

QUEEN'S UNIVERSITY

FACULTY OF LAW

**LAW 463 - TRUSTS**  
**PROF. C.D. FREEDMAN**

FINAL EXAMINATION  
December 2013

- INSTRUCTIONS:
1. This examination is THREE HOURS in length.
  2. This is an OPEN BOOK examination.
  3. There are 8 questions together worth 100 marks:  
Questions 1, 2 and 3 are worth 25 marks each.  
Questions 4, 5, 6, 7 and 8 are worth 5 marks each.
  4. Please put your student number on the front of all answer booklets.
  5. **Please write legibly.** If your answer is illegible, it will not be marked.

**GOOD LUCK!**

**PLEASE NOTE: "Proctors are unable to respond to queries about the interpretation of exam questions. Do your best to answer exam questions as written."**

This material is copyrighted and is for the sole use of students registered in Law 463 and writing this exam. This material shall not be distributed or disseminated. Failure to abide by these conditions is a breach of copyright and may also constitute a breach of academic integrity under the University Senate's Academic Integrity Policy Statement.

**QUESTION ONE: 25 marks**

**MORRIS** had been married and divorced twice. Besides heartache and legal bills, these two marriages left him with two daughters from different mothers: **ALICE** and **ZELDA** (who never did get on with each other). Some years ago, Morris's lawyer advised him to avoid a family fight after he passed away by establishing trusts for each of his daughters while he was still alive. Morris agreed and instructed his lawyer to draft two trust settlements in the same terms, one to be called the 'Alice Trust' and the other the 'Zelda Trust'. The terms of those two settlements read:

1. I appoint my lawyer, **HUGO Z. HACKENBUSH** to hold the sum of \$1,000,000.00 on trust for [Alice in one document, Zelda in the other], on the following terms:
  - (a) to pay out ten percent (10%) of the gross value of the trust assets yearly on [Alice / Zelda]'s birthday to her until the trust property is exhausted or [Alice / Zelda] dies;
  - (b) if [Alice / Zelda] shall die before the trust assets are exhausted, whatever remains shall go to her sister or her sister's Estate;
  - (c) Mr. Hackenbush shall be compensated at the fixed sum of \$1000.00 per annum inclusive of tax and disbursements.

Morris executed the two trust settlements in 2004, and that same day transferred \$2,000,000 into Hugo's trust account (the account in which he held money in trust on behalf of his various clients). At the same time he made the settlement, Morris also executed a Will in which he left all assets owned at death to Queen's University.

Morris died earlier this year survived only by Alice and Zelda. After his death, the following facts became known:

- (a) Hugo has paid \$100,000 to each of Alice and Zelda on each of their nine birthdays until Morris' death;
- (b) Hugo invested the \$2,000,000 received from Morris in a real estate development (**DEVCO**) that one of his clients had organized. The \$2,000,000 investment resulted in a 10% partnership interest in DEVCO. In fact, the development is just

now being completed. By agreement reached this year, DEVCO will be sell the development to another corporation (that the majority owners in DEVCO control) for \$100,000,000.00 in 2014;

- (c) In order to make the birthday distributions to Morris's two daughters, Hugo sold 5% of the shares in DEVCO to one of the other DEVCO partners for \$100,000 just before each birthday fell and paid that sum to Alice or Zelda (depending on whose birthday it was);
- (d) Hackenbush still retains shares in DEVCO – 10% of the original shares acquired using the \$2,000,000 provided by Morris;
- (e) Hackenbush has submitted a claim for compensation for his work since 2003.

**Advise Alice and Zelda.**

**QUESTION TWO: 25 marks**

**KEFFI** held herself out to be a lawyer even though she never completed any legal education, was never called to the Bar, and held no license from the Law Society.

**ALAN** sought Keffi's advice as a lawyer in relation to a problem relating to his company **ALANCO**. The company was on the verge of bankruptcy and Alan needed a way to get some money to pay his two key suppliers. If he could do so, Alan said Alanco would survive given that its bid on a big project had just recently been accepted. Alan said he didn't want to go to his bank for a loan as the bank might just call in Alanco's existing operating loan and that would be the end of the company. Keffi told Alan that she was not specialized in commercial lending but she could seek out and retain a more specialized lawyer to handle arranging a loan and then just act as general counsel for Alanco in relation to that loan. Alan, on behalf of Alanco, instructed Keffi to proceed.

