

ASK

Dear Nancy Woods: My mother recently passed away and left a large insurance policy with my father as beneficiary. He does not have mental or physical capacity due to a stroke. I have power of attorney for my father. Can I or should I disburse some of the insurance proceeds to my siblings and myself who are sole beneficiaries of my father's estate? *Now or Later.*

Dear N.L.: You need to make the decision whether or not to make an early disburse-

ment of your father's estate based on whether it is in his best interests. As a power of attorney for property, you are bound by the Substitute Decisions Act. It is best to seek a legal opinion and advice. The Substitute Decisions Act, 1992, can be found at www.e-laws.gov.on.ca.

■ Nancy Woods is an associate portfolio manager and investment advisor with RBC Dominion Securities Inc. Send your money questions to asknancy@rbc.com. *Financial Post*



FAMILY FINANCE: WEALTHY BOOMER

The lone investor fights back

Retiree got hit from all sides but won't give up



JONATHAN CHEVREAU
Wealthy Boomer

When Canadian investors lose money to the nation's giant financial institutions, they often settle out of court and sign "gag orders" agreeing not to publicize their experience.

But rarely does the financial industry come up against a customer as ornery as retiree Mary Diwell of Chelsea, Que. Diwell, 60, has a small RRSP but the major source of her retirement income is her husband's pension. She has a Masters degree in history and political science and hoped to use her non-registered investments to pursue a PhD.

In the 1990s, she had a "good man" at BMO Nesbitt Burns who doubled her money from \$40,000 to \$80,000. But then he began investing in options with her account. She

In effect he was selling off my property without my consent

balked and moved to Scotia Capital in 1995, opening a margin account with an Ottawa broker named Frank Cestnik. From the original \$80,000, she added funds to grow her account to more than \$130,000. But by the year 2000, she says this plummeted to \$17,000.

In 2004, Diwell sued Scotia Capital for gross negligence and fraudulent misrepresentation. She says the account was run as if it were discretionary and had given the bank authorization to make trades without her approval each time. The bank denies this. "In effect, he was selling off my property without my consent," she told me in a series of telephone interviews. "It changed our lives dramatically."

In its statement of defence, Scotia Capital denied Diwell's allegations and said her account "had a gain of \$38,840 based on net investment of \$132,411 and withdrawals of \$167,251." If she suffered any losses, they "were caused or contributed [due] to her own negligence."

Finally, in 2007, the bank's legal counsel, Ogilvy Renault, made a non-negotiable offer of \$20,000, complete with gag order. ScotiaMcLeod spokesman Frank Switzer says the offer was made to avoid the cost of trial. Cestnik is still with the firm, Switzer says, but ceased to be Diwell's advisor by September, 2000.

At this point, many investors roll over, take the money and are never heard from again.

In a departure from the usual pattern, Diwell claims she rejected the offer and told her lawyers at Toronto-based Lerner's LLP to fight it out in court. Minutes before the March 31, 2007, deadline, Diwell says Lerner's accepted the bank's settlement offer "without my knowledge or consent." She refused to sign the release,

which included the gag order.

When she refused to sign, Scotia brought a motion to enforce the settlement Lerner's had accepted. In February, the Ontario Superior Court of Justice sided with the bank, leaving Diwell in contempt.

"I'm not gagged because I signed nothing," Diwell says, and describes Lerner's stance this way: "It was not a case of take it or leave it. It was take it or we'll take it for you." She claims she never received the \$20,000.

Her contract specified that if she won in court the lawyers would get 23% of the proceeds, rising to 38% if it reached appeal.

When asked whether the firm had proceeded without its client's authorization, Peter Jervis, a veteran lawyer with Lerner's, responded in an e-mail: "you have very likely been misinformed." In a subsequent phone interview, he said he was unable to talk about the case. The firm may have concluded that a small case such as Diwell's was not worth fighting in court. It is also possible she is regarded as a nuisance — Diwell had tried other legal counsel before landing at Lerner's and has made complaints to the Law Society of Upper Canada.

She had been referred to Lerner's by Stan Buell, president of the Small Investor Protection Association (SIPA). "The fact Lerner's took it on a contingency fee basis suggests there was some merit to the case and the fact Scotia offered her money to keep her quiet also suggests there was some merit to the case," Buell says. "It's not unusual for brokerages to offer a pittance to settle a case."

