THE UNIVERSITY OF BRITISH COLUMBIA
PETER A. ALLARD SCHOOL OF LAW

FINAL EXAMINATION – DECEMBER 2020

LAW 551.002
Trusts

Professor John Smith

EXAM PASSWORD: 7a4ALk
RESUME CODE: ABB530

TOTAL MARKS: 100

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(8:50 AM PST) **PREPARATION TIME ALLOWED:** 10 MINUTES
(9:00 AM PST) **WRITING (INCLUSIVE OF READING) TIME ALLOWED:** 3 HOURS

8:50-9:00 AM Preparation Time (Exam writing not permitted) – This time is given to students to download/print your exam questions once the exam has been made available online on Canvas, to read the Exam Password on this exam coversheet, to enter the Exam Password for the exam in Examplify, and to progress in Examplify until you see the **STOP SIGN,** where you will **WAIT until 9:00 AM**. **DO NOT proceed past the STOP SIGN**. **DO NOT begin typing your exam answers in Examplify until 9:00 AM!**

9:00 AM Exam Writing Time – At 9:00 AM, you may proceed past the STOP SIGN in Examplify and begin typing your exam answers. Students are required to calculate and monitor their own time for writing exams. All exam answer uploads will be monitored to ensure that typing of answers only occurred during the allotted Exam Writing Time.

This is an open book examination.

If you think you have discovered an error or potential error in a question on this exam, please make a realistic assumption, set out that assumption clearly in writing for your professor, and continue answering the question. Do not email your professor or anyone else about this while the exam is in progress.

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i.e., **9999 LAW 100.001 Law of Exam Taking - Galileo**

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THIS EXAMINATION CONSISTS OF 3 QUESTIONS.

MARKS

40 (70 minutes) 1. A died a number of years ago, having been predeceased by his spouse. He and his ancestors had accumulated significant wealth through businesses formerly owned by the family. Their businesses had been structured so that, even while A was alive, his three children, B, C, and D, who are all still alive, were each independently wealthy. His will left the residue of his estate (the "Fund") in trust to E, A's friend and business associate, and F, who had been A's accountant, as Trustees. Until the date of death of the last to die of B, C and D (the "Distribution Date"), the annual income of the Fund must be distributed among A's children and grandchildren in such proportions as the Trustees determine. On the Distribution Date the Fund (as it then exists) must be distributed as to one-third to B's son, one-third among C's children and one-third among D's children. B has one child, C has three children and D has four children. (Given their ages, we can assume that none of B, C and D will have more children.) Prior to the Distribution Date the Trustees have a discretionary power to pay out capital from the Fund to any one or more of B, C and D to the exclusion of the other(s). That power is restricted to payments to A's children, and does not include A's grandchildren.

The Fund has been properly invested and the annual income has been distributed among A's children and grandchildren, all in accordance with A's will. Before the "Capital Distributions" described below were made, the Fund was worth $24 million.

For decades A had owned a home on a waterfront property (the "Property") on Vancouver Island which had been a special place for his children. It was destroyed by fire some years before A's death. He chose not to rebuild, and the land has sat vacant since. A was concerned about what would happen if the Property stayed in his estate, because he thought one of his three children would want to leave it "unspoiled", one would want to build, and the other would want to sell. A was himself unclear about what he would ideally want for the Property, so prior to his death he sold the Property outright to his good friend G for $4 million, which was the fair market value at that time, since he thought that G would do as good a job as anyone at figuring out how the Property should be handled. (This did <u>not</u> create any trust, or fiduciary obligation on G, and no unjust enrichment.) G held onto the Property without developing it.

Not long ago G was diagnosed with a terminal disease, which was not widely known. A's daughter C learned about this (in a non-confidential context). C wanted to keep the Property undeveloped. Adjacent lands are owned by a property development company ("Devco"), which would be able to build a massive waterfront project if it could acquire the Property. C determined to try to acquire the Property to prevent Devco from acquiring it. Some years ago C worked for G for a time, but her employment ended on bad terms, and she did not wish to approach G directly.

C's cousin H is not engaged in any real estate business or profession, but knows a lot about real estate. C contacted H in regards to the Property. She told H about G's illness (which was news to H), and C's desire to acquire the Property to keep it undeveloped. C asked H to approach G to see what his plans were for the Property, which had an assessed value of $7 million. H agreed to do this, and asked C what she would be prepared to pay for the Property, so he could have some sense of that in his discussion with G. C told H that she would be prepared to pay up to $8 million, but both agreed that H was not becoming C's agent, and so H could not make an offer to G on C's behalf. H chose not to tell C that he had had previous discussions with Devco about how Devco might acquire the Property if G ever decided to sell it.

