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**THE UNIVERSITY OF BRITISH COLUMBIA FACULTY OF LAW**

**FINAL EXAMINATION – APRIL 17, 2019**

**LAW 451- Trusts  
Section 2**

**Professor John Smith**

**TOTAL MARKS: 100**

**TIME ALLOWED: 3 HOURS TOTAL  
(including reading time)**

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- NOTE:**
- 1. This is an open book examination. A candidate may bring into the examination room any written materials they wish.**
  - 2. ANSWER ALL THREE QUESTIONS. You may answer them in any order.**
  - 3. PLEASE budget your time.**

**THIS EXAMINATION CONSISTS OF 3 QUESTIONS.**

**QUESTION 1****MARKS**

35 B, who died over 10 years ago, established a trust by his Will. A, the retired bookkeeper in a business formerly owned by B, is the sole trustee. The beneficiaries are B's 10 nephews and nieces. The relevant provisions of B's Will are as follows.

"My Trustee shall retain the Trust Fund in trust for my nephews and nieces (the "Beneficiaries") on the following trusts.

- (a) Until the first of the Beneficiaries attains the age of 35 (the "Distribution Date"), my Trustee shall each year pay or apply the income of the Trust Fund to or for the benefit of such one or more of the Beneficiaries (which may be to the exclusion of other Beneficiaries) in such proportions (which need not be equal) as my Trustee in his discretion determines.
- (b) Prior to the Distribution Date, my Trustee may in his sole discretion at any time and from time to time pay or apply such part or parts or the whole of the capital of the Trust Fund to or for the benefit of such one or more of the Beneficiaries (which may be to the exclusion of other Beneficiaries) in such proportions (which need not be equal) as my Trustee in his discretion determines.
- (c) On the Distribution Date my Trustee shall distribute the remaining capital, if any, of the Trust Fund among such of the Beneficiaries as are living on the Distribution Date in equal shares."

The oldest Beneficiary turned 35 in February, 2019. All 10 nephews and nieces are still alive. A has not distributed any of the Trust Fund since the Distribution Date.

Until two years ago, A had handled the Trust Fund as follows. He informed the Beneficiaries of the provisions of the Will and told them that they could in exceptional circumstances ask for a larger share of the annual income, or a distribution of capital, prior to the Distribution Date, saying that with respect to capital he would be reluctant to make any distributions prior to the Distribution Date, since B had told him that he thought that young people ought not to get money too early in their lives. (There is no document that sets out B's intentions other than the Will.) A invested the Trust Fund prudently, and by 2017 it had grown to \$3,000,000 in value. Each year up to and including 2018 A distributed the annual income in accordance with paragraph (a).

At various times prior to 2017, A received requests for capital distributions, all of which he turned down. In 2017 he received two separate requests for a capital distribution from Beneficiaries C and D. C asked A to distribute \$600,000 to him so that C could invest with a partner in a cannabis-related business they were starting. At this time A's son, E, was trying to buy a house and had asked A for a loan of \$100,000 for the down payment. A's only assets of material value are his home, a condominium worth \$300,000, and his pension entitlements, so A did not have money to lend to E. Instead, A proposed to C that A would distribute \$700,000 to C from the Trust Fund if C would make a loan of \$100,000 to E, repayable without interest at such time as E would sell the house he would acquire. C agreed, A distributed \$700,000 to C, and C invested in the cannabis-related business and made the loan to E, who knew nothing about the trust, being told by A only that A had arranged the loan from C. The success of C's new business is still uncertain, but it shows potential to have substantial value. Apart from that investment, C has few assets. The loan to E represented most of the down payment on his house, which he would not otherwise have been able to buy. E's house has gone up in value since he acquired it.

The other request for a capital distribution came from another Beneficiary, D, who had lost employment and was struggling financially, unable to meet the mortgage payments on his home. D asked A to distribute D's share of the Trust Fund to him, in advance of the Distribution Date. A told D that he would not consider such a request because it was not consistent with B's objectives. A also thought, but did not tell D, that distributing a further amount after the \$700,000 distributed to C would leave insufficient capital on which income could be earned up to the Distribution Date. D's home was subsequently sold in foreclosure proceedings which, because of the forced sale, yielded proceeds of \$100,000 less than its fair value. Its value may have increased subsequently.

