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How Family Law Impacts Wealth Planning

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Applicable Family Law

- When discussing family property issues with a client, warn them that it is difficult to give guarantees, since it is impossible to know what the law will be at the time of separation or where the parties will reside at the time of separation
- The family property rules vary quite a bit between the provinces and territories – this presentation will focus on MB
- Today we will cover family law issues at two main points:
  - Transfers of assets during a client's lifetime
  - Transfers of assets at the time of death

Transfers of Assets During Lifetime

Gifts Made/Received During Lifetime

- Many clients have heard cocktail party advice about how “gifts and inheritances” aren’t shareable at the time of divorce, but don’t understand the limitations of those exemptions
- There is an exclusion for gifts and inheritances in the family law statutes of almost every province in Canada
- If you have a client who is either thinking of making a major gift or may soon receive a gift, they need to consider how best to protect it
- Beware that if money is used to purchase family asset (particularly a home), or invested in joint names that both original amount of gift and growth may become shareable

Gifts and Inheritances
Manitoba *Family Property Act* – s.7

- In Manitoba, the original amount of the gift or inheritance is exempt, along with any income from, appreciation or depreciation in the value of such an asset, unless it can be shown that the gift was conferred or the inheritance devised or bequeathed, with the intention that the income or appreciation should benefit both spouses or common-law partners
- Also applies to insurance proceeds where premiums paid by a 3rd party with the intention to make a gift (to one spouse only)
- Exemption is lost if asset is used to purchase a family asset
- Onus is on the person claiming the exemption to prove that asset is a gift/inheritance

Gifts and Inheritances

- If a client receives a gift or inheritance, advise them to invest funds in a SEPARATE account
  - E.g. open up a separate TFSA, RRSP, non-registered account, etc.
  - If funds are being transferred over time from non-registered to TFSA/RRSP, keep records of where deposits came from – need to be able to trace funds
  - Try not to use accounts where money is co-mingled with shareable assets and withdrawn and re-invested from time to time
- Once asset is used to purchase or pay down a family asset, exemption may be lost
- Older couples who marry/recouple later in life should be warned before putting home/real estate in joint names

Major Gifts to Children

- The concept of how family property is divided often comes up in the context of a HNW client wanting to make a large gift to a child, who may not even be married yet
- If a client wants to make a large gift to a child, client needs to be comfortable with the concept of <u>never seeing those funds again</u>
- Some clients seem to believe they can simply ask for the money back and it will reappear

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Consider if a loan may be more appropriate

- If transaction is more properly characterized as a loan, need to structure it as such; need loan agreement, promissory note, security, etc.
- Clients should speak to a lawyer to properly document
- Documentation should be completed at time of transaction, not after; it is the intent at the time of transfer that is relevant
- One additional benefit of structuring transaction as a loan is that it may help to equalize the estate later if not all children being given similar amounts of money at the same time

Loan vs. Gift

- Even with documentation, if evidence points to almost no intent to repay loan, then value of loan may be discounted when dividing property in family property division
- Interest does not have to be charged, but if it is included in documentation, then it needs to be paid, or failure to repay could be construed as forgiveness of the loan
- Make sure limitation periods do not expire on collecting debts – if no interest or principal payments being made, need to refresh promissory note periodically
- Parents must understand that they are only entitled to return of capital, plus interest

Down Payment for a Home

- If funds are being used to purchase a home, then it could be difficult to characterize transaction as a loan if child doesn't have sufficient equity to qualify for a mortgage without funds from parents
  - If third party lender is involved, either child or parent may need to sign a declaration of gift, which will make it next to impossible to argue there is a loan
  - All collateral documentation must be consistent; if client files personal financial statements with the bank, make sure that loan liability is indicated on statements
  - Third party lender may object to 2nd mortgage being registered

Gifts/Loans from Parents

- If not possible to structure transaction as a loan, recommend domestic contract
  - A domestic contract will not protect the parent in any way – they need to understand that they have made a gift, which will never be paid back (unless the child chooses to do so)
  - A domestic contract may help to protect the funds for the child, but the contract must be drafted properly (e.g. full disclosure, independent legal advice, no undue influence) – contract may also become moot if it indicates that only assets held in individual names are protected, but child then chooses to add spouse as joint owner to the asset