C could have afforded to pay $8 million for the Property from her own resources if necessary, but requested the Trustees of the Fund (E and F) that, if C were to purchase the Property, the Trustees would distribute $4 million to her from the Fund to assist with the purchase. C justified her request by pointing to the strong connection of A's family to the Property. Around the same time, D separately approached the Trustees and said that she considered that the provisions of A's will were unfair because of the initial one-third split between the families of B, C and D, which would result in B's only child getting one-third of the Fund, each of C's children getting one-ninth of the Fund and each of her own children getting only one-twelfth. D said that this was unfair and was causing her children to resent B's only child, so D proposed that the Trustees should distribute $5 million to C and $7 million to D, which each could then pass onto their children, which D asserted would result in a more equitable division of the Fund, and better family harmony.

The Trustees considered the requests of C and D. F, A's former accountant, was initially reluctant to accede to D's request, because he felt it went against the terms of A's will. E said that A's will was probably written that way just because A's lawyer had suggested it, that A had given the Trustees discretion to vary in effect the division of the Fund, and that D's point about family harmony was important, because their job as Trustees was to act in the best interests of all the beneficiaries. E and F then made distributions from the capital of the Fund of $5 million to C and $7 million to D ("Capital Distributions"), representing in aggregate 50% of the value of the Fund. They told C that there would be no distribution to assist with the purchase of the Property, but that she would be able to decide how much if any of her $5 million she would put towards the purchase of the Property. Both C and D still have the amounts distributed.

Having completed the Capital Distributions, E and F then advised B and her son about them and told them that the level of income they had been receiving from the Fund would be maintained, while annual distributions of income to the other beneficiaries would be reduced since the income of the Fund would be less because of the Capital Distributions. B and her son were both furious that the Capital Distributions had been made.

Meanwhile H had approached G about the Property. G advised H that, like A, he had decided to sell the Property rather than have it become an issue in his estate. G told H that he had thought about offering it first to B, C and D, but had decided to list it for $7.9 million, recognizing that one or more of B, C and D might put in an offer. H immediately offered G $8.5 million for the Property if G did not list it. G accepted H's offer, thinking that it would keep the Property in A's family and would save G from the potential headache of dealing with multiple offers, and from paying commission on the sale.

H then told C that he had spoken with G who was looking to sell the Property for more than $8 million. H did not tell C that he was buying the Property. C did not pursue the matter further with H, since she took from what H said that G would list the Property, and she would then be able to put in an offer. The sale from G to H completed, whereupon H approached Devco, and offered to sell them the Property for $9.5 million. Devco accepted H's offer, but their deal has not yet closed, as Devco needs to arrange financing.

C ran into G, and to her surprise they had a cordial conversation. G told C that he had sold the Property to H for $8.5 million. C then contacted H who was quite evasive about what he proposed to do with the Property. Shortly afterwards C learned that Devco was actively looking for financing for their deal with H, who admitted everything when C confronted him.

Based on these facts,

(a) what recourse, if any, may B and her son have with respect to the Capital Distributions, on what basis, and against whom;

(b) what if anything can C do about the Property and H's dealings with her and the Property?

MARKS

30 (55 minutes)

2. J died approximately a year ago. Many of the family's assets (the family home and bank and investment accounts) were held jointly with his spouse K, and K was the designated beneficiary of most other assets (his pension, RRSP and TFSA). The only asset that J had held in his name alone was a piece of undeveloped land in Vancouver ("Land") that he had acquired many years ago, reasoning (correctly) that it would appreciate substantially in value.

J was diagnosed with a terminal illness and decided to see a lawyer, N, to make sure that he did not need to do anything further with respect to estate planning. N said (correctly) that everything was fine with the assets held jointly with K or of which she was the designated beneficiary. N asked what J intended to do with the Land. J said that he wanted it to be retained as long as possible, since it would keep getting more valuable, and that his two sons L and M should have it, except if K needed additional funds to live on at any point. N advised that J should transfer the Land to L and M before J's death since that would avoid probate fees, and N could draft a trust agreement to govern the Land. J agreed to transfer the Land to his sons, but said that a trust agreement sounded too elaborate, and that he could work that out himself with his sons. N prepared the appropriate land transfer document ("Transfer") to transfer the Land into the names of L and M as joint tenants, which was validly executed in registerable form. J said that he would not register the Transfer immediately, and took it home to discuss with his sons.

J discussed the proposed arrangement with L without showing him the Transfer. L agreed with J's proposed handling of the Land. Rather than leave it at a verbal conversation, J wrote a letter addressed to his sons which said the following.

> "I am transferring the Land to both of you now. Please take the transfer document that N prepared to him so that he may register it as soon as possible.
>
> You should hold the Land for as long as you can, but can sell it when the time is right. If your mother is still alive when you sell it, you can invest the money and pay her income if she needs it, or you can give her some of the proceeds."