Keffi approached each of the two suppliers and told them that if Alanco went bankrupt they would probably get nothing in repayment of the company's debt to them - Alanco's bank would get all Alanco's assets. She told each supplier that the other supplier was

making a demand for immediate payment and asked each supplier for a make loan to Alanco to pay the other supplier. Thus, she explained, Alanco would get the short term loan it needed to stay afloat and would prosper given that it had a new project coming up – more to the point, Alanco would then be able to repay the loan and existing indebtedness in short order. Both suppliers agreed. **ABLE CORPORATION** agreed to lend Alanco \$1,000,000 to pay **BABEL CORPORATION**, and Babel Corporation agreed to lend Alanco \$1,000,000 to pay Able Corporation.

Keffi then approached a prestigious law firm and spoke with **HEMLOCK**, a partner practicing commercial law with a specialization in commercial lending. She asked Hemlock to handle the Able and Babel loans for Alanco. Hemlock did as instructed and worked with Able and Babel, had them sign the various papers together with Alan as CEO of Alanco, obtained the money from the two corporations and deposited the money into Hemlock's firm's own trust account. Hemlock then acted on Keffi's instructions to pay the money to Keffi ('in trust') as the general counsel for Alanco.

Keffi transferred the money provided by Hemlock from her trust account into her personal account which contained her own money, left for Tahiti, and hasn't been seen since. Keffi's bank has produced her banking records which show that after the transfer of the \$2,000,000 into her personal bank account, Keffi paid off the mortgage on her house in Kingston (about \$500,000), paid off her operating loan with the bank in respect of her practice (about \$100,000), and had the remaining money in her personal account transferred into an account in her name at the *Banque de Tahiti*. Keffi's house has recently been sold but the proceeds (\$1,500,000) remain in the trust account of the lawyer who acted for Keffi on the real estate transaction. Keffi has sent a direction to the lawyer and the bank to have the money paid by the lawyer to the bank and transferred to her account at the *Banque de Tahiti*. The real estate lawyer has refused to act on the direction.

**Advise Able and Babel.**

**QUESTION THREE: 25 marks**

Five years ago, **ALBERT** had a health scare. It caused him to reflect on his life and priorities. He visited his lawyer (**MRS. PEPPER**) and had her draft a document to reflect his wishes. Once he approved the text, Albert executed it in Mrs. Pepper's office **[it is titled 'A Settlement', and is reproduced at the end of this question]**.

Unfortunately, some few weeks after settling the trusts, Albert contracted a virus resulting in *Acute Disseminated Encephalomyelitis* which caused Albert to fall into a coma. Upon hearing this alarming news, **BORIS** (Albert's son) became so distraught that he went to a bar, drank way too many Mint Highballs (*Creme de Menthe* and ginger ale), drove home while intoxicated, and had a serious accident. Boris was in hospital for a few weeks and then pleaded guilty to a charge of Impaired Driving Causing Bodily Harm. He has been incarcerated at Frontenac Institution in Kingston for the last four years or so, but hopes to be released soon on parole.

Albert remained in a coma until he passed away a few weeks ago. He is survived by Boris, and Boris's two sisters, **CATHY** and **DOROTHY**.

The Estate Trustee of Albert's Estate, **MR. PSMITH**, advises you of the following facts:

- Ten days after signing the trust settlement, Albert transferred the sum of at \$1,000,000 to Mrs. Pepper and instructed her to transfer title in the real estate to Boris. Mrs. Pepper deposited the money into a special trust account, and started the work on the real estate conveyance but it had not been completed when Albert fell ill.
- Mrs. Pepper did not know what to do after Albert became ill. She wrote to Boris but never received an answer from him. She has continued to write to him for instructions every six months or so. She mails the letter to the address provided by Albert for Boris when he settled the trust.
- Mrs. Pepper's special trust account now contains \$875,000. Mrs. Pepper says that she used some of the money to pay off her mother's mortgage and to have her mother's teeth fixed;

- Queen's University is happy to have a statue of George MacKenzie commissioned and placed upon its property, and, to create a museum in Watson Hall (where the Department of history is located) dedicated to the art and history of brushmaking in Upper Canada. It advises that it cannot create a brushmaking program primarily due to University cutbacks and out of concern for the remote possibility that the program may not attract sufficient student interest.