Case Study

- Jacques and Pamela were married in 2002; five years after they married, Jacques' parents gave him $200,000 to buy a vacation property
- Jacques uses the gift to purchase a vacation property which is worth $600,000 at the time of separation in 2018
- The entire $600,000 is divisible when Jacques and Pamela separate, because Jacques used the gift to buy a family home, as opposed to keeping it separate (in which case the entire $600,000 may have been exempt, depending upon which province they lived in)
- If the $200,000 had been structured as a bona fide loan, Jacques parents could demand repayment first (perhaps with interest), but the $400,000 of growth would have been divisible

Case Study

- If the vacation property had cost $400,000 at the date of purchase, and $200,000 was financed through a third party lender, Jacques would likely have to certify to the lender that the $200,000 was a gift and not a loan
- If that is the case, it will not be possible to protect the funds by structuring the transaction as a loan
- In that case, Jacques will need to enter into a marriage contract with Pamela, which may help to protect his interest in the funds, but will not result in any funds ever going back to the parents

Assets Acquired Before Marriage/Cohabitation – s.4 of the FPA

The *Family Property Act* also doesn't apply to assets acquired before marriage or cohabitation, except where:

- the asset was acquired when the spouse was cohabiting in a conjugal relationship with the other spouse immediately before their marriage
- the asset was acquired before, but in specific contemplation of, the cohabitation with, or the marriage to, the other spouse
- any asset acquired by common-law partners before, but in specific contemplation of, their common-law relationship

Appreciation, depreciation, income

Where an asset is exempt:

(a) <u>any appreciation in the value of the asset </u>that occurred while the spouse was married to and cohabiting with the other spouse, or while the common-law partner was cohabiting with the other common-law partner, <u>shall be added to the inventory of assets of that spouse or common-law partner</u>;

(b) any depreciation in the value of the asset that occurred while the spouse was married to and cohabiting with the other spouse, or while the common-law partner was cohabiting with the other common-law partner, shall be deducted from the inventory of assets of that spouse or common-law partner; and

(c) <u>any income from the asset </u>earned while the spouse was married to and cohabiting with the other spouse, or while the common-law partner was cohabiting with the other common-law partner, <u>shall be treated in the same way as income from an asset to which this Act applies</u>.

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Case Study

- Jacques and Pamela were married in 2002
- Pamela had saved $200,000 in RRSPs before the date of their cohabitation or marriage
- Although the value of the asset at the date of marriage may be exempt, the growth in value will be shareable
- Still best to keep things as separate as possible
- Keep copies of investment statements, appraisals, etc as of date of marriage
- Best case scenario is a complete balance sheet with total personal net worth (including shares of privately held companies) as of date of marriage/cohabitation

Estate Freeze

- Another situation in which the “gift/inheritance” or “pre-acquired assets” exemptions may be relevant is where a client is considering an estate freeze
- If the client wants to rely on the gift and inheritance exclusion, ensure that the transaction is actually structured as a gift, not a sale. If the children purchase shares or property directly, then the exemption may not be available. See MB case of *Fehr* (2003)
- When implementing an estate freeze, a safer approach if children want to be direct shareholders may be to have the parents subscribe for the shares and then gift them to the children
- Consider using a trust to maintain control

Is an Interest in a Trust a Family Asset?

- Rather than issuing shares directly to the next generation, many business owners prefer to use a family trust so that they maintain voting control
- Although the use of a trust is generally recommended, it is not a complete guarantee that an ex-spouse or partner will never have a claim against any part of the business or corporate assets in the event of separation
- Even in jurisdictions where it is difficult to see how an interest in a completely discretionary trust could be considered “property” of either of the spouses based on a strict interpretation of the legislation, the courts have held that such an interest is shareable

Manitoba *Family Property Act* – s.1

"family asset" means an asset owned by two spouses or common-law partners or either of them and used for shelter or transportation, or for household, educational, recreational, social or aesthetic purposes, including,...

