

**BOUTET**  
FAMILY LAW  
& MEDIATION

**P·T·L**  
PRYOR·TAX·LAW

# Family Law and Trusts: From Basic to Complex

---

TAX SPECIALIST GROUP  
JANUARY 20, 2020

---

**Sébastien Desmarais:**

---

Estate and Tax Lawyer

---

LL.B., J.D. (USA), LL.L. (Que)

---

TEP

---

Called to the Bar: 2007

---

---

## **Nathalie Boutet:**

---

Family law lawyer, Mediator, Collaborative law

---

Certified Family Enterprise Advisor™

---

Speaker, author, educator

---

Called to the Bar: 1991

---

# Agenda

---

Introduction

Division of Assets and Support Issues – An overview

Special issues:

- Trusts
- Estate Freeze
- Shareholders Agreements

Conclusion

*Caveat: Ontario law*

# Division of Assets

---

Preamble to the Ontario *Family Law Act*:

...to recognize the equal position of spouses as individuals within marriage and to recognize marriage as a form of partnership...

# Division of Assets

- Married Couples
  - Equalize net family property accumulated during the marriage
  - Do not include gifts and inheritance received during the marriage (unless co-mingled)
  - Gifts and inheritance received before the marriage are considered “pre-marriage” assets
  
- Common Law couples
  - Divide according to ownership
  - Joint Family Venture

# Income for Child Support

---

## **Federal Child Support Guidelines:**

Determination of annual income

15 (1) Subject to subsection (2), a spouse's annual income is determined by the court in accordance with sections 16 to 20.

# Income for Spousal Support

---

- Import income definition from the Federal Child Support Guidelines – for the most part



# TRUST & FAMILY LAW:

## A “Twisted” Relationship, Trust Me!

# Trusts

## Inter Vivos Trusts

- Need to review whether we are dealing with a **discretionary trust** or a **non-discretionary trust**.
1. Must review the named beneficiaries
    - Are they specifically named? Ex: John Doe
    - Is it a class of beneficiaries? Ex: the issues of John and Jane Doe
    - Are there contingent beneficiaries? Ex: my children who graduate high school
    - What if the “contingent beneficiaries” are unascertainable? Or the contingency is unachievable?
  2. Who are the trustees and reviewing the discretion afforded to the trustees?
    - Absolute discretion vs. “fixed” interest (non-discretionary trust)?
    - A *discretionary trust* is a trust where the trustees have complete discretion as to when and how the income or property is distributed/transferred to the beneficiary(ies) and in what proportion.

# Trusts

---

- Frequent language in the Deed of Trust of *Inter Vivos* Trust:

No benefit under this Deed of Settlement shall be assigned or anticipated or fall into any community of property which may exist between any Beneficiary and his Spouse.

# Trust

- Standard Language in Wills:

I HEREBY DECLARE that all property given under this my Will to any beneficiary who is married at the time such beneficiary becomes entitled to such property and all income derived from such property shall be excluded from the net family property of such beneficiary for all purposes of the Family Law Act, as amended from time to time, or pursuant to the comparable legislation of any other jurisdiction.

# Trust

## Family Law Act, section 4(2):

### Excluded property

The value of the following property that a spouse owns on the valuation date does not form part of the spouse's net family property:

1. Property, other than a matrimonial home, that **was acquired by gift or inheritance** from a third person after the date of the marriage.
2. **Income from property referred to in paragraph 1**, if the donor or testator has expressly stated that it is to be excluded from the spouse's net family property.

...

# Trust

---

- Impacts on Income for Support when there are such restrictions:
  - Income stream:
    - Will likely be included in income for child and spousal support
  - Income distribution invested into assets (a bank account, real estate):
    - Maybe imputation of “income” at a reasonable rate of interest

# Trust

- Impacts on Property when there are such restrictions:

S. 4(1) of the *Family Law Act* :

"property" means any interest, present or future, vested or contingent, in real or personal property . . .

- A contingent interest in a trust is considered property within the meaning of the *Family Law Act*.
- An interest in a trust will be taken into account when determining each spouse's net family property.
- Impact if received before vs during marriage?
- Impact if the beneficiary keeps the funds received in a separate account vs co-mingles or into matrimonial home the funds with family assets?

# Trust

---

- The difficulty is **how to value** a beneficiary's interest in a discretionary trust?
  - There is no definitive method to value a discretionary trust
  - Three methods have generally been recognized by court



