Matrimonial Property Law and the Family Trust

Prepared for: Legal Education Society of Alberta

Matrimonial Property 2017

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For presentation in:
Edmonton, Alberta – February 14, 2017
Calgary, Alberta – February 22, 2017
INTRODUCTION: WHAT IS A FAMILY TRUST?

A family trust is an express private trust. It is a simple instrument with far-reaching and complex effects in the family law practice. It is most commonly used by high net-worth individuals, or as a tool affecting matrimonial property division. Family trusts are also a way to defer taxes, and are more commonly used when taxes are high, such as Alberta’s current high-tax environment. This paper examines the nature of the family trust, and discusses some common ways to pierce a trust as well as defenses to preserve a trust, and future trends in family trust litigation.

What is a Trust and How is it Created?

A family trust is, at its heart, a relationship, not a creature of statute. A trust is a common law concept that has its roots in the Middle Ages, but has changed throughout the centuries to adapt to the needs of the time. The flexibility of the trust instrument has led legal commentators to conclude that the trust is, “the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence...” It is this flexibility that makes a trust an invaluable tool in the family law and matrimonial property context.

The three essential features of a common law trust are: (1) segregated assets or property, (2) a person or purpose as the object of the trust with exclusive right to the enjoyment of the property, and (3) a person holding title to the assets or property held in the trust. Put another way:

A trust is the relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one, and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust.

Another definition of trusts that has been commonly used by the courts in Canada states that:

A trust is an equitable obligation, binding a person (called a trustee) to deal with property owned by him (called trust property) as a separate fund, distinct from his

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1 F.W. Maitland, Selected Essays (1936): “If I were asked what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence, I cannot thin that we should have any better answer to give that this, namely, the development from century to century of the trust idea.”


4 See Water’s Law of Trusts in Canada, supra note 2 at 4, n 4.
own private property, for the benefit of persons (called beneficiaries or, in old cases, *cestuis que trust*), of whom he may himself be one, and any one of whom may enforce the obligation.5

As these definitions suggest, the trustee, while holding the trust property in trust for the beneficiary, owes the beneficiary a fiduciary duty, and the beneficiary may enforce this duty. The purpose of the trustee’s role is to administer property on behalf of the beneficiaries. An express trustee is expected to put the interests of the beneficiaries before his own, and to act in their best interest in the administration of the trust. The trustee’s fiduciary duties have been stated and restated in many ways by the courts and legal commentators, “but essentially it means the duty to account to another, who is the person with the right of enjoyment over the property in question, for all that one does with the property and in the office of trustee. Nothing may be done which is not directed solely towards the best interests of the trust beneficiary or beneficiaries.”6 The ramifications of this relationship are numerous and have been explored at length in legal articles and by the courts. Suffice it to say that the thrust of this duty is that a trustee must never allow his personal interests and the best interest of the beneficiaries to conflict in any way.

A family trust is created when the essential elements have been established. The person who enters the property into the trust declaration, is called the “settlor” and is said to have “settled” the trust. The cornerstone of creating a trust is that you must establish “The Three Certainties”. That is, certainty of intention, certainty of subject matter, and certainty of objects. Without these three essential elements, a trust cannot come into existence. As stated in *Knight v Knight*7 in 1840, adopted into Canadian common law in *Renehan v Malone*8 in 1897, and commonly used in Canadian jurisprudence since that time9, (1) the language of the alleged settlor must be imperative; (2) the subject-matter or trust property must be certain; and (3) the objects of the trust must be certain. Put in plain terms, this means that first, the settlor must use language that clearly shows his intention for the property to be held by the trustee in trust, and not given absolutely. Second, that the property to be held in trust has been clearly and unequivocally described by the settlor. And third, that the objects of the trust, that is the beneficiaries, can also be clearly and unequivocally determined. If any one of The Three Certainties is missing, the trust is void *ab initio*, and never came into existence.

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6 *Water’s Law of Trusts in Canada*, supra note 2 at 43.
7 *Knight v Knight* (1840), 3 Beav 148, 49 ER 58 (Eng Ch).
8 *Renehan v Malone* (1897), 1 NB Eq 506 (NBSC [In Equity]).
9 See *Water’s Law of Trusts in Canada*, supra note 2 at 140, n 3.