

# Privacy threatened when marriage rocky



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By  
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Recently, three business owners with companies that have earnings of over \$4 million, before interest, tax and amortisation approached me. All were looking for solutions on how to unwind their family trusts, which had been created to place share as part of an estate freeze on their respective businesses back in the

1990s at the recommendation of their public accountants.

This was to maximize the lifetime capital gains exemption that would have multiplied if the business were sold, or reduce the taxes paid on their death.

The motivation for reversing their estate freezes was a marriage of one of their children.

Many people set up trusts for younger family members, usually children, with the intention of transferring wealth to the next generation by keeping money and assets within the immediate or extended family.

To learn more about how family law impacts trusts and estate freezes, I sat down with Andrew Feldstein, principal of Feldstein Family Law Group, which has offices throughout the Greater Toronto Area.

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*Peter Merrick, MerrickWealth.com*

Feldstein explained that a trust is an entity created to hold the assets for the benefit of a certain person or entities, with a trustee managing the trust (who often holds title in the relevant property on behalf of the trust). So, for example, a father acting as trustee, may hold a property in trust for his son (the beneficiary), with the intention of having his son enjoy the value of the property at some point during his life.

Here are some highlights from our discussion.

**Merrick:** How is the relationship between trustee and beneficiary jeopardized by marriage and then divorce?

**Feldstein:** Not everybody gets divorced, but many people do, and some of those people may have trust interests. Certain property owned as at the date of marriage is typically deducted from a separating spouse's net family property calculation. Gifts or inheritances received during the course of a marriage are usually excluded from one's net family property calculation.

When and how someone acquires an interest in a trust, as well as the use of the funds or property that make up the substance of the trust, will ultimately determine whether or not a separating spouse that is a beneficiary to a trust will have to equalize the value of his or her trust interest, or whether it will be deducted or excluded. There may also be unwelcome consequences for the trustee, insofar as disclosure is concerned.

**Merrick:** How does equalization work in this situation? And what are the risks to passing on wealth?

**Feldstein:** Trust interests could certainly come into play for the purpose of calculating the net family property of each separating spouse, so my advice to anyone thinking of establishing a trust is that they should be extremely cautious before doing so even with a contract in place.

Essentially, trustees may be at risk of not only seeing their intentions of passing wealth downward through their family tree thwarted, but also at having a third party eat into the value of an asset.

**Merrick:** How does equalization relate to income?

**Feldstein:** All sources of income must be taken into account for the purposes of calculating spousal and child support. Therefore, if a spouse has an income generating trust interest, there may be implications

for the payor spouse and in turn, the trustee.

**Merrick:** Do clients underestimate the impact and process of disclosure?

**Feldstein:** Perhaps a less obvious issue is the disclosure of documentation pertaining to the trusts and how to go about getting them produced if they are possessed by the trustee. If someone claims their spouse has a trust interest, but the trustee does not want to produce evidence regarding same, what recourse, if any, does the party seeking disclosure have?

**Merrick:** What is the legal precedent in these situations?

**Feldstein:** *Ludmer v. Ludmer*, which was heard by Justice Craig Perkins of the Ontario Superior Court of Justice in 2010, addressed this very issue. How does the law regulate the flow of information between spouses when trusts and

tained information that the father never intended to be viewed by Lisa, or anyone else for that matter, but the father needed to be more specific and he needed to prove that he would suffer some harm.

She did have to sign a confidentiality agreement, however.

**Merrick:** Sounds like the "law of unintended consequences."

**Feldstein:** The father was trying to assert confidentiality over an asset that his son had a beneficial interest in, and Lisa has a right to access information about this asset. This is an unfortunate, and often unanticipated consequence of setting up a trust for a family member.

**Merrick:** Is it possible to lose control of the money?

**Feldstein:** The bottom line of this case is once you give your child a beneficial interest in a trust, you may have lost control of the privacy regarding some of the financial

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*Andrew Feldstein, Feldstein Family Law Group*

third party trustees are involved?

The Ludmers were engaged in a matrimonial property dispute and Lisa Ludmer was trying to get an order for production of documents pertaining to Brian Ludmer's trust interests, over which Brian's father, Irving, was the trustee. The father objected to producing any information, claiming that it was personal and confidential and brought a motion seeking an order that Lisa sign a confidentiality agreement with respect to whatever he has to disclose, if anything. The fear Irving had was that his personal and business information would become visible in open court.

**Merrick:** What about confidentiality of business information?

**Feldstein:** Perkins stated that there were no facts suggesting that any form of harm or injustice would result if the father's information were disclosed to the public, despite the father's protests that the documents contained sensitive and private business and estate matters.

The reasoning for his decision was that the father could not just make broad, conclusory statements, as he did, to try and prevent all documents relevant to the trust from being disclosed. The documents very well may have con-

information surrounding you and any business interests you may have. And yes, you may also lose control of the flow of the money itself.

The understanding I left from my discussions with Feldstein is the importance of reviewing a client's family situation and the need to be mindful that changes in a business client's children's marital status can have huge ramifications on your clients' financial affairs. If your client has completed an estate freeze and established a family trust for his or her children in the past, and if these children are now adults, it is the time to re-evaluate that strategy.

And it is important for your client to engage a family lawyer for guidance on the intersection of trusts and family law.

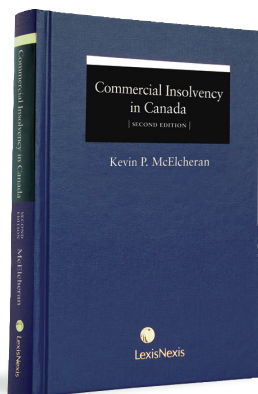
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