# Trusts

## The three (3) valuation methods are:

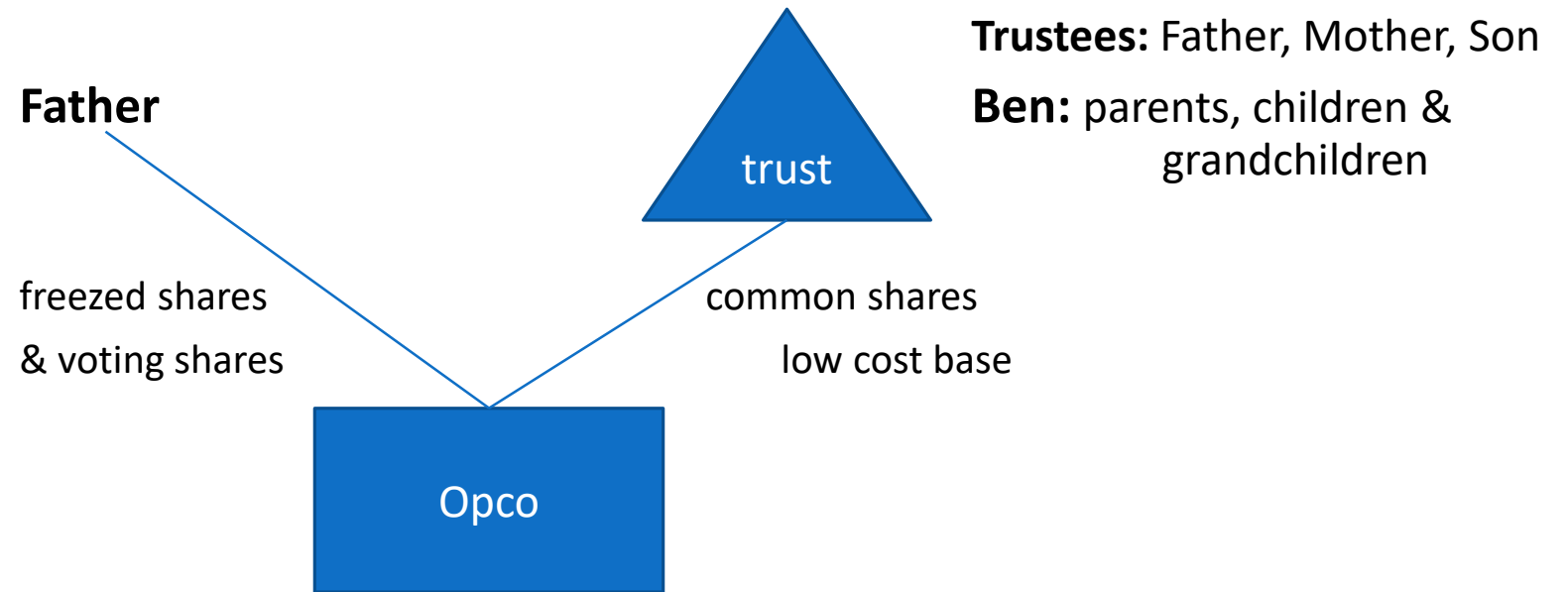
1. Evaluating the likelihood of the beneficiary receiving benefits by examining the purpose of the trust or the history of past receipt
2. Using a “notional pro rata” approach that divides the interest by the number of beneficiaries at the date of valuation (ie. if there are two beneficiaries, each are assumed to have a 50 per cent interest, and if there are 10 beneficiaries, each are assumed to have a 10 per cent interest)
3. Applying the “if and when” approach that allows the spouse with no interest to receive a portion of the beneficiary’s interest when it is distributed in the future

\* It is always at the discretion of the Court & the judge.

**Trust & Estate Freeze:**

**No Problem?**

# Estate Freeze



# Estate Freeze

Implication of an estate freeze involving a trust:

- To whom can we attribute the value of the growth of the c/s held by the trust?
- Is it a discretionary trust?
- Who are the trustees?
- Value of freeze shares shall take precedence in the valuation of the interest in the trust.

# Estate Freeze

- Could the growth in the value of the shares with low cost base be considered a gift from parent and excluded from sharing in a divorce?
  - Depends if the documentation and tax reporting match the argument
  - Most likely this claim will fail
- Should the spouse obtain ILA on a freeze?

## *Family Law Act*

### **Equalization of net family properties**

#### **Divorce, etc.**

5 (1) **When a divorce is granted or a marriage is declared a nullity, or when the spouses are separated and there is no reasonable prospect that they will resume cohabitation**, the spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them. R.S.O. 1990, c. F.3, s. 5 (1).

#### **Death of spouse**

(2) **When a spouse dies**, if the net family property of the deceased spouse exceeds the net family property of the surviving spouse, the surviving spouse is entitled to one-half the difference between them. R.S.O. 1990, c. F.3, s. 5 (2).

#### **Improvident depletion of spouse's net family property**

(3) **When spouses are cohabiting**, if there is a serious danger that one spouse may improvidently deplete his or her net family property, the other spouse may on an application under section 7 have the difference between the net family properties divided as if the spouses were separated and there were no reasonable prospect that they would resume cohabitation. R.S.O. 1990, c. F.3, s. 5 (3).

# Trust & Shareholders' Agreements:

## Adding Layers Of Protection?

# Shareholders Agreements

## Trust as a party of a Shareholders' Agreement

- It is not uncommon to have a “discount” clause for family law matters in shareholders' agreement:

In the event a shareholder (...) becomes subject to any proceedings which may fall under the *Family Law Act* (Ontario), (...) which will in any way interfere with, encumber or effect the Corporation or a party's interest in any Shares of the corporation(...) the Selling Price shall be equal to fifty percent (50%) of the Share Price on the date of the Triggering Event.

- Should it be mandatory for the spouse to obtain ILA?



# Shareholders Agreements

## Trust as a party of a Shareholders' Agreement

- What are the implications for Family Law:
  - *Fraudulent Conveyance Act?*
  - Unequal division based on unconscionability claim under s. 5(6) of the *Family Law Act?*
  - Reisman v. Reisman
    - 2012 ONSC 3148 (CanLII), appeal dismissed 2014 ONCA 109

Thank you.