<u>(c) where an asset owned by a corporation, partnership or trustee would, if it were owned by a spouse or common-law partner, be a family asset, shares in the corporation or an interest in the partnership or trust owned by the spouse or common-law partner having a market value equal to the value of the benefit the spouse or common-law partner has in respect of the asset,</u>

(d) an asset over which a spouse or common-law partner has, either alone or in conjunction with another person, <u>a power of appointment exercisable in favour of the spouse or common-law partner,</u> if the asset would be a family asset if it were owned by the spouse or common-law partner...

Valuing a Trust Interest

- It's possible that the trust interest could fall under a gift/inheritance or pre-acquired asset exemption, but that may not be available if trust assets were acquired by one of the spouses during the course of the relationship
- If trust interest is shareable, then issue becomes valuation
- Valuing a trust for family law purposes is often quite different than determining the fair market value
- The aim of family law is to equalize the property – look more at "fair value" vs. "fair market value"
- Very few cases on the topic, but more during the last few years

Sagl v. Sagl, ONSC, 1997

- Early case on the valuation of a trust interest, but heavily criticized
- Husband established a trust two years prior to his second marriage (being the marriage at issue)
- Gift/inheritance exemption not available, but husband could receive a credit for the value of the trust as at the date of marriage
- Court struggled to find a method by which to properly value the interest in the trust
- Judge characterized the husband's interest in the trust as a "contingent capital interest" (in order to fall within the definition of marital assets under Ontario's legislation), but there was no contingency in the trust agreement that would trigger any sort of vested interest for the husband

Sagl vs. Sagl (cont'd)

- Husband was capital and income beneficiary, along with 3 sons from a previous marriage; wife was not a beneficiary
- Husband was 1 of 3 trustees; resigned before trial
- Even though the trust was fully discretionary, court took a "compromise" position and divided value by number of beneficiaries – treated it as if there had been a deemed realization
- 5 capital beneficiaries as of the date of marriage, so divided value by 5 as of that date; 7 capital beneficiaries as of the date of separation, so divided that value by 7 and subtracted original value

Mudronja v. Mudronja – ON, 2014

- Family trust was established <u>during the marriage</u>, with the husband as sole trustee. The beneficiaries included the wife, their children and a corporation owned 60% by the husband and 40% by the wife.
- The court held that the husband not only had the power to appoint himself a beneficiary and distribute the trust assets solely to himself, he also had the discretionary power to dispose of the trust assets.
- The court found that the husband's power of appointment was property for the purposes of the equalization as "property for the purposes of the equalization process is defined as any interest, present or future, vested or contingent in real or personal property and includes property over which a spouse has alone or in conjunction with another person, a power of appointment exercisable in favour of himself or herself."

Mudronja v. Mudronja – ON, 2014 (cont'd)

- The court further held that the value of the power of appointment was the value of the assets of the family trust, being the shares held by the trust, valued at over $3,000,000
- The wife's interest in the discretionary trust was an interest in property for the purposes of the equalization, stating "a beneficiary interest in a trust is not automatically excluded from a spouse's net family property merely because it is subject to discretion."
- However, the court found that the value of that interest was $1.00, stating: "In the circumstances of this case the entire discretionary, unfettered power in relation to the distribution and all dealings with the Trust assets rest with the applicant [i.e. the husband]. He is her adversary now and was also adverse in interest when the parties separated."

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Valuing a Trust

- The valuation of an interest in a trust is very fact specific. Robert Wise of MNP LLP has commented:
  - In valuing a beneficiary's interest in a discretionary trust, however, additional factors must be considered, such as the fiduciary powers of the trustees, the settlor or testator's overall intentions, the history of distributions, the rights of other beneficiaries (as well as their ages, health and needs), the relationship between the beneficiary and the trustee, the obligation of trustee(s) to maintain an even hand, the testator's letter of wishes (if any), the availability of information from the trustee(s), and the possibility of a change of trustee(s), etc.

Grosse v. Grosse – SK, 2015

- During the marriage, the husband and wife accumulated a significant amount of property, all in the husband's name. In 1995, the husband incorporated a company to which he transferred all of the properties. The husband was the sole shareholder and director of that company.
- In 2006, the husband's accountant recommended an estate freeze in order to transfer the future growth in the company to the couple's two sons through the use of a family trust. The wife was aware of the reorganization, as the couple had met with their accountant together to discuss the transaction.

