

## LITIGATION

— ESTATE ALERT

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### **To Be Or Not To Be? The Question of the Exclusion of Trust Property Upon Marriage Breakdown**

*By Caroline Abela*

*Ludmer v Ludmer* 2013 ONSC 784 is a case that dealt with, among other things, the exclusion of trust property in a net family property calculation upon a marriage breakdown.

#### **The facts are as follows:**

Lisa and Brian Ludmer were married for almost 20 years until they decided to end their marriage in 2005. They had entered into a marriage contract which excluded from the parties' net family property the value of any assets given to them by way of gift or inheritance through *inter vivos* or testamentary instrument. Brian Ludmer was a beneficiary of a trust created as part of his father's estate plan. His father Irving had substantial assets. As a result, one of the main issues in the Application became the validity and enforceability of a marriage contract.

Irving created a trust in 1971 that named his three children as beneficiaries. The trust deed was governed by the laws of Québec. The trust deed provided that all trust property, as well as any property acquired in replacement or derived therefrom, shall in no event and under no circumstances fall into or form part of any "community of property which may at any time subsist between any beneficiary and his or her consort" but shall remain separate property of the beneficiary. As a result of tax and trust law constraints, the control over the trust assets changed by a roll out of such assets to three corporations, one for each child. The voting control of those corporations was retained by Irving. The children did not have any decision making power or rights to exercise any power in relation to any aspect of the estate plan. The father had total control over all assets. Irving further testified that he kept the details of his estate plan a secret because he had seen so many children of wealthy friends lose all incentive to succeed on their own because of their expectation of inheritance.

After a year of Brian and Lisa's marriage, Irving told his son about the considerable value of his estate assets. As such, Brian and Lisa entered into a marriage contract.

A large portion of the hearing was devoted to the evidence related to Lisa's allegations that: (1) she signed the marriage contract under duress; (2) she was unaware of the nature and consequences of what she was signing; and (3) there was material non-disclosure of Brian's net worth.

Brian Ludmer responded to the allegation of material non-disclosure by providing a business valuation analysis that determined Brian's interest in the assets held by Irving on the children's behalf at the date of marriage and when the marriage contract was signed. These figures showed that the business valuation was similar if not over estimated in the disclosure material provided to Lisa at the time the marriage contract was signed.

There was also an extensive cross-examination of the lawyer who acted for Lisa and who provided her with independent legal advice on the marriage contract. However, by Lisa's own evidence, she wanted to sign the marriage contract. This testimony eviscerated her allegations of duress.

Justice Michael Penny concluded that Lisa's allegations failed based on the evidence. He found that the marriage contract was valid and enforceable according to its terms such that the value of any of Brian's assets that were traceable to funds received pursuant to Irving's estate plan must be excluded from Brian's net family property.

Justice Penny also held that the proceeds from the sale of the matrimonial home, where such proceeds could be traced from the trust property, were excluded from Brian's net family property calculation.

Most importantly, Justice Penny held that the trust deed did not govern the relationship between Brian and Lisa in matrimonial proceedings in Ontario. Lisa was not a party to or involved in the operation of the trust deed. Therefore, the terms of the trust deed did not govern Lisa's rights in the matrimonial proceeding. Rather, it was the marriage contract that governed her entitlement.

## There are two key points that come from this decision:

- (1) It may not be sufficient for a trust deed to exclude the spouse or partner of a beneficiary from benefiting from the trust property and particularly if the trust property is used to acquire a matrimonial home. An additional layer of protection (such as a marriage contract) between the parties involved is required.
- (2) The second generation must be aware of their beneficial interest in trust property. Open communication between the generations at the appropriate time is the recommended course of action.

In addition, during the summer of 2012, the Court of Appeal found that a family home held by a trust did not constitute a matrimonial home under the *Family Law Act*. See *Spencer v Riesberry* 2012 ONCA 418. There are a variety of planning tools to help avoid assets of a trust being included in an equalization claim upon a marriage breakdown.

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### AUTHOR

### Caroline E. Abela



Caroline is a partner whose litigation practice focuses on estates and trusts. She has appeared as counsel before all levels of courts in Ontario and has also appeared before the Federal Court of Canada. Caroline has authored many articles and papers. She has been an adjunct professor at the University of Western Ontario and is a regular lecturer on a variety of legal topics.

Contact Caroline at 416.947.5068 or [cabela@weirfoulds.com](mailto:cabela@weirfoulds.com)

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