Federation of Law Societies of Canada

National Committee on Accreditation

SAMPLE

Examination for Trusts

Candidate No.: ______________

(To ensure your anonymity, please do not print or sign your name)

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Examination for Trusts

General conditions of ALL NCA exams:

This is a **three (3) hour, open book** exam.

Answers should be **double-spaced** and written in **blue or black ink** (no pencils).

All answers **must** be completed on the pads provided unless space is expressly provided within the examination booklet.

The examination will be graded on a pass/fail basis (50% is a pass).

WRITE LEGIBLY. Writing considered illegible by the examiner may result in your exam not being fully graded **or your exam being disqualified**.

You must **return the exam questions in the envelope provided** along with your answers. Failure to return the questions will result in the **automatic disqualification** of your exam.

The contents of the examination, including the exam questions, **must not be disclosed** or discussed with others.

Each exam may have its own special instructions; therefore it is important for you to read these carefully before starting.

Instructions specific to this exam:

1. You will be assessed primarily on your ability to identify relevant issues, select and identify the material Canadian rules of law, and explain how those rules apply to the relevant issues, considering competing arguments where necessary.

2. Do not provide an initial summary of the facts; rather, deploy the facts in your analysis and assessment of the various issues.

3. If quoting from any source, use quotation marks and identify the source. Failure to do so will result in grade reduction and, in egregious instances, automatic failure.

These sample exams are simply indications of the style/types of questions which may be asked in each exam; they do not reflect the content or actual format/structure of questions nor of their value. Actual exams vary from subject to subject and from exam session to exam session.

QUESTION ONE (25 Marks, 45 minutes)

Leslie Weinstein is a movie producer who has amassed a great deal of money from making B-grade movies.

Leslie was the son of a solo mother, Kimberley, who had struggled to provide Leslie with a decent education. Leslie was always devoted to his mother and did all he could to provide for her welfare once he had gained some wealth.

Leslie was married to Glenda who had given birth to two children, Rachel and David. Leslie loved both his children but held particular affection for Rachel because she had followed Leslie into the movie business as an aspiring, but impoverished actress. David trained as an accountant and did not want to have anything to do with the movie business.

Ten years ago (2004), Leslie decided to make some provision for Kimberley, Rachel and David. He settled 50,000 shares of his business, Weinstein Movie Ltd., on trust with his best friend, Carmen Electra, on the following terms:

> [1] To hold the shares in trust with power to convert and encroach on the capital, and from which to pay, or accumulate, the income so that it may be paid to my mother and all my children at any time, and in any amounts, who, in the sole discretion of the trustee may find appropriate.
>
> [2] Following the death of my mother, Kimberley, any shares, capital or accumulated income is to be divided and distributed equally, one half to my surviving children equally and one half to the Society of Performing Artists (SPA) with my wish and desire that they will use it to provide support to destitute working artists.

At the time of the trust settlement the 50,000 shares were worth $1.5 million and generated approximately $100,000 per year in dividend income. With the general fall in the economy and the movie business over the last few years, the shares today are worth $400,000 and generate only $40,000 in dividend income.

At the time the trust was settled, Leslie gave a letter to Carmen Electra indicating that he would like Carmen to ensure that Kimberley and Rachel were well provided for and to give less consideration to David.

Five years ago (2009), Leslie was surprised to learn that he had another child, Simone, the product of a very brief affair that he had with a women while on a movie shoot in South Africa over seventeen years ago. Simone was now 22 years old and had also embarked on an acting career. This greatly impressed Leslie and he sent a letter to Carmen bringing his attention to a 'new' child of his and asking Carmen to give Simone most favourable treatment. He also asked Carmen to keep knowledge about Simone in the strictest confidence because if it came out it would only cause a family feud and great upset, particularly, because his wife, Glenda, knew nothing of his affair, and of Simone.

For the first five years of the trust settlement (2004-2009), Kimberley received the bulk of the income and Rachel and David both received only modest amounts, $15,000 to Rachel and $5,000 to David. Five years ago (2009), David stopped receiving anything, Rachel received only $5,000 and Kimberley received two thirds of what she used to receive. Kimberley, Rachel and David, did not know about Simone and simply thought the reduction in their funds was attributable to the economic decline of Leslie's movie company. In fact, Carmen started paying money for further acting lessons for Simone.