Grosse v. Grosse – SK, 2015 (cont'd)

- The husband, the couple's two sons and any future grandchildren were named as beneficiaries of the trust. The wife was not named as a beneficiary
- The husband was the sole trustee of the trust. The trust gave him broad discretion to manage the trust and determine if, when and to which beneficiary a portion of the income or capital might be paid
- After the trust was created, the husband converted his shares in the corporation to non-voting preferred shares. The trust then subscribed for common voting shares in the corporation with nominal value

Grosse v. Grosse – SK, 2015 (cont'd)

- Court analyzed definition of "family property" in SK *FPA:*

  "family property" means any real or personal property, …and includes the following:

  (a) a security, share or other interest in a corporation or <u>an interest in a trust</u>, partnership, association, organization, society or other joint venture;

  (b) <u>property over which a spouse has, either alone or in conjunction with another person, a power of appointment exercisable in favour of the spouse</u>;

  (c) <u>property disposed of by a spouse but over which the spouse has, either alone or in conjunction with another person, a power to consume, invoke or dispose of the property</u>;

Grosse v. Grosse – SK, 2015 (cont’d)

The court stated: “In my opinion, by virtue of the operation of subparagraphs (a), (b) and (c), a court in determining what constitutes family property for division purposes must “pierce the veil” of whatever legal entity or device is used to hold property, including a trust and power of appointment to see what degree of control a spouse actually exercises over the property. If a spouse retains the power to consume, invoke or dispose of that property, then the property is <u>deemed</u>, by virtue of the definition provisions of the Act, to be “family property” and its fair market value is *prima facie* subject to an equal division between spouses.”

Grosse v. Grosse – SK, 2015 (cont'd)

- The husband argued that his sons had an interest in the trust, which would diminish his interest in the trust. However, the court held that the sons had only a contingent beneficial interest in the trust. Because the husband was the sole trustee, he had complete control over the trust's income and assets.
- Since he could choose to take whatever portion of the income or capital from the trust he desired, an unequal division of the trust property was held not to be appropriate. Also, no distributions had ever been made from the trust, so there was no "history" that would make an equal division of the trust's assets between the husband and wife unfair or inequitable.

Purtzki v. Saunders, 2016 BCCA 344

- In *Purtzki*, the British Columbia Court of Appeal said the question whether an interest in a trust is vested or contingent is one not of entitlement, but of valuation.
- There are degrees of contingency in trust arrangements ranging from a beneficiary's faint hope of receiving something, someday, to a beneficiary possessing a more fixed and predictable expectation of reward.
- Contingent interests that have some degree of concreteness or solidity, or some degree of assurance that a party will actually derive or enjoy the benefit of those interests, are interests that are more susceptible to valuation.

Gordon v. Nielson 2018 SKQB 207

- In this case, the parties actually had a pre-nup, but it referred to "legal ownership" not beneficial, so still needed to value the beneficial interest in a discretionary trust

  .., the task, effectively, is to assess reasonable and probable outcomes in relation to the particular interest under consideration. In the body of case law addressing the subject of family trusts, <u>the outcome in each case is inevitably bound up with the unique facts before the court. Trust arrangements are infinite in their variety</u>.

  Importantly, not one of the decisions cited to me happens to address the particular situation where a prenuptial agreement is a prominent feature of the case, as it is here. The prenuptial agreement between the parties set the foundational rules for determining the property rights upon marital breakdown. By its terms, it is the legal ownership of property, as opposed to the equitable ownership of property, which is the determinative consideration at the end of the day. The prenuptial agreement ensured there could be no degree of certainty or solidity attaching to trust distributions by the GF Trust in favor of the husband.

Trusts - Summary

- The lack of certainty around how a court will value a trust interest or which type of remedy it will choose only encourages litigation. In order to reduce this possibility, ensure that to the extent possible, the trust interest falls under a specific exemption under any potential family law statute which a child may become subject to, and in a best case scenario, obtain a domestic contract (which refers to trust interests too).
- From a planning perspective, it is likely not advisable for a spouse to be the sole trustee of a trust if the intent is that the assets are not to be included in that person's family property. If the intent is that other beneficiaries are to be the primary beneficiaries, then consideration should be given to behaving in a manner that supports that assertion, most likely through a pattern of distributions to those beneficiaries.

