



STHI LEGAL NOTES

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The Trust Edition

A trust is a legal concept that allows a person, the trustee, to hold property for another person, the beneficiary. It may seem simple enough, but ask any lawyer who studied trusts in law school and you will quickly be disabused of this notion. The law of trusts is one of the most complex and difficult areas of the law, not least because there is a trust for every situation - more or less.

In this first issue of 2017, we provide you with a brief overview of this tricky but important area of the law (*Trusts 101- FAQs*). In *The Role of the Trustee* and *Stay Calm and Be Leaf* we give you two real life examples of how trusts work and demonstrate the crucial role of the trustee.

One reason for creating a trust is to lessen the impact of taxes. However, a year ago, a number of significant changes to the taxation of certain trusts came into effect (*Graduated vs Flat*). These changes have the potential to be quite costly if ignored. While it is always a good idea to review your estate planning on a regular basis, these changes by the CRA should provide the impetus to do it sooner rather than later.

Finally, we hope that 2017 brings you health, happiness and good fortune. ☺

Trusts 101 - FAQs

What is a trust?

At its most basic, a trust is an instrument that allows a person to transfer property to another person for the benefit of a third party. A trust can be either an inter vivos trust or a testamentary trust. With an inter vivos trust, the person transferring the property into the trust will do so during his or her lifetime. A testamentary trust on the other hand, is not set up until after the person's death. The instructions for setting up a testamentary trust will be in a Will. It is this latter type of trust that most are familiar with, particularly if they have minor children.

What are the "Three Certainties"?

A trust will not be legally enforceable unless it has three basic criteria commonly referred to as the "Three Certainties".

#1 Certainty of Intention

The person who transfers the property to a trust must in fact have the intention of creating a trust, that is to say the intention of transferring the property for the benefit of a third party. Although the intention can be oral, it will be more certain if it is in writing.

#2 Certainty of Subject Matter

There must be certainty about the nature of the property held in the trust. It must be ascertainable. Uncertainty is more likely to arise when what is being put into a trust are objects or property as opposed to money. In addition, there must be certainty about the amount of each beneficiary's share.

#3 Certainty of Object

This third criteria requires certainty about who is to receive the benefit of the trust. For instance, a group consisting of "my close friends" is unlikely to be found to be certain, but a group consisting of "my children" likely is.

Who are the players?

The *Settlor*, also called the Donor, is the person creating the trust and who is giving up the property to the trust.

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The articles in STHI Legal Notes are necessarily of a general nature and cannot be regarded as legal advice. Our firm will be pleased to provide additional details on request.

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The Role of the Trustee

Because of the dependency relationship and the fact that the trustee controls the beneficiary's property, the trustee is held to the most exacting standards of all fiduciaries.

Gillese J.A., *The Law of Trusts*

The role of a trustee is a demanding one. As the title suggests it is a position of great trust. The trustee is a fiduciary, as he or she has been entrusted to prudently oversee the property of another. According to Justice Gillese, author of *The Law of Trusts*, a breach of trust occurs “whenever a trustee fails to fulfill his or her obligations with respect to the administration of the trust” whether the breach is innocent, negligent or fraudulent.

The following case helps to illustrate the extent of the obligation on the part of a trustee.

The Facts

The testator of a Will died in March 2010. His son, Kevin, and his daughter, Sheila, were named in the Will as estate trustees. Among other things, the Will directed that a trust in the amount of \$100,000 be set up for the benefit of their brother Patrick. Patrick was to receive \$500 a month throughout his lifetime. Any monies left over from the trust fund at the time of Patrick's death were to be divided equally among the testator's grandchildren.

Kevin was appointed the sole trustee of Patrick's trust fund and was given sole discretion with respect to the investment of the \$100,000.

Kevin chose to open a non-registered investment plan with London Life. On the application form, he described himself as the annuitant and Sheila as the contingent policy holder. The account information for Michael Cahill, another brother, was listed under the heading “Information for Pre-Authorized Payment Agreement / Direct Deposit”. No mention was made of any trust, trust fund, or Patrick. Aside from signing the letter of direction to the bank to pay London Life, Sheila had no involvement with setting up her brother's trust.

For the next four years, London Life paid either Kevin or Michael \$500 a month, and they in turn gave the money to Patrick. In May 2014, the payments to Patrick stopped. Unfortunately, Kevin had decided to borrow more than \$92,000 of his brother's money for his business. The business failed and he lost everything. When Patrick discovered this, he successfully sued his brother and sister and they were ordered to repay the money.

