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Family Law Case Study

The Separation Agreement

On May 4th, 2010, Adam Robertson, partner at the family law firm of Robertson, Daniels & Leighton LLP, in Niagara Falls, Ontario, reviewed an urgent memo from his junior associate, Herta Schiller. Her client, Olivia Callahan, had demanded an explanation from a senior partner as to why her offer to settle had not yet been sent to her husband's lawyer. Olivia was due to arrive in the office in less than two hours and Adam had agreed to meet with her.

Robertson, Daniels & Leighton LLP

Adam Robertson, a senior partner at Robertson, Daniels & Leighton LLP, was called to the Bar in 1979 and founded the firm in 1986 with his partner, Joe Daniels. Fred Leighton joined the partnership in 1996. Prior to establishing the firm, Robertson practised family law in Niagara Falls as a sole practitioner. In 2010, the partnership employed two associates, one who was called to the Bar in 2004, and the other, Herta Schiller, who was called in 2009. The firm's practice was restricted to family law and enjoyed a reputation as one of the leading family law firms in the Niagara region.

The Callahan File

Herta Schiller's client, Olivia Callahan, retained the firm on April 16, 2010 after she was locked out of her business, *Espresso! Coffee Bar* by the other two shareholders: her husband, Sean Callahan, and Ethan Culbert. At the first consultation, Olivia told Herta that Sean had his own lawyer and that she was anxious to enter into a separation agreement to settle all issues with him as soon as possible. Herta gave Olivia a financial statement and net family property statement to complete in preparation for their next meeting two days later.

At the second meeting, Herta reviewed Olivia's financial information and received settlement instructions from her. The second meeting did not go well. Olivia disagreed with Herta's position on what financial information was to be given to Sean's lawyer. Olivia also insisted that Herta draft an offer to settle in accordance with terms she gave her. A few days later, Olivia called the office and spoke to Herta's assistant who advised her that the offer had not yet been sent to Sean's lawyer. Angry at the lack of progress on the file, Olivia insisted on seeing a senior partner that afternoon to explain why her instructions had not been followed. Herta drafted an urgent memo to Adam (*Memo to Adam Robertson, Exhibit 1*), setting out all the details of the matter to date. She was unable to meet with the client as she was called to trial that afternoon. Adam agreed to meet with Olivia.

Conclusion

Adam reviewed the memo from Herta. It was clear that Olivia required legal representation to settle her matter. It was up to Adam to recommend a settlement strategy for Olivia that was legally and ethically appropriate. He wondered what he should say to Olivia to ensure that she received the proper advice and remained as a client of the firm.

Exhibit 1

The Memo to Adam Robertson

To: Adam
From: Herta
Re: Your meeting with Olivia Callahan this afternoon
Date: May 4, 2010

Thank you for agreeing to meet with our client on such short notice.

Instructions to Settle

In my second meeting with Olivia, she instructed me to prepare an offer to settle all outstanding issues by way of a separation agreement that would incorporate the following terms:

- no spousal support payable to either party
- transfer to the wife the husband's net interest in the matrimonial home
- transfer to the wife two (out of seven) espresso kiosks, coffee outlets, owned by the husband's business, *Espresso! Coffee Bar*
- custody of their twin children, aged 9, to the wife, with alternate weekend access to the husband
- child support to the wife in the amount of \$1,404 per month
- each party to keep his or her own vehicle

Marriage Background

Olivia and Sean met in Dublin, Ireland 15 years ago and were married in 1998. They have two children, fraternal twins, Eric and Colleen, both 9 years old and born in Ireland. Olivia is a Canadian citizen and Sean is a citizen of the Irish Republic. In Ireland, Olivia was employed as buyer for a restaurant chain and Sean worked for one of the suppliers. The parties moved with their children to Niagara Falls in 2007, after Sean was laid off and unable to secure other employment in Dublin. The parties separated on April 1, 2010, when Sean moved out of the matrimonial home.

Income and Property

Sean's Inheritance

Shortly after the move to Ontario, Sean's mother died and left Sean approximately \$500,000. Sean used \$300,000 from the estate to start a business, *Espresso! Coffee Bar*, with his friend Ethan Culbert. He used the balance to purchase two vehicles, a 2008 Mercedes C280, now worth \$27,000 and registered in Sean's name and a 2008 Honda Accord, now worth \$18,000 and registered in Olivia's name. The balance of the estate went into the family joint account and was used for general family expenses.