Impact of large gifts on spousal support

- Be careful if client is making regular gifts to children in similar amounts at similar time periods during the year (e.g. $25,000 every January 1st)
- Regular payments from a family trust or dividends from shares of a family corporation could eventually be seen to be “income” for the recipient, whether or not there is any legal obligation to continue making the payments
- If parents want to make payments to children, they should consider possibly making the payments on an irregular basis, or for specific items, as opposed to cart blanche regular payments

Horowitz v. Nightingale – ON, 2015

- What is the impact that a “gift” can have on the calculation of support and whether or not certain income will be “imputed” to the parties for support purposes, regardless of whether or not it is taxable
- The husband had been receiving $50,000 per year from his parents for at least 8 years prior to the time of separation, and the funds had been used to support the family’s lifestyle
- The court acknowledged that while there was no obligation on the parents’ part to continue making gifts in the same amount and frequency, it was likely that such amounts would continue for the foreseeable future

Horowitz v. Nightingale – ON, 2015 (cont'd)

- The court found that such gifts could be considered income for support purposes, and cited the case of *Bak v. Dovell*, where the Court of Appeal for Ontario stated:

> Since the legislature did not include gifts within the ambit of imputed income, it can be presumed, in the normal course, that the legislature did not intend the receipt of gifts to be [an] "appropriate circumstance" in which to impute income. For this reason, usual gifts such as those given to mark a special occasion are not included as income…
>
> Although it seems the legislature intentionally did not include the receipt of gifts given in the normal course in presumptive income, or as an example of an appropriate circumstance under s.19(1), a court will consider whether the circumstances surrounding the particular gift are so unusual that they constitute an "appropriate circumstance" in which to impute income.

Horowitz v. Nightingale – ON, 2015 (cont'd)

- The Court went on to list the factors which ought to be considered when determining whether it is appropriate to include the receipt of unusual gifts in income:

(a) the regularity of the gifts;

(b) the duration of their receipts;

(c) whether the gifts were part of the family's income during cohabitation that entrenched a particular lifestyle;

(d) the circumstances of the gifts that earmarked them as exceptional;

(e) whether the gifts do more than provide a basic standard of living;

(f) the income generated by the gifts in proportion to the payor's entire income;

cont'd

Horowitz v. Nightingale – ON, 2015 (cont'd)

(g) whether the gifts are paid to support an adult child through a crisis or period of disability;

(h) whether the gifts are likely to continue; and

(i) the true purpose and nature of the gifts.

- Court imputed an additional $50,000 in the husband's income on an annual basis, both for child support and spousal support calculations. In fact, the income was to be grossed up to reflect the fact that the husband received it on a tax free basis, as it was a gift.
- A similar result occurred in the case of *Lo v. Mang*, where the husband received monthly payments of $2,250 (or $27,000 annually) from his parents. The court imputed these payments into the husband's income for the purposes of determining support payments.

Domestic Contracts

- A domestic contract is generally the recommended course of action if your client is concerned about the ability of a child's ex-spouse to make a family property claim
- Agreement should be properly executed and witnessed, and it is recommended that:
  - Each party obtain independent legal advice
  - Each party provide full financial disclosure to the other of all of their assets
  - The agreement be negotiated well in advance of the wedding date in order to avoid any inference of undue influence or duress
  - The agreement be fair and not unconscionable

Domestic Contracts (cont'd)

- Disclosure requirement sometimes dissuades individuals from entering into these agreements
- Client may not want to disclose the complete nature of their business holdings
- Simply telling the other party that you own "shares" in a company is not of assistance if they do not know the value of those shares
- *LeVan*- ON CA set aside a domestic contract due to lack of disclosure

Domestic Contracts (cont'd)

- This does not mean that the courts will set aside any contract they perceive to be unfair
- SCC case of *Hartshorne* (originally from BC) - marriage contract was signed shortly before the wedding, with the wife (who was a lawyer) believing at the time of execution that a court would not uphold it as she perceived it to be unfair
- Question is not whether there is something fundamentally unfair, but whether the operation of the agreement will prove to be unfair in the circumstances present at the time of distribution
- Contract was enforced

Shair v. Shair – ON, 2015

- The parties entered into a marriage contract 5 weeks before their marriage, but only 2 weeks prior to the expiration of the wife's visa from Romania.
- The wife had access to her own lawyer and a Romanian translator throughout the contract negotiations. Neither party provided financial disclosure to the other.
- The terms of the contract provided that all of the spouse's respective property was to remain separate and they released their rights to spousal support.
- The wife's lawyer advised her not to sign the agreement. Despite the husband's refusal to sign the amendments requested by the wife's lawyer, the wife chose to sign the agreement.