A had hoped that, despite the distribution to C, the Trust Fund's investments would increase in value so that by the Distribution Date it would be worth at least \$2,700,000, which would give each Beneficiary other than C \$300,000. By mid 2018 A determined that achieving this value would not happen. In an effort to increase the value of the Trust Fund quickly, A asked C if he could invest in C's new business. Since C's business was not looking for additional investment, C referred A to a friend whose cannabis-related business was going public. A invested \$200,000 from the Trust Fund in the latter business in the hope of making a quick profit, but the shares dropped rather than increasing in price and are now trading at half the price A paid.

As of the Distribution Date the capital of the Trust Fund (excluding the cannabis investment) was \$2,100,000. A still holds the Trust Fund. Please assume that, had the distribution to C and the cannabis investment not been made, the Trust Fund would be worth \$3,000,000.

Given the foregoing, please answer these questions.

- (i) In what respects has A breached his duties as trustee, and what remedies are available against A, and to whom, in respect of such breaches?
- (ii) To what extent, if any, may remedies be sought against any party other than A, and on what basis? What might those remedies be?

## **QUESTION 2**

### **MARKS**

35 F, G and H are siblings. Their mother P survived their father, and on P's death her Will left the family recreational property in the Gulf Islands ("Property") to F and G as Trustees on the following terms, and divided the residue of her Estate equally among F, G and H.

"My Trustees shall hold the Property in trust to permit the family the continued use and enjoyment of the Property until they consider that no longer practicable, and then sell the Property and distribute the proceeds among my children in equal shares."

The Will also provided a fund of \$100,000 ("Fund") to be held by F and G, in trust, and directed that the income be used to cover annual expenditures on the Property including property tax, insurance and minor repairs and maintenance, with discretion to expend up to \$50,000 of the Fund on major repairs if needed. The Will provides that, to the extent the Fund is not sufficient for the proper enjoyment of the Property, the Trustees may require contributions to the upkeep of the Property from those who make use of the Property, and that, in managing the assets of P's Estate, including the Property, the Trustees have all the powers they would have with respect to management of their own property. The Will confers numerous specific powers including the power to manage and improve real property held by the Estate in such manner as they determine, and to borrow money for such purposes, including from one or more of the Trustees.

F and H are both very busy and successful professionals. F lives in Eastern Canada, but her family usually spends at least one month each summer at the Property, with F visiting when she can manage. H lives in Vancouver and has no family. She visits the Property only occasionally. G lives in Vancouver and has a clerical job. He and his family frequently spend time at the Property, spending much of the summer there, and on weekends and at other times throughout the year.

Three years before her death, P made arrangements for her bank and investment accounts ("Accounts") aggregating \$800,000 to be transferred into the joint names of herself and G. The standard documentation states that they were joint tenants with right of survivorship. All P said to G about this was that P was doing this so that G "would be able to manage things". G lived closest in proximity to P, and G and his spouse had assisted her more than his sisters as P aged, including with respect to financial matters. G often handled payments from the Accounts for P. G also sometimes withdrew funds from the Accounts to meet expenses of his own. G always reported such withdrawals to P after the fact. The investment income on the Accounts was reported on P's tax returns. Prior to the Accounts being transferred, P had said to H that she thought she might have to make more provision for G than for F and H, given their different financial circumstances.

The Property is of sufficient size that it could be subdivided into 2 parcels, with the ability to construct a substantial home on each. The existing building straddles what would be the logical lot line on subdivision. The existing building is somewhat dilapidated, since P loved its "charm" and did not want to update it. The cost of meaningful renovations, without which the building will deteriorate further over time, would significantly exceed \$50,000. G proposed to his sisters that they should demolish the existing building, subdivide the Property, build a new house on one of the subdivided lots, and sell off the other lot, the proceeds from which would pay the costs of building the new house, with money to spare that could be added to the Fund and/or distributed to F, G and H. G proposed either that F and G mortgage the Property on an interim basis to provide the funds for construction, or that F and H should lend the required funds to the trust. The costs of subdivision and construction are expected to be in the \$600,000 range.