Espresso! Coffee Bar

The business is incorporated and has three shareholders: Sean owns 40% of the shares, Olivia 25%, and Ethan 35%. There is no shareholders' agreement. The corporation owns and operates seven espresso bar kiosks or outlets in Niagara Falls. Each shareholder operates one of the kiosks year-round. Four are only open during the tourist season and are operated by university summer students employed by the company. Most of the corporation's income is on a cash receipt basis. Olivia estimates that 70% of the sales are made in cash. The company only declares a small portion of its actual gross receipts. In each year of operation, the company financial statements showed either no profit or small losses, even though the company actually earned significant profits. Herta has in her possession a document prepared by Ethan Culbert for the past fiscal year showing the actual net receipts as compared to the amounts reported to the company's accountant.

Olivia's Income

Olivia's only source of income was from the business. Although Olivia (and Sean) enjoyed substantial income from *Espresso! Coffee Bar*, the company claimed, and Olivia reported to the Canada Revenue Agency, that her income was only approximately \$30,000 each year. Olivia reported no other source of income on her income tax returns.

Sean's Income

Sean receives a sizable income from the actual profits of the business. He does not have a valid visa to work in Canada, but has nevertheless worked at the business since the move to Niagara Falls in 2007. He has never filed a personal income tax return with the Canada Revenue Agency. Olivia declares Sean as a non-working dependant on her income tax returns.

Although the parties started an application for immigration status some time before the separation, with Olivia as spousal sponsor, a relatively minor criminal record in Ireland has held up the application. The application remains outstanding.

The Separation

Olivia states that the separation was caused by Sean's absences and an affair with another woman. Olivia found out about the affair in late 2009, but did not confront Sean until March of 2010. The parties attended marriage counseling for a few sessions in March without success. On April 1, 2010, after a heated argument, Sean left the matrimonial home and is currently staying with Ethan.

Approximately one week after Sean left the matrimonial home, Olivia was fired by *Espresso! Coffee Bar*. Ethan and Sean locked her out of the kiosk she was running and shut it down, alleging that the business was suffering financial losses. Olivia received two weeks' severance pay based on her \$30,000 per year gross income.

Olivia has in her possession a financial statement Ethan prepared in December 2009 that sets out the company's true profits. Based on the information in the statement, Olivia believes that the company is not in financial trouble. Her kiosk earnings as of the date she was locked out are consistent with last year's actual earnings for the same time period. Neither Ethan nor Sean is aware that she has a copy. Olivia admits that she took the papers from her husband's files without his knowledge after she became suspicious about his affair.

Matrimonial Home

The parties are joint owners of the matrimonial home worth approximately \$340,000 as of the date of separation. There is a mortgage securing a joint line of credit for \$280,000. As of November 2009, approximately \$140,000 had been drawn against it. As of the date of separation the debt had increased to \$260,000. Olivia took \$120,000 from the line of credit on January 3, 2010, and kept the proceeds in an

undisclosed personal account to pay for “general ongoing family expenses.” When I advised Olivia that she would have to account to Sean for the money, her response was, “I don’t think so. He is not going to get that money – it was before separation.” Olivia said that in any event, she “may have already lost all the money at the casino.” Apparently, the parties enjoyed going to the casino from time to time. The parties have no other significant property or debts.

File Background

I met with Olivia twice, once for the initial consultation and a second time to review Olivia’s financial information and to provide her with preliminary advice. Olivia’s financial documents were incomplete and she had little supporting documentation. Olivia insisted that we send the offer to settle to her husband’s lawyer immediately, without supporting financial documentation, since her husband knows everything about the finances. According to Olivia, he, like her, would not be interested in “wasting time and money sending papers back and forth on stuff that both of us already know.”

By the end of the meeting I thought that I had convinced Olivia to properly complete her financial documents. Two days later Olivia e-mailed me and left a message on my voice mail: she wanted the offer to settle to go out immediately so that she could get back into her kiosk – and back to work.

When she called today, she spoke to my assistant, Beatrice, who told her that no offer had been sent. That’s when Olivia told Beatrice that she was no longer interested in speaking to me and that she wanted to meet with a senior partner immediately to find out why her instructions were not being followed. She said she was coming in this afternoon to either speak to a partner or to pick up her file. As she put it, “it’s your choice.”

I have checked with accounting. Olivia’s accounts are all in good standing – she’s all paid up. Sorry that I can’t be there this afternoon. I am in Brampton on a trial all this week.

Thanks,

Herta