Shair v. Shair – ON, 2015 (cont'd)

- The parties separated after 18 years of marriage. There were no children.
- The court rejected several challenges made by the wife and found as follows:
  - She understood the nature and consequences of the marriage contract. The court specifically cited her access to a translator and lawyer. Just because the contract was not favourable to the wife did not mean that she didn't understand it.
  - She was not under undue influence and/or duress at the time the marriage contract was executed. The court mentioned that the wife had a job and family in Romania and could have returned there if necessary. There was no evidence that she was "subject to intimidation or illegitimate pressure to sign the marriage contract."

Shair v. Shair – ON, 2015 (cont'd)

- The court found that the wife did not request disclosure, and therefore disclosure was not denied by the husband; evidence pointed to the fact that the wife was adamant about signing the contract, regardless of its terms, so more disclosure was unlikely to have impacted her decision.
- The circumstances at the time the contract was drafted were not unconscionable under the *Family Law Act.*
- However, despite finding that the marriage contract was enforceable, the court did set aside the spousal support provisions, finding that the results were unconscionable, even though the negotiation itself was not. The wife had dedicated herself to the husband for more than 18 years and was financially dependent upon him as a result of their relationship.

Impact of Family Property Rules on Transfers of Assets at the Time of Death

The Family Property Act – s.35

- Surviving spouses have the right to apply for an accounting and equalization of family assets pursuant to Part IV of the FPA
- Many clients do not understand that the way in which an asset is left to a spouse (or non-spouse) at death will impact the equalization
- If assets not being left exclusively to spouse, need to consider FPA
- This could particularly be the case in blended families

Exclusion at death

- FPA provides that the value of each of the following is to be included in the assets of the deceased:
  - A *gift mortis causa* to a person other than the survivor;
  - property that was held with a person other than the survivor, with a right of survivorship
  - A TFSA, retirement savings plan, etc., payable to a person other than the survivor
  - The CSV of a life insurance policy payable to a person other than the survivor
  - The proceeds of a life insurance policy payable to the estate; and
  - Any other payment to the estate

Family Property Accounting

- Even though some assets intended for others are included in the accounting, certain assets transferred to the spouse are excluded:
  - An asset owned jointly with the deceased where the surviving spouse has a right of survivorship
  - Life insurance payable on the death of the other spouse; and
  - A TFSA, retirement savings plan, etc. payable to the surviving spouse
- Assets received by the spouse under the will or as a result of an intestacy are deducted

Leaving Assets to Children

- Attempting to transfer the asset to the child outside the estate (either by virtue of a direct beneficiary designation or a right of survivorship on a jointly owned property) may not provide the desired result
- One option may be to transfer the asset to the child during the client's lifetime – that could trigger tax
- If a client wants to leave significant assets to their children, then
    - Hold assets in individual names, not jointly with a surviving spouse
    - Designate the estate, not the spouse, as the beneficiary of a life insurance policy intended for the spouse, and leave those funds to the surviving spouse in the will
    - However, these assets would then be subject to probate fees and expose them to creditors of the estate

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Leaving Assets to Spouse

- Where a client wants to leave a particular property to a spouse, but wants it taken into account they could:
  - Register the asset in their name only and give the asset as part of estate
  - Sever the joint tenancy so that each spouse is entitled to one-half of the value in the accounting and leave it to the spouse as part of the estate
  - Give the asset to the spouse during the client's lifetime, so that it is included in the spouse's assets in the accounting
- Another possibility may be to ask their spouse to sign an agreement waiving their right to make a family property claim

