

COMPETING FIDUCIARY OBLIGATIONS

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by
Albert H. Oosterhoff
Professor Emeritus,
Faculty of Law, Western University
Counsel, Whaley Estate Litigation

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1. Introduction

This paper discusses a number of issues that arise when the fiduciary obligations of lawyers, trustees, directors, substitute decision makers, and others conflict. It makes an attempt to resolve these conflicts.

For the purpose of the discussion I begin with the following fact situation and shall vary it for different circumstances as needed.

2. Basic Fact Situation

James indirectly holds 50% of an operating business. His brother, John, and John’s family indirectly hold the other 50%. The business qualifies as a small business corporation for tax purposes. (See organization chart below.) The total value of the company is \$20,000,000. James

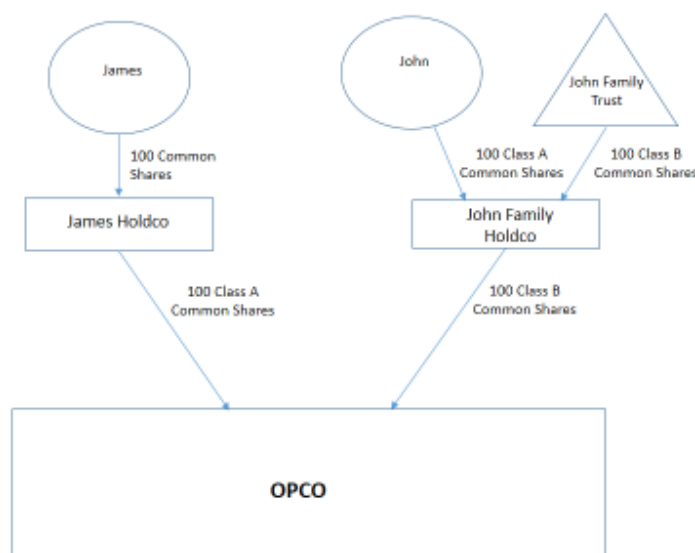
owns his 50% interest through his holding company. It has liquid assets totalling \$5,000,000. John and his family own their aggregate 50% interest through: (a) John's direct interest in his family holding company; and (b) an interest held by a family trust in the same holding company. The family trust was created for the benefit of John, his spouse, and his issue. John is the trustee of the family trust.

As a result of earlier estate planning, the 50% interests held in the operating company by each of John and James' holding companies are distinct classes of shares, *i.e.*, Class A Common and Class B Common. These shares permit the directors of the operating company to sprinkle dividends between John and James' holding companies as the directors deem advisable. John's holding company also has two classes of common shares. One class is held by the family trust and one by him personally.

James and Karen married each other in 2010. It is the second marriage for both. Each has adult children from a previous marriage, but they do not have children together. When they married, they engaged Alison, the long-time lawyer for James, John and their company, to prepare their wills. Alison prepared Primary and Secondary Wills for James. The Secondary Will deals only with James' interests in his company (both shares and debt). James' Primary Will, which contains nominal assets, leaves his "primary will assets" outright to Karen. The Secondary Will contains a spousal trust in favour of Karen that will entitle her to the income from the property to be placed in the trust on James' death. James left the remainder after Karen's life interest to his children. Karen's will (she has only one) leaves her property to her children. James has named Karen, John and Alison as the trustees of the spousal trust under his Secondary Will.

James died in 2015.

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3. Conflict of Interest

3.1 Introduction

The concept of “conflict of interest” is typically used in the context of fiduciary obligations and is concerned with the breach by a fiduciary of the absolute loyalty owed to the beneficiary of the relationship. Section 27(1) and (2) of the *Uniform Trustee Act*¹ aptly describe this duty as follows:

27 (1) A trustee must exercise the powers and perform the duties of the office of trustee solely in the interests of the objects of the trust.

(2) Without limiting subsection (1), a trustee must not knowingly permit a situation to arise

- (a) in which the trustee’s personal interest conflicts in any way with the trustee’s exercise of the powers or performance of the duties of the office of trustee, or
- (b) in which the trustee may derive any personal benefit or a benefit for any other person,

except so far as the law or the trust instrument expressly permits.

