Blaney McMurtry LLP

PUBLICATION

Privileged yet powerless beneficiary spouse of a family trust

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Picture this: your client is one of two beneficiaries of a $10 million discretionary family trust set up by his maternal grandfather. The trustees are your client's parents. A trust company manages the money through an investment account.

Your client has never worked a day in his life and has zero employment income. But for three years now, the trustees have favoured him with a CRA-verified $300,000 annual income derived from taxable dividends, interest and investment income and taxable capital gains emanating from the trust.

Your client has separated from his common law partner of nearly 10 years. The parties have two minor children. They have agreed to shared parenting but remain at loggerheads over set-off child support. The spouse's lawyer has delivered multiple requests for financial disclosure with a view to determining your client's obligations pursuant to the *Child Support Guidelines*. Litigation threats have followed.

An estate/trust lawyer is advising the parents, who are furious with the spouse. They are adamant that the spouse will "never see a dime from the trust." As trustees, they have cut off your client's distributions.

This is not an uncommon story for family lawyers confronted with the complexities of intergenerational wealth. When clients have no control over trust income that is their sole income, how do their lawyers advise them regarding their disclosure and support obligations?

Although family lawyers more often than not err on the side of disclosure, they frequently meet resistance from estate or trust counsel. Their position is normally that the common law partner is

not a beneficiary of the family trust and therefore is not entitled to funds or disclosure from the trust.

But while this appears to be an accurate statement of trust law, it's too simplistic when trust disclosure issues arise in the family law context. Here, core trust and estate law principles must yield to the best interests of the children. It is, after all, the child who has the right to support and the parents who have the obligation to provide that support — even if they're aghast at the fact that the child support is payable to the ex-spouse.

What emerges, often, is a landscape of privileged but powerless beneficiaries. And what are they to do?

Certainly, reverting to first principles of estate and trust law by way of a hard "no" is not the answer.

Frequently, trust agreements provide that your client and *issue* are the beneficiaries of the family trust. In this sense, at least, the children have a financial interest in the trust — whether contingent or vested. It follows that a child's right to support will simply not give way to the argument that the parent has no "control" over distributions from a family trust.

Tough questions must be asked, and in the context of family litigation, requests for third-party disclosure from the trustees (i.e. the beneficiary's parents) may be necessary to demonstrate that your client has made all reasonable efforts to obtain the relevant disclosure. But just how far does the beneficiary spouse or the trustees have to go? Is providing a copy of the trust agreement sufficient for the purposes of complying with a demand for disclosure? Or is disclosure of all relevant financial statements necessary?

The answer is: it depends.

In a recent decision (*Shinder v. Shinder* 2018 ONCA 717), the Ontario Court of Appeal ruled that a spouse claiming financial support who had knowledge of the existence of the family trust but made no further demands for disclosure could not several years later seek further information.

But what if the non-beneficiary spouse does in fact demand more information at the outset? Are three years of investment account statements prior to the date of separation enough? Should 10 years' worth of statements be produced?

Determining the relevance and degree of disclosure is always a delicate balance — one that must not be approached with haste or flippantly. Proportionality and the need to discourage fishing expeditions from the onset are principles equally as important as the revered family law principle of full and frank disclosure.

So where and when does one draw a line in the sand?

We know that the consequences of non-disclosure can be disastrous. In the context of family law litigation, motions for disclosure and to strike pleadings followed by an award of costs on a substantial indemnity basis are becoming ever more common. Such a disastrous outcome is best avoided by consulting lawyers with expertise and experience in both trust/estate and family law, or alternatively, by trust/estate and family lawyers working hand-in-hand.

The upshot is that at the intersection of estate/trust and family law, more often than not “one must cut the finger to save the hand.” Judgments about where to cut and how deep is best left to lawyers fully equipped to make the right call.

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