Sheila appealed the decision claiming that the loss was Kevin's fault, since he was the trustee of the trust and that she had not known what he had done.

The Court Case

Kevin's wrongdoing is obvious. Although as trustee he was responsible for the \$100,000, it was not his money. Rather he was overseeing and administering the money on his brother's behalf. In fact, the application's judge found that Kevin had failed to set up a proper trust.

Unlike Kevin, Sheila's liability in this affair may seem difficult to understand, particularly since Kevin and not she was named the trustee of Patrick's trust. However, what Sheila failed to understand was that she, like Kevin, was an estate trustee and therefore equally responsible for ensuring that their father's wishes were carried out as directed, i.e. the setting up of a trust for Patrick.

During the hearing, Sheila admitted that she had no real involvement in the administration of her father's estate. Instead, she let Kevin do the bulk of the work, despite the testator's clear intention that both she and Kevin administer his estate.

Although this scenario may be common, the law is quite clear that co-trustees bear equal responsibility for the job and that one cannot simply defer to the wishes of the other. In the book, *Law of Trusts and Trustees*, the authors state that, “the settlor has trusted all his trustees and it beholds each and every one of them to exercise his individual judgment and discretion on every matter, and not blindly to leave any questions to his co-trustees or co-trustee.”

As one of the estate trustees it was up to Sheila to ensure that Patrick's trust was properly set up, even if she was not responsible for the actual administration of the trust. Further, as estate trustee, she was under a continuing obligation to ensure that the remainder of the trust, if any, be divided among the grandchildren. If Sheila felt she was not up to the job of estate trustee it was open to her to renounce the position, something she did not do, hence her financial liability.

The Lessons

Perhaps the most significant lesson to be learned from this case is that the role of trustee is not a mere gesture or some honorary title. It is an important job with serious and ongoing responsibilities.

The second lesson is that failure to properly execute one's duties can prove to be a costly one, as in this case. If one does not feel up to the task of being a trustee, there is always the possibility of renouncing the appointment.

Finally, when choosing one or more trustees it is essential to find someone who is trustworthy and who will take the job seriously. ☞

Stay Calm and Be Leaf

Dad, what's playoffs? I don't know son, we're Maple Leaf fans.

It may be fifty years since the Toronto Maple Leafs last won the Stanley Cup, but season tickets¹ are still a prized possession in Hogtown. So perhaps it is not surprising that the following situation ended up before the court!

The Facts

Chaim and Harry were fellow immigrants from Poland, friends, brothers-in-law and business partners. Together they created Nuspor, a construction and real estate partnership. Sometime in the late 60s, early 70s, they were offered a pair of season tickets for the Toronto Maple Leafs from a business contact of Harold Ballard. The contact told them, erroneously as it turned out, that the tickets had to be registered in an individual's name rather than in a company's. They decided to purchase them in Chaim's name. This situation continued until his death in 2012.

When Edie, one of Chaim's daughter's and one of the estate trustees², refused to turn the tickets over to Nuspor, the latter commenced an application for a declaration that it was in fact the beneficial owner of the tickets.

The Evidence

Harry's evidence was that while the partners agreed that the tickets would be in Chaim's name, it was understood that the tickets in fact belonged to Nuspor. For this reason Nuspor, and not Chaim, paid for the tickets every year. Harry stated that the tickets were used by both he and Chaim as well as for business purposes.

Lax, Harry's son-in-law who had worked for Nuspor since 1989, confirmed that the business paid for the tickets every year and exercised complete control over them, including choosing the seat location at the AC Centre following the Leafs move from the Gardens.

The third person to provide evidence was Edie's husband, Jesin. He testified that Chaim had complete control over the use and distribution of the tickets. He stated that for the 10 years after his marriage to Edie, Chaim regularly let him choose tickets for 10 games each season while he sold the balance to a scalper. He did not know how the tickets were originally acquired or who paid for them each year.

The Law

Nuspor argued that Chaim held the tickets in trust for Nuspor.

See **BE LEAF** on page 4

Graduated vs Flat

It has been just over a year since the Canada Revenue Agency put into place new rules regarding the taxation of *testamentary trusts*, *estates* and *grandfathered inter vivos trusts*. Up until December 31, 2015, all benefited from graduated rates of taxation. All that changed in 2016.