¹ http://www.ulcc.ca/images/stories/2012_pdfs_eng/2012ulcc0029.pdf. The Uniform Law Conference of Canada promulgated this Act in 2012.

The section thus deals with what may be called true conflicts of interest, that is, conflicts in which the fiduciary's duties conflict with her personal interests. It summarizes what the cases have said, sometimes in very strong language, about the fiduciary's duty of loyalty. Thus, for example, Chief Justice Cardozo, while on the New York Court of Appeals, described the fiduciary obligation of a "co-adventurer" as follows:²

Joint adventurers, like co-partners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length, are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the "disintegrating erosion" of particular exceptions. . . . Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court.

However the *Rules of Professional Conduct* of the Law Society of Upper Canada³ define "conflict of interest" as:

. . . the existence of a substantial risk that a lawyer's loyalty to or representation of a client would be materially and adversely affected by the lawyer's own interest or the lawyer's duties to another client, a former client, or a third person. The risk must be more than a mere possibility; there must be a genuine, serious risk to the duty of loyalty or to client representation arising from the retainer.

Thus, this definition combines both true conflicts of interest and what might be better referred to as conflicts of duty and duty. A conflict of duty and duty arises in cases of double employment, that is, when a person has fiduciary obligations to two or more persons and a conflict arises. Such conflicts are fairly common. An example is persons who serve as directors on competing boards. Indeed, the law does not prohibit double employment completely, but it does recognize that one cannot serve two masters⁴ and will castigate offenders that do so and provide redress to

² *Meinhard v. Salmon*, 249 N.Y. 458, 164 N.E. 545 (Ct. Apps., 1928) at 546.

³ <https://www.lsuc.on.ca/uploadedFiles/RulesofProfessionalConduct.pdf>, Rule 1.1-1 (conflict of interest"). And see Rule 3.4-1, Commentary [1].

⁴ *Cf.* Matt 6:24; Lk 16:13.

beneficiaries.⁵ Thus, in *Breen v. Williams* Gaudron and McHugh JJ., of the High Court of Australia drew this lesson from the biblical principle.⁶

The law of fiduciary duty rests not so much on morality or conscience as on the acceptance of the implications of the biblical injunction that “[n]o man can serve two masters.” Duty and self-interest, like God and Mammon, make inconsistent calls on the faithful. Equity solves the problem in a practical way by insisting that fiduciaries give undivided loyalty to the persons whom they serve.

So also, in *Davey v. Wooley, Hanes, & Dingwall* Wilson J.A. said:⁷

A solicitor is in a fiduciary relationship to his client and must avoid situations where he has or potentially may develop a conflict of interests. This is not confined to situations where his client’s interests and his own are in conflict although it of course covers that situation. It also precludes him from acting for two clients adverse in interest unless, having been fully informed of the conflict and understanding its implications, they have agreed in advance to his doing so. The underlying premise in both these situations is that, human nature being what it is, the solicitor cannot give his exclusive, undivided attention to the interests of his client if he is torn between his client’s interests and his own or his client's interests and those of another client to whom he owes the self-same duty of loyalty, dedication and good faith.

And in *Waxman v. Waxman*⁸ the court said: “Ordinarily a lawyer should not act on both sides of a transaction where the interests of one client potentially conflict with the interests of the other.”

In some cases legislation covers conflicts of duty and duty.⁹ Both types of conflict can arise in a variety of situations, but it is usually the conflict of duty and duty that predominates.

3.2 Lawyer’s Conflict of Interest

First, there is the conflict of interest faced by Alison when she drafted James’ and Karen’s wills. She had to comply with Rule 3.4-5, the joint retainer rule of the Law Society of Upper Canada *Rules of Professional Conduct*.¹⁰ It provides:

⁵ See, e.g., *Boulting v. Association of Cinematograph, Television and Allied Technicians*, [1963] 2 Q.B. 606 at 638; *Levy-Russell Ltd. v. Tecmotiv Inc.* (1994), 13 B.L.R. (2d) 1 (Ont. Gen. Div.), additional reasons *ibid.*, at 233.