Case Study

- Joan is in a second marriage to Benny; she has 2 children from a previous relationship
- Joan leaves her TFSAs to her children via direct beneficiary designation
- She leaves her home, RRSPs and insurance to Benny either through joint ownership or direct beneficiary designation
- Joan has no assets to pass through her estate
- If Benny applies for an equalization of assets, the TFSAs given to the children would be included in Joan's inventory of assets, but all of the assets he received outside of the estate would not be included
- If Benny has other assets that are worth more than the TFSA, it is possible that the children would be able to keep those funds, but if not, they could be shareable

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Dissipation, Excessive Gifts

- Court may set aside a transaction where it believes assets were dissipated or transferred for inadequate consideration – *Hamm* (MBQB, 2014)
- Husband was sole owner of all of the farmland
- 41 year marriage; it was a second marriage for the husband, who had three children from a previous marriage; the couple subsequently had a daughter together
- Husband incorporated a numbered company that issued common voting shares to the two sons equally (who by that point were involved in the farming operations), with the husband receiving preferred shares. He did not issue any common shares to his wife, or either of his two daughters.
- Husband later transferred all of the farmland (save for the homestead quarter-section), equipment and machinery to a corporation in exchange for preferred shares and a shareholder loan.

HAMM CASE

- Wife was not involved in any discussions regarding the estate freeze. She was told that the company was being incorporated for tax purposes. Although the wife handled many of the financial affairs related to the farm, she still wrote the cheques and made the deposits to and from their personal bank accounts.
- Husband made a new will in which he left all of the corporate shares to his sons, and left his wife certain other assets. He left one half of the residue to his wife and one-quarter to each of his daughters. He did not tell his wife about the will (which was substantially different from the mirror wills they had drawn up in 1977 which left the entirety of their estates to each other).
- In 2000, the sons borrowed funds in order to repay the majority of the husband's shareholder loan. These funds were then deposited right back into the corporate account.
- In 2006, the husband decided to transfer his preferred shares to the two sons. Neither son paid anything for these shares, which were considered a gift.

HAMM CASE

- The husband died in 2007, at which point the wife learned for the first time that she would receive no part of the farming operations. Rather than accept the assets left to her under the will, she elected to apply for an accounting and equalization of assets.
- Court found “that in these circumstances, the divesting of the entire future growth potential of the family farm was both an excessive gift and a dissipation causing the family’s financial future to be significantly less secure.”
- Shareholder loan was characterized as “a transfer…for inadequate or in fact no consideration at all.”
- The gifting of the preferred shares to the sons met “the legal criteria required to find any one of dissipation, excessive gift or a transfer for inadequate consideration”, although the court further stated that it most closely resembled an excessive gift, as the husband “gave away a huge portion of family assets in exchange for nothing.”

The Dependants' Relief Act

- Clients must also consider whether or not any dependants could make a claim against their estate
- Claimant must establish financial need
- Although a court may consider any reasons given by a spouse in writing for not leaving much (if anything) to a spouse, it is not possible to contract out of this right
- Definition of "dependant" does include step-children, but must prove dependency – generally speaking, if a financially independent adult is left out of a step-parent's estate, he/she won't have much recourse

Dickinson v. Woodiwiss - 2008 MBQB

- Testator had two adult children from a previous marriage; she left the bulk of her estate ($54,000 life insurance policy) to her children in her will, but nothing to her husband
- Wrote a letter explaining that husband had not been good to her
- Husband received the marital home ($160,000), had a monthly pension ($1,250) and $42,000 in savings
- Court dismissed claim – husband did not establish that he was in financial need; further held that even if he *had* established financial need, considering the small value of the estate, the fact that the applicant already held most of the assets that the couple had and the competing claims of the beneficiaries, he had already received reasonable provision from her estate – the court also considered her written reasons for excluding him
- Could this have been avoided had the deceased simply designated her children as the direct beneficiaries of the insurance?

IG WEALTH MANAGEMENT

The Homesteads Act

- Spouses have a life interest in the homestead, regardless of to whom it is left in the will
- In blended families, if spouse not willing to waive homestead right, then need to consider leaving something else to children from previous relationship
- Spouse trusts are "high maintenance" – spouse is required to pay annual upkeep, but capital beneficiaries (e.g. children) will be required to pay for capital repairs, which could be very expensive
- Consider whether or not it will be practical to keep a home in a trust until the second spouse dies, particularly if spouses are young
- May be better to leave house to spouse and buy insurance for other beneficiaries

Questions?