spent doing so is never wasted and may save your deductible not to mention the stress of responding to a claim.