⁶ [1996] HCA 57, 186 C.L.R. 71 at 108.

⁷ (1982), 35 O.R. (2d) 599 at 602, leave to appeal to S.C.C. refused (1982), 37 O.R. (2d) 499n.

⁸ 2004 CanLII 39040, 44 B.L.R. (3d) 165 (Ont. C.A.) at para. 646, leave to appeal refused [2005] 1 S.C.R. xvii note. And see *Roth Estate v. Juschka*, 2016 ONCA 92, 13 E.T.R. (4th) 186, to the same effect.

⁹ See, e.g., *Pension Benefits Act*, R.S.O. 1990, c. P-8, s. 22(4); *Re Indalex Ltd.*, 2011 ONCA 265; *Municipal Conflict of Interest Act*, R.S.O. 1990, c. M.50; *Sacks v. Campbell* (1991), 87 D.L.R. (4th) 342 (Ont. Gen. Div.).

Joint Retainers

3.4-5 Before a lawyer acts in a matter or transaction for more than one client, the lawyer shall advise each of the clients that

- (a) the lawyer has been asked to act for both or all of them;
- (b) no information received in connection with the matter from one client can be treated as confidential so far as any of the others are concerned; and
- (c) if a conflict develops that cannot be resolved, the lawyer cannot continue to act for both or all of them and may have to withdraw completely.

Commentary

[1] Although this rule does not require that a lawyer advise clients to obtain independent legal advice before the lawyer may accept a joint retainer, in some cases, the lawyer should recommend such advice to ensure that the clients' consent to the joint retainer is informed, genuine and uncoerced. This is especially so when one of the clients is less sophisticated or more vulnerable than the other.

[2] A lawyer who receives instructions from spouses or partners as defined in the *Substitute Decisions Act, 1992*¹¹ to prepare one or more wills for them based on their shared understanding of what is to be in each will should treat the matter as a joint retainer and comply with this rule. Further, at the outset of this joint retainer, the lawyer should advise the spouses or partners that, if subsequently only one of them were to communicate new instructions, such as instructions to change or revoke a will

- (a) the subsequent communication would be treated as a request for a new retainer and not as part of the joint retainer;
- (b) in accordance with rules 3.3-1 to 3.3-6 (Confidentiality), the lawyer would be obliged to hold the subsequent communication in strict confidence and not disclose it to the other spouse or partner; and
- (c) the lawyer would have a duty to decline the new retainer, unless:
 - (i) the spouses or partners had annulled their marriage, divorced, permanently ended their conjugal relationship or permanently ended their close personal relationship, as the case may be;
 - (ii) the other spouse or partner had died; or
 - (iii) the other spouse or partner was informed of the subsequent communication and agreed to the lawyer acting on the new instructions.

[3] After advising the spouses or partners in the manner described above, the lawyer should obtain their consent to act in accordance with rule 3.4-7.

[3.1] Joint retainers should be distinguished from separate retainers in which a law firm is retained to assist two or more clients competing at the same time for the same

¹⁰ Footnote 3, *supra*.

¹¹ S.O. 1992, c. 30.

opportunity such as, for example, by competing bids in a corporate acquisition or competing applications for a single licence. Each client would be represented by different lawyers in the firm. Since competing retainers of this kind are not joint retainers, information received can be treated as confidential and not disclosed to the client in the competing retainer. However, competing retainers to pursue the same opportunity require express consent pursuant to rule 3.4-2 because a conflict of interest will exist and the retainers will be related. With consent, confidentiality screens as described in rules 3.4-17 to 3.4-23 would be permitted between competing retainers to pursue the same opportunity. But confidentiality screens are not permitted in a joint retainer because rule 3.4-5(b) does not permit treating information received in connection with the joint retainer as confidential so far as any of the joint clients are concerned.

The facts don't tell us whether Alison complied with this rule. In the circumstances she should have advised Karen of the situation and invited her to seek independent legal advice.

