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PUBLICATION

Trustees in the middle when family trust meets family law

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Family trusts, like all trusts, are by their nature complex beasts. They create unique rights and obligations between specific actors that originate in the trust obligation itself.

In most scenarios, the settlor of the trust transfers property to a trustee (legal owner) for the benefit of persons known as beneficiaries (beneficial owner). The relationship is formalized by a trust agreement or deed of trust. The trustee owes a fiduciary obligation to hold the property for the benefit of the beneficiaries.

Trusts of this type often arise in estate administration, corporate reorganizations and tax planning for high net worth individuals. The common objective in family trusts is the preservation and growth of family wealth, a laudable goal indeed. But what happens when a trustee or beneficiary separates from a spouse and disputes follow? How does one reconcile the competing rights and obligations of a trustee or beneficiary vis-à-vis rights and obligations pursuant to the *Family Law Act* (FLA)?

In our practice, we have acted for two types of family law clients in trust scenarios. The first category is the “beneficiary spouse” of a family trust. The beneficiary spouse is either entitled to a specific amount, or — in the more common fully discretionary trust — dependent upon the trustees to exercise discretion in his/her favour (or not). In a discretionary trust, discretion rests solely with the trustees.

The second category is the “trustee spouse” who holds trust property in a fiduciary capacity on behalf of the beneficiaries, who often include the self-same trustee.

The issue in both scenarios is how to attribute the trust capital and income (whether allocated and received, or not) in calculating equalization of net family property and support. In the case of the beneficiary spouse, if the trustees of a $5 million trust with five beneficiaries have never exercised discretion in favour of the beneficiary spouse, is it fair that the beneficiary spouse be required to include his or her contingent or vested interest of (hypothetically) $1 million in an equalization calculation when he/she cannot compel its payment?

As for the trustee spouse, if he or she holds legal title to trust property in his/her capacity as trustee for the benefit of other beneficiaries, should such value be included in his or her own net family property calculations? What if the trustee regularly pays out $50,000 to his or her spouse or their children out of the family's overall cash flow? Should this be a consideration in determining the trustee spouse's ongoing support obligation?

The answer in both scenarios is: *it depends*. There are no statutory guidelines for such a determination, and an assessment of the facts before and following the valuation date is required in determining whether an interest in a trust is property or income for family law purposes. Further, requests for financial disclosure often pre-date an evaluation of whether such interests are indeed relevant to family law calculations.

The trustee spouse often responds that "it is not my money" or "it was a gift and therefore excluded property" pursuant to the FLA. The beneficiary spouse says, "I have no control" and therefore cannot provide information from the trust because the "trustees will not heed" to my requests for same.

In a family law system founded on the hallmark of "full and frank financial disclosure" the answer to whether a client's disclosure obligations extend to a trust is usually — yes. But the extent of disclosure and its "semblance of relevance" is a different issue to which there is no easy answer.

Trust us when we say, all one can do is seek the advice of family and trust lawyers who practise at the intersection of these two distinct areas of law. Counsel's response to initial requests for disclosure, after all, often sets the stage for what will be either the dissipation or preservation of the sacred family trust.

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