As you know, the income of individual Canadians is taxed on a graduated rate. In other words lower amounts of income are taxed at a lower rate and as one earns more money the additional amounts are taxed at a higher level. Prior to these changes, *testamentary trusts*, *estates* and *grandfathered inter vivos trusts* were taxed in this same manner. This is no longer the case - sort of.

A *grandfathered inter vivos trust*, which is a living trust created prior to June 18, 1971, is now taxed at the flat-top rate, regardless of the amount of money actually in the trust.

The estate of a deceased will continue to benefit from graduated tax rates, but only for the first 36 months. After that every dollar earned by the estate will be taxed at the highest marginal rate. These changes also apply to estates that continue to be administered but which came into existence prior to December 31, 2015. In addition, many of the tax preferential rules that apply to the final tax return of the deceased are now restricted to a graduated rate estate.

The concept of the *graduated rate estate* was introduced as part of the above changes. It is defined as an estate that arose on and as a consequence of the individual's death if:

- That time is no more than 36 months after death;
- The estate is at that time a testamentary trust;
- The individual's Social Insurance Number is provided in the Estate's return;
- The estate designates itself as a graduated rate estate in its first return of income for its fiscal taxation year that ends after 2015; and
- No other estate designates itself as a graduated rate estate of the individual in a return of income for a taxation year that ends after 2015.

A mistake as simple as a late filing or forgetting to designate the estate as a graduated rate estate could result in an increased tax bill.

If your head is spinning at this point then rest assured that our lawyers are here to assist you. They can review your current estate plan to determine if you should reevaluate your arrangements. We can also help you navigate the niceties of the new rules if you are an Estate Trustee in the midst of administering an estate. 

BE LEAF continued from page 3

The Court agreed, concluding that this was a situation of a purchase money resulting trust as described in the case of *A.M.K. Investments Ltd. (Trustee of) v. Kraus*. “A purchase money resulting trust can potentially arise when one person pays for something but title is recorded in the name of a different person. There are three requirements to establish such a trust: first, the trustee must have title to the property; second, the claimant must have supplied the whole or a part of the purchase price at the time the property was being bought; and third, the claimant must prove throughout he acted as purchaser.”

The Court accepted Harry’s evidence concerning the original acquisition of the tickets and why they were in Chaim’s name. The first criteria therefore was met since Chaim had title to the property. The Court also accepted Lax’s evidence that the business and not Chaim, had always paid for the tickets, thus meeting the second criteria. Although the tickets were mailed to Chaim’s home address, Nuspor had complete control of the tickets since it was Nuspor that decided how the tickets would be used, the third criteria.

As a result, Chaim’s control of the tickets was not on behalf of himself personally but on behalf of Nuspor. The estate trustees were directed to transfer the Maple Leaf season tickets into Nuspor’s name. ☞

¹ According to the National Post journalist Allen Donnelly, “Inheriting season tickets is by far the easiest way to come by them. Toronto’s Air Canada Centre has 18,900 seats available for Leafs games, and 15,500 of them belong to season ticket holders. In March 2016, 99.5 per cent of those tickets were renewed — meaning just 77 season tickets became available for sale to the 10,000 people currently on the wait list.”

² Chaim’s two daughters, Edie and Myra, were the estate trustees and therefore the respondents in the application. Myra did not care about the tickets and therefore did not take part in the application.

TRUSTS 101 continued from page 1

The **Trustee** is the person who becomes the interim holder of the legal title to the property. They are given the responsibility of protecting and managing the property. Since the property does not actually belong to the Trustee, it is incumbent that they avoid all conflicts of interest while administering the trust, even if that means their own interests may be thwarted.

The **Beneficiary**, also called the Donee, is the third party, the one entitled to the benefit of the trust property. Although the Beneficiary does not have the right to oversee the property, they have the sole right to enjoy the benefits of the property.

The **Lawyer** can be of assistance to any of the three main players, although initially he or she will assist in drafting the document that will create the trust.

Why create a trust?

You might think that trust funds are only for the rich as a way to reduce taxes or to parcel out money to an irresponsible child. However, there are many scenarios where a trust might be an appropriate vehicle. If you have a child with a serious disability, you may want to set aside money to provide long term care for him or her. If you are embarking on a risky business venture you may want to set up a trust so that your family members are financially protected from potential creditors. You may wish to set up a trust for a specific charitable project. And of course there is the trust that most people are familiar with, the trust set up in a Will for the benefit of minor children.

Is a trust for me?

There are many reasons why a trust might be something to consider. A trained legal professional will be able to help you decide as well as create the trust. ☞

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