3.3 Trustees' Conflict of Interest

Each of the trustees in our fact situation are faced with conflicts of interest. They each owe fiduciary duties to both the life tenant, Karen, and on the tenant's death, the remainderers.¹²

In addition each trustee is subject to specific individual conflicts:

1. Karen is conflicted because she is trustee of a trust in which she has a financial interest. The more she receives from the trust and retains in her hands will flow through her will at her death. Thus, she has an interest in maximizing the distributions to her, even to the detriment of the remainderers to whom she owes a fiduciary duty.

2. John is conflicted because:

(i) he is trustee of his family trust and also of the spousal trust for his brother's widow and these trusts have indirect equitable interests in the same corporation, but have different beneficiaries;

(ii) he is an indirect shareholder of the operating corporation that is also owned by both of the trusts that he serves as trustee;

¹² I realize that I am coining a word, but it is badly needed and apt. *Remainderman* is clearly no longer appropriate in 2016, the circumlocution, "the persons entitled to the remainder" is awkward, and one certainly doesn't want to use the silly *remainder person*, although I have seen it employed. Moreover, the suffix *-er* (or *-yer* in some cases) is a very convenient one, with strong Anglo-Saxon antecedents, to convert inanimate objects into animate ones involving human actors, e.g., park-parker, hunt-hunter, law-lawyer, farm-farmer, etc. And we already have a well-known cousin of *remainderer* that employs that suffix, namely, *reversioner*. *Quod erat demonstrandum*.

(iii) he is a director of the operating corporation that is held indirectly by all the trusts and himself, through the two holding corporations. Thus, he has an obligation to maximize the value of the corporation for the benefit of the shareholders, which obligation may not yield the same result as a fiduciary obligation to act in the best interest of the beneficiaries; and

(iv) the different common share classes of his holding corporation and the operating corporation would permit him as director to favour one class of shareholders (and therefore beneficiaries) over another;

3. Alison is conflicted because her fiduciary obligations to the beneficiaries of the trust are at odds with her ongoing legal obligations to James and the corporate entities owned by the family.

How should these conflicts be resolved? Of course, if all parties agree about the administration and ongoing management of the business there is not an issue (subject to rights on a Passing of Accounts). However, if the parties cannot agree, the trustees are in a difficult situation.

Here are some simpler options for dealing with these types of issues:

(a) Bring an application to be discharged from both fiduciary positions. The court has an inherent jurisdiction to remove trustees for a number of reasons, including conflict of interest.¹³ Moreover, it is a well-recognized principle that a person cannot be compelled to continue as trustee.¹⁴ However, in the circumstances it is unlikely that any party, other than Alison, would seek to be removed as their interests are so intertwined with the trusts in question.

(b) The trustee may make an application for the advice and direction of the court, seeking an order as to how the estate is to be administered. However, the court is typically reluctant to interfere with the trustees' exercise of discretion so this option may not be particularly helpful.¹⁵

¹³ *Zimmerman v. McMichael Estate* (2010), 103 O.R. (3d) 25, 57 E.T.R. (3d) 101 (S.C.J.).

¹⁴ *Mitchell v. Richey* (1867), 13 Gr. 445 (U.C. Ch.), cited in *Lee v. North Vancouver School District No. 44* (2011), 67 E.T.R. (3d) 274 (B.C.S.C.).

¹⁵ See *Re Wright* (1976), 14 O.R. (2d) 698, 74 D.L.R. (3d) 504 (H.C.); *Re Kaptyn Estate*, 2010 ONSC 4293, paras. 59, 102, and especially para. 220, *per* D.M. Brown J.; C.D. Freedman, "The Opinion, Advice and Direction of the Court: Principles, Procedures and Judicial Blessings" (2013, 32 E.T.P.J. 379; *Oosterhoff on Trusts: Text, Commentary and Materials*, 8th ed. by A.H. Oosterhoff, Robert Chambers, and Mitchell McInnes (Toronto: Thomson Reuters/Carswell, 2014), §14.2.3.