Shortly afterwards, J became extremely ill and was hospitalized. At his request K brought him the envelope which contained the Transfer and J's letter. When M (J's other son) came to see him in hospital, J gave M the envelope before losing consciousness, following which J passed away.

Some weeks after J's death, L went to see N with the Transfer and the letter. N asked L whether, while J was alive, he had given the Transfer to L and M, which L said J had. N asked if L understood the terms of the letter, which L said he did. N then registered the transfer document so that legal title to the Land is now in the names of L and M. J's will, which was made many years ago, made K his executor and gave her all his assets. On N's recommendation, K has not probated the will because it was assumed that all J's assets were dealt with otherwise. (Please assume that there is no basis for any allegation of professional misconduct or negligence on N's part relating to any of the foregoing.)

All this happened a year ago. About three months ago M told L that, given volatility in land values, M had decided that the Land should be sold. L disagreed, saying that J was right to think that the Land would only get more valuable over time, that K did not need any more money immediately, but might later, and that selling now would benefit no-one, since L and M cannot use the proceeds themselves while K is alive. M said that that is not how he reads the letter, that the proceeds from sale of the Land would be theirs alone, and that anyway K would likely agree to L and M getting the proceeds, or most of them. M told L that they would have to find a way to resolve things, but did nothing further immediately. Neither L nor M discussed any of this with K.

K has formed a new relationship. Her partner, P, is a criminal lawyer who was interested to hear about the transfer of the Land. P learned all the facts above and told K that his recollection from Law School is that the transfer of the Land to L and M may not have been effective. K reported this to M, who immediately told L and insisted that they must sell the Land at once, for all the reasons he gave before, and split the proceeds between them. L remains opposed, saying among other things that his

sense from his discussion with J was that the Land has to stay as a backstop for K, which she might need, particularly now, in case P takes advantage of her.

In these circumstances,

(a) what are the obligations, if any, of L and M with respect to the Land;

(b) what if anything can M do to force a sale of the Land;

(c) if the Land is sold, how should the proceeds be dealt with?

MARKS

30 (55 minutes) 3. Q (recently deceased) was a longshore worker who accumulated modest assets (principally his home) while he and his wife (who predeceased him) raised their three children. Their elder son R and daughter S are both successful business people with substantial assets. Their younger son T became a longshore worker like his father. He saved some money which he invested in the stock market. He has had no education about investing, and has not had great success with his investments.

Two years ago Q won $1 million in a lottery. R and S both encouraged Q to spend and enjoy some of the money, but to invest most of it with a broker in conservative investments. T however proposed to Q that Q and T should start investing together, with T managing the investments. Q went along with T's proposal which he hoped would enable T to experience some of the financial success that T's siblings had achieved. (Assume that Q had full legal capacity and was under no undue influence.)

Q and T opened a joint bank account ("Account") at ABC Bank, into which Q deposited $900,000 and T $100,000. The agreement with the Bank provides that either of them alone can withdraw funds from the Account, and that upon the death of one, only the other is entitled to withdraw funds from the Account. Q told the account manager that they were opening the Account to enable them to invest together, and that he did not want to receive statements for the Account, which T would access online. Q told T that he was planning to leave more of his Estate to T than to his siblings, and that this arrangement could turn out to be consistent with that.

T opened a self-directed securities trading account in his own name with XYZ Brokerage. (Assume that there is no fault attributable to XYZ Brokerage with respect to opening or managing this account.) T transferred $500,000 from the ABC Account to the XYZ account, all of

which T then invested in shares of risky cannabis companies late in 2018. Within a year their value had dropped significantly. Following this year's investment turmoil, these shares are now worth $300,000. T alone receives statements for this account. All that T told Q about this was that he had invested some of the $1 million with XYZ Brokerage "safely"

In mid 2019, without telling Q, T took $100,000 from the ABC Account as the down payment on a condominium which he purchased in his own name for $400,000, the other $300,000 coming from a mortgage that T arranged, secured on the condo. T has made the mortgage payments from his own funds. The value of the condo has risen to $600,000.

The small amount of interest earned on the Account was reported by Q as his for tax purposes. Q withdrew funds from the Account for his own purposes in the aggregate amount of $50,000.

Q (now deceased) appointed S as Executor in his Will and divided his Estate 25% each to R and S and 50% to T. (Please ignore any implications concerning wills variation.) In order to probate Q's will, S as Executor has asked for information about Q's money. T stated that Q gave T most of his lottery winnings, and refused to give S any further information. In summary, out the $1,000,000 initially deposited into the ABC Account:

- $500,000 went to the XYZ account, the current value of which is $300,000;
- $100,000 went into the condominium;
- Q withdrew about $50,000 for his own use, leaving $350,000 in the ABC Account for the last two years, which has earned only a small amount of interest.

What claims may Q's Estate make arising from the foregoing, and on what basis?

END OF EXAMINATION