H favours the idea of subdivision, and sale of one lot, but would want the proceeds of sale distributed among the three of them, not used to fund construction of a new house. She says that if F and G want to build a new house they should pay for it, and she would forego any right to use the Property. She says that if F and G cannot work it out, and given the state of the building, they should call it a day and sell the Property. F expects to remain in Eastern Canada and expects that as her children get older she

will have less use for the Property. She considers that with minor expenditures the building will survive for as long as she wishes to use it, and so declines to spend more. She does not favour the effort and expenditures required by G's plan, is not willing to fund construction, and is concerned about the risk of mortgaging the Property if the proceeds of sale of the other lot (if subdivision occurs) are not sufficient to repay the mortgage. G remains keen to try to implement his plan for the Property, including, if necessary, by using funds from the Accounts for funding construction, and does not agree with F's proposal to make only minor expenditures.

Given the foregoing, please answer these questions.

- (i) Who is beneficially entitled to the Accounts?
- (ii) What are the duties of F and G with respect to the Property in these circumstances, and in what respects may either or both of them be breaching their duties?
- (iii) Is there any legal recourse available to G to implement his plan?

### **QUESTION 3**

#### **MARKS**

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J and her friends K, L and M had a common interest in preservation and enhancement of green space. J owned a waterfront property ("J Property") adjacent to a popular beach. The property next door to J's was owned by N ("N Property"). K, L and M lived in the same neighborhood and spent a lot of time at the J Property. The four harboured the idea of turning both Properties into a public park by selling them to the municipality at less than market value. N was never receptive to this idea. Relations between J and N worsened over the last few years with friction over many issues including noise and parking.

About five months ago, J learned that N's business might be having financial difficulties. J and the others thought this might be an opportune time for J to buy the N Property, but that J should not be the one to approach N. M had the best relationship with N, so it was agreed the M would approach N with a view to acquiring the N Property, with funds to be provided by J. J was the only one of the group with substantial financial resources of her own. The N Property is assessed at \$1,000,000. M managed a "chance encounter" with N in a bar, where after a few drinks N acknowledged his financial difficulties and his need to sell the N Property. M said that he would buy it, but could only afford to pay \$800,000. N

accepted, and both attended at the office of N's lawyer a few days later to draw up the paperwork. M told J, K and L nothing about this. Rather than getting the money required from J, M borrowed the money from his parents and paid N, and title to the N Property was transferred to M.

(Please assume that the loan to M from his parents was properly documented so they have no claim for resulting trust over the N Property, and that there is no issue of duress or lack of legal representation in the dealings between M and N.)

The first that J, K and L learned of all this was when N moved out of his home, followed closely by M moving in. M told them that he had acquired the N Property and would live there during the process to dedicate both Properties for park use. When J asked how to reimburse M for the money used to purchase the N Property, M replied that would not be necessary, that J already had a substantial investment in the form of the J Property, and that M had managed to come up with the money otherwise. J had an uneasy feeling, but had no evidence on which to doubt M's intentions.

J set about negotiating with the municipality and within 3 months worked out an agreement under which the municipality would buy each Property for 80% of its assessed value, provide a tax receipt for the other 20%, and dedicate both Properties as park. This arrangement would have fully reimbursed M and given him a tax receipt for \$200,000. However, when J took the required documents to M, he first suggested that he should have some return for his trouble and wanted 90% of the assessed value of the N Property. J offered to cover the extra \$100,000, at which point M said that he did not feel that the time was right, that he was enjoying his house and would like to live in it for a couple of years.

J was devastated by this. She had been diagnosed with a terminal illness, which she revealed to K, L and M at this point, telling them that she was desperate to see the park project completed while she was alive. M was unmoved. J was concerned that the J Property might get tied up in a battle over her Estate between her two children, who did not get along with each other or with J. J saw her lawyer and executed a Form A Transfer of the J Property into the name of K. She delivered the Form A to K and told her: "I want you to have title to my property so that, when M comes to his senses, you will be able to complete the transfer to the municipality. I do not want my children fighting over my home." When K asked what should happen to the J Property if M never agrees to implement the park plan, J replied "Then you will own it". J also gave K a cheque for \$100,000 so that K could complete J's offer to M. J died soon afterwards, after K had cashed the cheque, but before K had taken any steps to register the Form A and transfer title to the J Property. J's Will

appoints L as her executor and divides the residue of J's Estate between J's two children.

Given the foregoing, please answer these questions.

- (i) What are the beneficial entitlements to the J Property and the \$100,000 that J gave K?
- (ii) Is there anything K and/or L can do to bring about completion of the dedication of the two Properties for park?

**END OF EXAMINATION**