4. Power of Attorney

Can an attorney under a continuing power of attorney for property solve the problem in some cases?¹⁶

Suppose that James appointed Karen as his attorney under a continuing power of attorney for property. The year is 2016. James had the necessary capacity to grant the power of attorney, but he now lacks capacity to manage his property.¹⁷ Karen is still alive. What can Karen do in these circumstances? It must be remembered that an attorney under a continuing power of attorney for property is a fiduciary.¹⁸ Clearly, the attorney must act in the best interests of the grantor of the power.¹⁹ Therefore Karen must adhere to the terms of the power of attorney and observe the fiduciary obligations imposed on her as attorney. Thus, for example, if the power of attorney provides that it can be exercised only when the grantor lacks capacity and there is insufficient evidence of incapacity, she cannot act. This is so even if she acts with the best of intentions and a desire to protect the property.²⁰

For present purposes, I shall assume that Karen has power to act under the power of attorney. On that basis I shall explore two possibilities:

- (1) whether Karen can create a trust; and
- (2) whether she can she engage in an estate freeze.

¹⁶ In passing, can we please stop calling an attorney a “power of attorney”? One sees this misuse even in judgments, but it is an egregious solecism. A power of attorney is a document that appoints an attorney and endows her with certain powers. To call the attorney a “power of attorney” calls to mind the ludicrous image of a document with arms and legs and a silly grin on its face. Surely only the fecund and fevered imagination of a Mary Wollstonecraft Shelley and her mad scientist, Victor Frankenstein, could have engendered such a monstrosity?

¹⁷ If the grantor, A, still has capacity, the person he has appointed, B, can still act for him on his instructions. However, B does not then act as attorney under the power of attorney, but as agent for A. Then if B needs to sign any documents she will do so *per procuracionem*, i.e., by the action of another. The term is usually abbreviated as “per pro,” or even “p.p.,” and the abbreviation should be added to B’s signature. See *Re Hanson’s Estate*, 2016 ONSC 2386.

¹⁸ Cf. *Substitute Decisions Act*, footnote 11, *supra*, ss. 32(1) and 38(1).

¹⁹ *Stanton v. Coughlin & Associates*, 2013 ONSC 7294.

²⁰ As, for example, when an attorney acts out of a desire to protect the grantor’s property from the grantor’s predatory younger partner: *McMullen v. McMullen*, 2006 BCSC 1656.

4.1 Creation of a Trust

Suppose that Karen is concerned about what may happen in the future and wants to create an alter-ego trust, the terms of which will mirror James' will and of which she will be the only trustee? Can she do this?

Section 7(2) of the *Substitute Decisions Act, 1992*²¹ provides:

The continuing power of attorney may authorize the person named as attorney to do on the grantor's behalf anything in respect of property that the grantor could do if capable, except make a will.

Thus, the only way in which the attorney can create a trust is to constitute it with other property of James. Can that be done, or does that infringe the injunction against making a will?

Whether Karen can create a trust depends on the definition of "will." Historically, a will is an instrument by which a person disposes of his property and the property over which he has a general power of appointment. The will may in fact consist of more than one instrument and include more than one instrument called "will," all of which complement each other. It may also include one or more codicils. All such documents together constitute the testator's will.²² Of particular importance is that a will is said to be ambulatory. It does not take effect until the testator dies and is revocable until then.

The problem is that s. 1(1) of the *Succession Law Reform Act*²³ defines "will" to include:

- (a) a testament,²⁴
- (b) a codicil,

²¹ Footnote 11, *supra*.

²² See generally *Oosterhoff on Wills and Succession: Text, Commentary and Materials*, 7th ed. (Toronto: Thomson Reuters/Carswell, 2011) 105-110 (8th edition forthcoming in 2016).

²³ R.S.O. 1990, c. S.26.

²⁴ Historically, wills disposed of a person's real property, whereas testaments disposed of her personal property and different courts had jurisdiction over the administration of a deceased person's real and personal property. However, for more than a century real and personal property have been dealt with promiscuously without distinction. Thus, *e.g.*, *Estates Administration Act*, R.S.O. 1990, c. E.22, s. 2, directs that the real and personal property of a deceased person devolves upon and becomes vested in his personal representative. Consequently, it is no longer necessary to distinguish between a will and a testament and indeed, the introduction of a will as a person's "last will and testament" is an anachronistic tautology. See *Oosterhoff, Wills*, footnote 22, *supra*, p. 22.

