

WHAT ADVISORS NEED TO KNOW ABOUT FINANCIAL/RETIREMENT PLANS

Clients regularly ask their advisors a series of questions that can be answered through the exercise of preparing a financial or retirement plan (a “Plan”) - how much do I need to retire comfortably; when can I stop working, am I on target, what about my debts? The advisor or agent’s response is: “Let’s build a Plan”. It seems to me that almost everyone should therefore want a Plan so they establish their goals and how to achieve them financially.

Presently in Canada, an advisor or agent is not required to have a Certified Financial Planning designation to prepare a Plan but regardless of whether the advisor/agent is designated or not, there are some important aspects of providing a Plan to clients that both advisors and agents should consider, arising from a recent Manitoba Court of Appeal decision (*Giesbrecht v. Canada Life Assurance Co.* ([2013] M.J. No. 169, (Man. C.A.)).

Like many investors, Mr. and Mrs. Giesbrecht wanted to know, based on their present income, assets, liabilities and retirement expectations, when they could retire. The insurance agents in this case, Richard Kirk and Ronald Browning wanted to assist their clients and help them to plan for the future.

The Giesbrechts had already done some of the analysis as they knew that they could make ends meet with \$35,000 per annum and they expected to live to age 90. The Giesbrechts were only in their 50’s and had saved some money and owned their home, outright, without a mortgage. They provided this information to Kirk and Browning who analyzed their financial situation and prepared a two page letter and two pages of printed out calculations. The letter included an introductory paragraph that explained that what followed were “some suggestions regarding your upcoming retirement ...” and concluded with: “The attached RRIF illustration is the result of these calculations on all of these charts... we are using for the purpose of these illustrations the assumptions as follows:” The assumptions included the investment growth each year, the CPP and OAS available upon retirement, income continuing until retirement, the sale of and value of their home in Calgary which would be added to the retirement funds, and rental costs remaining consistent. Further, the agents suggested at the conclusion of the letter that if the clients wanted to follow the Plan then they ought to





gather together the savings they had to invest according to the Plan, which included certain sums of money that the clients stated they had saved and set aside.

The Giesbrechts did not follow the directions in the letter and Plan but instead tucked it away in a drawer and did not engage in the discipline of following their Plan to meet their retirement goals. Mr. Giesbrecht received a long-awaited termination package from his employer, which he accepted. Without consultation with their advisors, Mrs. Giesbrecht quit her job and the Giesbrechts sold their Calgary home and moved to Winnipeg to be with their family. In Winnipeg they purchased a new home from the proceeds from their Calgary home and did not rent, as the Plan had contemplated, nor did they send certain sums of money, contemplated in the Plan, to the agents. They met with the agents relatively frequently, but never referred specifically to the letter or Plan and the agents didn't specifically refer to it either. Several years later when it became clear to the Giesbrechts that they were going to run out of money, they found jobs that paid them far less than they had previously made and sued the agents for their loss of income.

At trial the judge found in favour of the Giesbrechts and awarded them damages calculated based on several years' loss of income as His Honour concluded that the agents failed to fulfil their obligations to the Giesbrechts both before and after retirement. I was really surprised at this finding when I read the decision, and the Judges of the Manitoba Court of Appeal agreed with me when they overturned the Trial Judge's decision. How could the agents be held responsible for the losses when:

1. the Giesbrechts' own evidence was that they didn't rely on the Plan (document);
2. the Giesbrechts did not consult with their advisors before they retired to determine whether they were on track to fund \$35,000 per year through their retirement, as contemplated;
3. the Giesbrechts admitted that they didn't follow the Plan as they didn't deposit the funds required and set out as an assumption in the Plan;
4. the "illustrations" were clearly just that – "illustrations" based on a number of assumptions.

When you put this altogether, the test required to be met to succeed against the agents could not be met. The conclusion must be that it was not as a result of delivery of the Plan and advice provided that the Giesbrechts quit their jobs and sold their house as these were not contemplated in the Plan and the agents were not consulted to revise the Plan.

The Court of Appeal Judges found that the Trial Judge's analysis was flawed and reversed the decision so the agents were not found to be negligent or responsible for any portion of the Giesbrechts' losses.

As a litigator I know that even when advisors win (note that the action was dismissed against Canada Life before trial), they really lose because the energy and resources spent on defending the action and appealing the decision is costly. Even though the agents (hopefully) had errors and omission ("E&O") insurance for themselves, their respective companies under which they operate were also sued (R.E. Kirk Financial Services, Said R. E. Kirk Financial Services, Browning Financial Services and Said Browning



Financial Services), which may not have had separate entity E&O insurance and therefore may have had to pay for counsel to defend them. Even if there was insurance, there are substantial costs associated with the distraction and stress associated with litigation as the potential for bad publicity can wreak havoc on an agent/advisor's reputation.

So what can agents and advisors learn from this decision in respect of preparing a Plan for clients?

1. Plans are living and breathing documents as they are a reflection of clients' changes in values and circumstances. A regular review of any Plan with a client is important to establish whether the client has changed and adjust the Plan accordingly, while explaining to the client how the changes impact the Plan and why;
2. Using the Plan is a good way to keep in touch with clients to ensure that the KYC obligations are fulfilled, ensuring the KYC and the Plan assumptions are consistent (see the 5 C's in my book) and growing your business, if, for example, the client's circumstances have improved with a bonus or inheritance;
3. Credibility is very important and played a substantial role in the decision of both the Trial Judge, who questioned whether the clients were indeed as unsophisticated as they suggested at trial, and the Court of Appeal Judges, who concluded that the clients did indeed have a sufficient understanding of their Plan and the assumptions therein;
4. The choice of language in a Plan is important so the clients and judges understand that "assumptions" and "illustrations" are not facts or guarantees and cannot be relied upon. This was central to the Court of Appeal decision, as well as the Trial Judge's decision, not to find against the agents for negligent misrepresentation because any interpretation that the Plan contained opinions or forecasts rather than mere illustrations, even to clients who suggest they are unsophisticated, would be unreasonable;
5. Note that even if you are not a Certified Financial Planner and even if you are an insurance agent and not a financial or investment advisor you may be held to the standards set out in both the Conduct and Practices handbook (IIROC) and the Financial Planners Standards Council.

My message to advisors and agents is to continue to service clients by answering their questions about retirement by preparing Plans, but ensure that the language clearly identifies that this is a document that needs to be regularly updated, and that delineates the assumptions and the illustrations as such. Ensure that any template used for your Plans clearly delineate the limitations of the Plan so clients understand the assumptions made and discipline they must follow to meet their goals.

FOR FURTHER INFORMATION REGARDING THESE AMENDMENTS OR IF YOU HAVE ANY QUESTIONS, PLEASE CONTACT ELLEN BESSNER.