In 2014, Kimberley died. The shares in the trust settlement are worth $400,000 and there is $15,000 cash as undistributed income. Carmen has realized the trust assets and is preparing to make the following distribution. He plans to send half the $415,000 being $207,500 to the Society of Performing Artists, and the other half, $207,500 to be divided into thirds, ($69,170) and sent to Rachel, David and Simone.

The Society of Performing Artists (SPA) is an unincorporated society consisting of 1500 artists. The purposes of the Society are to advance the interests and welfare of performing artists. When it was established thirty years ago, almost all of its funds were used to support destitute artists. However, since the advent of unemployment insurance, and that artists can qualify to receive this insurance between performance gigs, there are now, really no destitute working artists. However, there are a number of members of the SPA who have retired from working and are without any pensions and who could be described as poor and in need of additional funds.

David has done some research through his grandmother's accounts. He has found that after 2009 she did not receive during her life what he thought was all the income being generated from the trust assets, less the amount received by Rachel. He also cannot understand why he and Rachel are not getting more of the trust assets. David still knows nothing of Simone.

David has come to your office. He would like to know the reasons why Carmen appears to have paid out trust funds to somebody else other than to Kimberley, Rachel and David. He would also like to get more of the money that is to be distributed upon his mother's death. Advise.

QUESTION TWO (25 marks total in three sub-parts, 45 minutes)

Now assume that Leslie Weinstein (from question one) has died. Before he died he wrote his will which contains the following provisions:

[1] I leave to my good friend, Carmen Electra the sum of $400,000.

[2] I appoint Judith Thatcher and Ontario Trust Ltd as my executors and trustees and leave in trust, to sell, call in and convert all my shares in Weinstein Movie Ltd, and to pay the income to my wife, Glenda Weinstein during her life, and then for the capital to be distributed absolutely in accordance with a power of appointment exercisable by her will, and in her sole discretion as to share, to my two children, Rachel and David Weinstein. Provided that should my wife fail to exercise the power of appointment then the capital will pass to the children of Rachel or David Weinstein in equal shares in trust to be distributed absolutely upon the last child becoming of age following the death of the last survivor of my children, Rachel and David Weinstein.

[3] I leave all remaining property to the Vancouver Public Hospital for the purpose of conducting education and research into cancer.

Question 2(a) (5 marks, 9 minutes)

Prior to his death, Leslie spoke to Carmen indicating that he was going to leave him some money in his will. He also gave Carmen a letter, which he asked Carmen not to open until after his death, but that Carmen would know what it was about and what he should do. Carmen took the letter and said that he would help Leslie. When Carmen opened the letter after Leslie's death he found that it contained instructions that the funds left to him in Leslie's will should go to Simone provided Simone signed a confidentiality agreement to keep in confidence the source of the funds and that she agrees not to make any further claim on Leslie's estate.

Discuss the validity of the will's provision and advise Carmen of its implications.

Question 2(b) (10 marks, 18 minutes)

Glenda is not happy with the will. It is only upon the death of her husband, Leslie, that she has found out that for the last five years, most of their income has come from Leslie selling off assets in his business, Weinstein Movie Ltd, because the company has made very little income. If Glenda is forced to rely solely upon the income from the business, it will only amount to $60,000 per year, far less than she has been used to while Leslie was alive. The shares in Weinstein Movie Ltd are currently valued at $2 million. The value of the shares fluctuates quite dramatically because they are very much dependent upon how the movies the company produces fair at the box office and in critical reviews. For over the past five years Weinstein Movie Ltd., has not had a 'box office hit'. However, the company does have a film in production that chronicles the life of Michelle Obama staring Beyoncé in the title role and which they think could be a hit. The film will have its first screening in about 15 months. The management of Ontario Trust Ltd are sympathetic to Glenda's predicament but Judith Thatcher, who is also the head of marketing for Weinstein Movie Ltd, keeps saying that things will get better and Glenda shouldn't worry.

Advise Glenda of what she can expect of the trustees and what can be done to improve her income.

Question 2(c) (10 Marks, 18 minutes)

Now assume that Glenda has spoken to both Rachel and David. Glenda believes they can do a better job than the trustees in administering what has been left to her. Both Rachel and David are willing to help as long as they get some money up front rather than waiting until their mother dies.