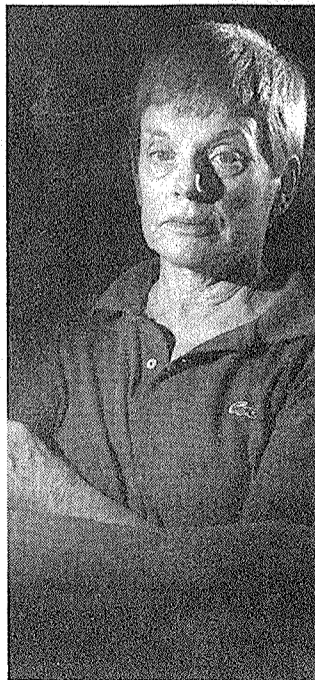
ScotiaMcLeod's Switzer says "we negotiated what we believe was a fair settlement with her lawyer. We were prepared to follow through on this. The dispute appears to be between her and her lawyer."

Duff Conacher, co-ordinator for Democracy Watch, says Diwell "is being courageous in not rolling over." He says her situation is typical of the lone investor pitted against big financial institutions. The solution, he says, is to create a consumer-oriented body that allows investors to share legal resources. He'd like to see all financial institutions forced to include information on such a body in mailings to customers.

The playing field "is completely tilted in favour of sellers and against consumers," Conacher says. "Mary is on her own."

■ Jonathan Chevreau blogs at www.wealthyboomer.ca.

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JANA CHYTHLOVA FOR NATIONAL POST
Mary Diwell is not only taking on the banks, she is also taking on her lawyer.



BRETT GUNDLOCK FOR NATIONAL POST

Elaine Dembe will climb Mount Kilimanjaro before she turns 60 on Aug. 9, and has set her sights on Patagonia for next year.

60 ain't nothing but a number



WILLIAM HANLEY
About Retirement

Elaine Dembe has just run the two kilometres from her office on a sweltering Toronto day to the midtown restaurant where we're having lunch without even breaking a sweat. And the super-fit star chiropractor, author and motivational speaker will need to be in top shape next month when she and 16 women friends climb Mount Kilimanjaro in Africa just before her 60th birthday on Aug. 9.

"Last summer I embarked on this journey," she declares, sounding every bit the inspirational speaker. "I wanted to be in super-duper shape for this climb and also for this next new decade, which is daunting for many Baby Boomers who can no longer say they're 50-something."

As I noted when I first caught up with Dembe almost two years ago, she was 58 going on 38. Now, with her stepped-up health and fitness regime, she can truly claim to be the poster girl for the notion that 60 can be the new 40.

"Sixty is only my chronological age," she says devouring a veggie wrap and lentil salad. "How old am I on the inside? I could be 35 or maybe 40. You could be 10 to 20 years younger than your stated age."

However old she is on the inside, there's no doubt that on the outside Dembe looks a lot younger than her chronological age — lean and muscular, even more powerful than when I saw her last, but in a package very pleasing to the eye.

Of course, looks are an important part of the professional package — Elaine Dembe Inc., if you will. She recently sailed from Southampton to New York aboard the Queen Mary II,

speaking on behalf of the Canyon Ranch spa about "healthy ageing," and it certainly helped that she looks like the "after" in a "before and after" ad.

And, of course, if you think you're 40, you have no thought of retirement — or "inspiration," as she puts it.

"I work hard at it because it's my business, it's my life and it's my practice. I want to help people get stronger, leaner, fitter, healthier. So I do it through my [life] coaching and chiropractic."

Over the past year, Dembe has gotten stronger, leaner, fitter and healthier by elevating her fitness beyond running, hiking, calisthenics and light weights. She has added two punishing sessions a week at Lawlor Personal Performance gym in downtown Toronto, where she is pushed to her strength limits in a regime that has drastically reduced her body-fat percentage to a very low 18%. She has also fine-tuned her diet, cutting back on carbs and loading up on more protein while eating plenty of vegetables.

"I'm doing workouts so beyond what I ever thought I could do. I get excited just going there to see what barriers I can break through."

She and her 16 women friends — almost all in their 50s and 60s — will need every bit of their fitness to break through the "Mt. Kili" barrier next month. Wisely, they have decided to climb the 20,000-foot peak in eight days instead of the usual five. On Aug. 9, a day after they descend, there will be a 60th-birthday party for Dembe at a spa. The group will then embark on a week-long safari.