(c) an appointment by will or by writing in the nature of a will in the exercise of a power, and

(d) any other testamentary disposition.

Clauses (c) and (d) may present a problem. Do they mean that all instruments that have the effect of disposing of a person's property on death, that is, instruments usually referred to as "will substitutes," are testamentary in nature? A number of cases have suggested that that is so. But I am of opinion that they overstate the point.

For example, it is clear that when a person transfers property into the joint names of himself and another, the title passes immediately and, if the transferor intends that the transferee shall take the property by survivorship on the transferor's death, in law the property belongs to the transferee from the time of the transfer.²⁵ It does not just become hers when the transferor dies.²⁶

Similarly, when a person creates an *inter vivos* trust in favour of herself for life, with remainder to another person, no one would think to call the remainder interest testamentary. That is because that interest vests at the time the trust is created. And it does not matter that the trust is revocable or can be varied.²⁷

The concept of an instrument being testamentary if it is intended to have effect only when the maker dies derives from an older English case, *Cock v. Cooke*.²⁸ In it Sir J.P. Wilde said:

It is undoubted law that whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent on his death for its vigour and effect, it is testamentary.²⁹

This statement makes perfect sense and was properly applied, for example, in *Carson v. Wilson*.³⁰ The owner of property executed transfers of land and assignments of mortgages in favour of named persons. He gave the transfers and assignments to his solicitor and instructed

²⁵ This principle also applies to joint bank accounts, in which case the property is the chose in action against the bank that is transferred.

²⁶ *Pecore v. Pecore*, [2007] 1 S.C.R. 795; *Saylor v. Madsden Estate*, [2007] 1 S.C.R. 838. See also *Champion v. Guibord*, 2007 ONCA 161, in which the court notes, in *dictum*, at para. 2 that the severance of a joint tenancy is not a testamentary disposition; *Sawdon Estate v. Sawdon*, 2014 ONCA 101.

²⁷ *Anderson v. Patton*, [1948] 2 D.L.R. 202, [1948] 1 W.W.R. 461 (Alta. C.A.).

²⁸ (1866) L.R. 1 P.D. 241 (Prob. Ct.)

²⁹ *Ibid.*, at 243.

³⁰ [1961] O.R. 113, 26 D.L.R. (2d) 307 (C.A.).

him to deliver them to the named persons on the owner's death. The owner did not create an immediate *inter vivos* trust. In fact, he retained full control over the property and the intended beneficiaries could therefore only receive the properties on his death. Thus, the transfers were attempted testamentary instruments that failed because they were not properly executed.

*Norman Estate v. Watch Tower Bible and Tract Society of Canada*³¹ is an important case in this context. In it, Warren J. explained the principle by reference to other cases. *Norman Estate* concerned the validity of a conditional donation agreement that allowed the donors to recover their donations in case of need. Warren J., applied the explanation of the test of the British Columbia Court of Appeal in *Wonnacot v. Loewen*.³² There the Court of Appeal endorsed the explanation of the test by the Alberta Appellate Division in *Corlet v. Isle of Man Bank Ltd.*:³³

The fallacy in the argument based upon the “oft quoted words” of Sir J.P. Wilde in *Cock v. Cooke*. . . lies in a misunderstanding of what the words “vigour and effect” are applicable to. They are clearly applicable not to the result to be obtained by, or to the performance of, the terms of the instrument, but to the instrument itself. The question is whether the instrument has vigour to effect, and does effect, or is “consummate on execution” to effect, a gift or to create a trust. If the document is “consummate” to create a trust *in praesenti*, though to be performed after the death of the donor, it is not dependent upon his death for its vigour and effect.

Based on that explanation, Warren J. held that the conditional donation agreement had immediate effect, even though it could be revoked in part subsequently.