**Advise Mr. Psmith.**

**[see over for Albert's Settlement]**

**A SETTLEMENT**

ALBERT, hereinafter referred to as 'the settlor', settles the following trusts in favour of the following persons and purposes and nominates and appoints BORIS (or should Boris be unwilling or unable to take up that appointment, the settlor's lawyer Mrs. Pepper) hereinafter referred to as 'the trustee', and directs him or her as follows:

- (1) To provide any income or dividends from stocks and bonds that I shall provide to my trustee to Queen's University, and, after my death, to use that which remains to build a statue in honour of Sir John A. Macdonald's long forgotten supervising lawyer, George Mackenzie, in Kingston, Ontario;
- (2) To provide the sum of \$800,000 to a university to develop a degree program in the history of brushmaking and to celebrate the *Brushmakers' Society of Upper Canada*, and to endow a scholarship to be awarded to an in-coming student based on need and to be called the 'Alfred C. Fuller Scholarship';
- (3) To take from my wine cellar, the best 12 bottles which shall be provided to a charity in Kingston, Ontario for auction, the proceeds of which should be used to help recovering alcoholics;
- (4) To provide for the needy members of my lawyer's family, should there ever be any, and for this purpose I shall give to my trustee the sum of \$125,000;
- (5) To create a fund for the protection of animals in need in Kingston, Ontario, and for this purpose I shall give to my trustee the sum of \$50,000;
- (6) To provide an income to myself for life and thereafter to pay the capital interest therein to my children Cathy and Dorothy, I shall provide my trustee with the property that I own at 752 King Street West, Kingston;
- (7) My trustee shall be forgiven any innocent or unintended errors or breaches of trust.

Made this 19<sup>h</sup> day of December, 2007 at Kingston Ontario.

*Albert*

**QUESTION FOUR: 5 marks**

Relying on advice, **ARLO** settled a discretionary trust in a jurisdiction outside Canada with his wife (**ARABELLA**) as beneficiary and his lawyer as trustee. The trust property were shares in a company that Arlo owned, **ARLONAUT INC.** One a single day, the trustee received the shares for the trust and sold the same shares to Arabella for \$1, then acted as Arabella's agent and sold them on the open market on her behalf for \$1,000,000, and then acted for Arabella in lending that same amount to **ARLONAUT INC.** The result of this strategy was that there was a capital gains tax savings on the overseas sale of the shares compared with selling those same shares in Canada.

**Is the trust valid?**

**QUESTION FIVE: 5 marks**

A settlor settles a trust for his four adult children (10% of income) and four minor grandchildren (capital plus accumulated income). The adults want to wind the trust up because they are all trustees and can't get along. They propose that the trust assets be split as follows: 5% to each adult, and, 20% to each child in the form of four individual trusts for the individual grandchildren. The Children's Lawyer represents the grandchildren and has only one objection – the intention of the settlor should be respected and the trust left in place.

**The issue is put before you as a Judge for decision. How does Your Honour rule?**

**QUESTION SIX: 5 marks**

**ROSE** and **JANE** were friends and wanted to buy a semi-derelict house to use a studio as they were both artists. The house cost \$250,000. A mortgage was taken by Rose and Jane, on the condition that they paid \$100,000 on the initial transaction. Their \$150,000 mortgage was for 20 years. The initial \$100,000 was paid by the trustee of a family trust in which Rose was a beneficiary on the condition that the property was put into Rose's

sole ownership. Jane paid no money up front but contributed to the mortgage and put her own money into decorating and maintenance. Over the years Rose got into financial trouble until she had to petition to be discharged from her debts as a bankrupt. The trustee in bankruptcy has written to Jane demanding that she pick up whatever property she has in the house as it will shortly be sold to pay Rose's debts.

**Advise Jane.**

**QUESTION SEVEN: 5 marks**

What must be proved to sue successfully for 'breach of fiduciary duty' and 'knowing assistance in breach of fiduciary duty' and what sort of remedies are available to a successful plaintiff?

**QUESTION EIGHT: 5 marks**

In what circumstances may a Court order relief in the form of a constructive trust?