Dembe, the author of *Pasionate Longevity: The 10 Secrets To Growing Younger* and *Use The Good Dishes: Finding Joy In Everyday Life*, embarked on her personal fitness journey 30 years ago when she became a serious runner at about the same time she became a chiropractor. In the 1980s, she became one of Canada's elite women marathoners.

Looking beyond Kilimanjaro, she is already beginning to focus on her next fitness journey: Running in Toronto's first half-marathon for women next May 31. She hasn't run that distance in about 30 years, but is excited by the prospect of perhaps finishing very well in the 60-plus age group division.

But Dembe is not all focus, drive and self-control. She indulges her love of dark chocolate, has a "cheat" meal every week, eating anything she wishes, and enjoys a glass of wine each evening.

And yet, she is mostly being Elaine Dembe, the human dynamo.

"People have a perception of how they are in terms of their strength and fitness," she says. "When you start taking risks and finding the courage to do something you never thought you could do, the physical gain spills into your emotional aspect. It builds your confidence. You feel strong and feeling strong is a good feeling. It's an empowering feeling — especially for women."

She says it all boils down to respect for one's being. "This is the only body that I've been given and I haven't got time to be sick. I'm too busy. When you're healthy, anything's possible. When you're healthy, you can make plans."

Plans? Dembe has plans. Lots of them. Adventurous ones. Besides the half-marathon, there's hiking in Patagonia next year. Possibly carrying a guide on her back. Just kidding. Well, maybe not.

She is one in a thousand, perhaps a million. We can't all be like her. But what we can do is learn from her, take inspiration that being the mistress/master of your own bodily temple is absolutely within the realm of probability.

"The key is that when you are happy, when you are fulfilled, when you really understand your life purpose," Elaine Dembe says, "it's the best anti-ageing supplement known to man."

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Know the score, keep the change

JAMIE GOLOBEK
Tax Expert

Taxes not only affect what we take home each payday, but nearly every financial decision we make during our lives.

The most obvious example is investing. Being aware that interest income is taxed at full marginal rates while Canadian dividend income and capital gains when earned outside registered plans are taxed at much lower rates, can contribute significantly to overall portfolio design and asset allocation.

Yet another example of tax-based decision making is when an employee is considering leaving a job and exiting from a defined benefit pension plan. The employee has to make a choice: agree to take a pension later on from the plan or take a lump-sum "commuted value" amount, essentially an estimate of what the future pension benefits are worth today.

The commuted value can't be taken in cash but must be transferred to a "locked-in" type of retirement vehicle, which is usually subject to minimum and maximum annual withdrawals.

In the past, advisors would simply perform a mathematical calculation to determine whether an employee would be better off taking the monthly promised pension upon retirement or taking the theoretical lump-sum amount, investing it and hoping to beat the returns of the pension plan.

But with the introduction of pension income splitting last year, the decision becomes much more complicated. That's because, while both pension income and withdrawals from a locked-in plan qualify for pension splitting, the latter applies only upon reaching the age of 65 (whereas pension income can be split at any age).

As a result, a departing employee who is under age 65 and has a low-income earning-spouse may be better off taking an early pension and splitting it than taking a commuted value and waiting until age 65 to split it.

Taxes can even factor into the decision of how to pay for your daily commute. Take the cost of commuting on public transit in Toronto as an example: A one-way TTC fare is \$2.75 for an adult commuter. Buying tokens in advance, in quantities of at least 10, drops the price to \$2.25 per ride. Using tokens, the return fare to get to and from work is \$4.50 a day.

Ignoring vacation days, with about 22 work days per month, the monthly cost of commuting is about \$99 (or \$121 if you pay cash). Compare that to a monthly pass, which costs \$109, and it appears that you'd save \$10 per month by choosing to purchase tokens instead of the monthly pass. This is where the relatively new federal tax credit for monthly transit passes kicks in.

This credit, which is not available for single-ticket fares, is equal to 15% of the cost of the monthly pass. Applying a credit of about \$16 to the monthly cost of \$109 brings the true cost of the pass down to \$93.

Clearly, knowing about the tax rules can result in more cash in your jeans.

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