Unfortunately, the “vigour and effect” principle has been extended to designation of beneficiaries under insurance contracts and pension plans. And it is problematic in those contexts. In my opinion, such designations have immediate effect, even though they can be changed subsequently. But in *MacInnes v. MacInnes*³⁴ the Supreme Court of Canada applied the *Cock v. Cooke* test to hold that a designation of beneficiary in a savings and profit sharing fund was testamentary since it took effect only on the employee's death. Until then the employee could withdraw from the plan at any time. In *Norman Estate*, Warren J. distinguished *MacInnes* and similar cases, since the defendant there obtained an immediate interest in the funds, and also

³¹ 2013 BCSC 2099.

³² (1990), 44 B.C.L.R. (2d) 23 (B.C.C.A.) at para. 18.

³³ [1937] 2 W.W.R. 209 (Alta. C.A.) at 211, per Frank Ford J.A.

³⁴ [1935] S.C.R. 200.

because in *MacInnes* the employee had the power to cancel or extinguish the very document in issue.³⁵ In my view, these are very helpful remarks to avoid an overzealous application of the “vigour and effect” principle. Accordingly, I submit that cases that characterize a change in the designation of a beneficiary of a pension plan as testamentary should be looked at with caution.³⁶

Modern statutes have resolved the issue. Thus, for example, s. 53 of the *Succession Law Reform Act*³⁷ provides that when a participant in a plan has designated a beneficiary, the administrator of the plan is discharged on paying the benefit to the beneficiary and the beneficiary can enforce payment of the benefit. In *Amherst Crane Rentals Ltd. v. Perring*,³⁸ the Ontario Court of Appeal held that s. 53 amounts to an exemption from the rule that an RRSP designation is a testamentary disposition. Consequently, the creditors of the deceased participant in the plan could not reach the proceeds. A Nova Scotia case, *Turner Estate v. Bezanson*³⁹ also held that a beneficiary designation is not testamentary, so that the maker does not have to comply with the formal requirements for wills, nor with the rules about onus and manner of proof of capacity and of knowledge and approval.⁴⁰

In my opinion the making of an *inter vivos* trust by an attorney is not a testamentary act, since the trust will have immediate effect. Moreover, it has been held in a number of cases that an attorney can create a trust.⁴¹ A helpful case in this regard is *Easingwood v. Easingwood Estate*.⁴²

³⁵ *Norman Estate*, footnote 31, *supra*, paras. 46 and 49.

³⁶ *Desharnais v. Toronto Dominion Bank*, 2001 BCSC 1695 is such a case (appeal allowed on different grounds, 2002 BCCA 640). See para. 39 of the trial decision.

³⁷ Footnote 23, *supra*.

³⁸ (2003), 241 D.L.R. (4th) 176 (Ont. C.A.)

³⁹ (1995), 8 E.T.R. (2d) 169 (N.S.C.A.), leave to appeal refused (1996), 14 E.T.R. (2d) 399n (S.C.C.).

⁴⁰ There were suspicious circumstances surrounding the execution of the designation, so the court held, somewhat illogically in my view, that the testamentary rule about the burden of proof respecting fraud and undue influence did apply.

⁴¹ See, e.g., *Banton v. Banton* (1998), 164 D.L.R. (4th) 176, [1998] O.J. No. 3528; additional reasons (1998), 164 D.L.R. (4th) 244 (costs); sub nom. *Banton v. CIBC Trust Corp.* (1999), 182 D.L.R. (4th) 486, 30 E.T.R. (2d) 138 (liability of trust to reimburse expenses); and 182 D.L.R. (4th) 500, 30 E.T.R. (2d) 148 (ordering payment of amount to trustees) (Ont. S.C.J.); appeal of *Banton v. CIBC Trust Corp.* dismissed (2001), 197 D.L.R. (4th) 212, 53 O.R. (3d) 567, 38 E.T.R. (2d) 167 (C.A.); application for leave to appeal dismissed (2001), 276 N.R. 395 (note) (S.C.C.).

⁴² 2013 BCCA 182, 85 E.T.R. (3d) 225 (B.C.C.A.) at paras. 40, 42, 53.

In it the court considered *Bank of Nova Scotia v. Lawson*,⁴³ in which the court concluded that an attorney cannot vary a trust, as that amounts to a testamentary act. Saunders J.A. disagreed with the *Lawson* case. Further, in *Testa v. Testa*⁴⁴ the court reviewed the current state of the law on the right of an attorney to create a trust. Justice D.L. Edwards said:

I prefer the reasoning in *Easingwood v. Easingwood Estate* of the British Columbia Court of Appeal⁴⁵ to that of *Bank of Nova Scotia Trust Co. v Lawson*⁴⁶ and conclude that a continuing attorney for property can create an inter vivos trust that takes immediate effect, and is not dependent on the death of the settlor for its vigor and effect.

As we have seen,⁴⁷ since attorneys are fiduciaries, they must act in the sole interest of the grantor of the power. Consequently, unless the power of attorney permits it, if the effect of the creation of the trust is that the attorney, or others, receive property under the trust, it will be a breach of the attorney's fiduciary duty and the grantor or his estate can recover the property.⁴⁸

In *Banton v. Banton*⁴⁹ Justice Cullity stated that in considering whether there is a breach of a fiduciary duty when an attorney creates a trust, it is not the interest of the beneficiaries, or the intent of the attorney that one must consider. Rather, one must examine whether the effect of the trust deprived the grantor of his property rights to a greater extent than is reasonably necessary to protect his interests, and whether the creation of the trust would improve the grantor's material situation.

In any event, s. 35.1(3)(a) of the *Substitute Decisions Act*⁵⁰ provides that a guardian of property may dispose of property that is subject to a specific testamentary gift in the incapable person's will if the disposition of the property is necessary to comply with the guardian's duties.⁵¹

Further, s. 38(1) provides, *inter alia*, that s. 35.1(3)(a) applies, *mutatis mutandis* to an attorney acting under a continuing power of attorney for property.

⁴³ (2005), 22 E.T.R. (3d) 198 (Ont. S.C.J.).

⁴⁴ 2015 ONSC 2381 at para. 92.

⁴⁵ Footnote 42, *supra*.

⁴⁶ Footnote 43, *supra*.

⁴⁷ See text at footnote 19, *supra*.

⁴⁸ *Banton v. Banton*, footnote 41, *supra*.

⁴⁹ *Ibid.*, at [1998] O.J. No. 3528, para. 157.

⁵⁰ Footnote 11, *supra*.

⁵¹ See *Champion v. Guibord*, footnote 26, *supra*; *Schwartz v. Fuss*, 2016 ONSC 468, para. 12.

4.2 Estate Freeze

A substitute decision maker, such as a committee or an attorney can also engage in an estate freeze of the property of the patient or grantor of the power of attorney. This is clear from a number of cases. An early case is *O'Hagan v. O'Hagan*.⁵² A father suffered from Alzheimer's disease and the court appointed his son as his committee. The father's estate was large and the son wanted to reorganize his father's shareholding in his company to avoid a large tax liability on the father's death, so he applied under the *Patients Property Act*⁵³ for approval of the estate freeze. Section 16 of the Act provides that a committee must exercise his powers "for the benefit of the patient and the patient's family, having regard to the nature and value of the property . . . and the circumstances and needs of the patient and the patient's family." Section 28 empowers the court to make an order "that it considers necessary for or in the interests of the proper, honest and prudent management of the estate." Previous cases had held that an estate freeze was permissible only if it was necessary. However, the Court of Appeal held that the legislation was apt to permit the proposed estate freeze, considering that it did not diminish or prevent the father from regaining control of it if he should recover. For a similar case, see *Callender v. Callender Estate*.⁵⁴

5. Conclusion

In conclusion, it is clear that conflicts of interest can easily arise in estate planning. Careful planning will allow lawyers and clients to avoid them before the planning is completed. However, once an estate plan is in place and problems arise it may be more difficult to resolve conflicts.

⁵² 2000 BCCA 79.

⁵³ R.S.B.C. 1996, c. 349.

⁵⁴ 2001 BCCA 413.