Advise Glenda what she can do, if anything.

QUESTION THREE (20 marks, 36 minutes)

18 months ago, Greg Eldon met Kerry Hacker in a bar one evening. Over the course of the evening they found that they had some common interests. Both had once been married, and subsequently divorced; both worked in the oil and gas industry, and both had a tendency to live beyond their means. After this meeting their friendship grew over the following six months.

12 months ago, after Greg was laid off from his last job and had been given a payout of $30,000, Kerry suggested that they should buy a two-bedroom condominium together rather than Greg simply wasting his payout. Greg thought this a very good idea and they both looked for a condominium together. They found a suitable one in the downtown core of Toronto. The condo price was $250,000, of which Greg put in $30,000 and Kerry $15,000. At the time of the purchase, Greg insisted that the title of the condo should be placed in Kerry's name. This was partly because Greg still had not found any work, and was collecting social assistance at the time and had not disclosed his cash payout as part of his assets when applying for social assistance. Had he done so he would not have qualified for social assistance, and, in fact, his actions were fraudulent. However, it was also desirable that Kerry's name be placed on the title because he had a job and the mortgage financing they secured would only accept Kerry as the sole mortgagor.

Three months ago, Greg secured a well-paying job in the oil-patch of Alberta. He left Toronto and the condo to undertake the job. He did not inform social welfare and kept receiving his social assistance, which was sent to his condo address.

Last month, Greg received a letter from the Ontario Social Welfare department indicating that he was no longer eligible for social assistance and demanding that he repay $15,000 that he had received over the past eight months. The Social Welfare department became aware of Greg's dealings after an officer visited the condo and was told by Kerry that no one of that name had ever lived at the address.

After receiving the letter, Greg tried to phone Kerry but the phone number was no longer in service. Greg immediately terminated his employment and returned to Toronto. He found that Kerry was no longer living in the condo and that it had in fact been sold to another couple two months ago for $310,000.

Yesterday, Greg came into your office. He tells you that Kerry is living with his parents. After Kerry sold the condo and paid out the mortgage plus penalty he was left with $100,000 cash from the sale of the condo. Kerry had placed these funds into his bank account. Kerry had then drawn out a cheque for $70,000 to buy a Porsche car.

Greg wants to know whether he can get any of his money back. Advise.

QUESTION FOUR (30 marks, 54, minutes)

OMERS (Ontario Municipal Employees Retirement System) is the pension plan set up for all municipal employees in Ontario. The OMERS administrators are governed by the *Pension Benefits Act*, and, in particular, section 22 which states:

> **Care, diligence and skill**
> 22.(1) The administrator of a pension plan shall exercise the care, diligence and skill in the administration and investment of the pension fund that a person of ordinary prudence would exercise in dealing with the property of another person.
>
> **Conflict of interest**
> 22.(4) An administrator, or if the administrator is a pension committee or a board of trustees, a member of the committee or board that is the administration of a pension plan shall not knowingly permit the administrator's interest to conflict with the administrator's duties and powers in respect of the pension fund.
>
> **Employment of agent**
> 22.(5) Where it is reasonable and prudent in the circumstances so to do, the administrator of a pension plan may employ one or more agents to carry out any act required to be done in the administration of the pension plan.
>
> **Employee or agent**
> 22.(8) An employee or agent of an administrator is also subject to the standards that apply to the administrator under subsections (1) and (4).
>
> **Payment of agent**
> 22.(11) An agent of the administrator of a pension plan is not entitled to payment from the pension fund other than the usual and reasonable fees and expenses for the services provided by the agent in respect of the pension plan.

In 2005, Dorset Capital was incorporated as a company designed to act as a merchant bank with a mandate for private equity, venture capital and infrastructure investments. In 2007 OMERS acquired a small shareholding in Dorset Capital. At the same time, Collier, who had been Vice President of Private Placement Investments for OMERS, and Nobrega, who had been Vice President of Infrastructure Investments for OMERS, left the employment of OMERS and joined Dorset Capital, both as company directors.

In 2008, OMERS became the sole shareholder of Oxford Properties Group (OPG), one of North America's largest commercial real estate companies, owning about $7.5 billion in real estate. OPG managed this property in-house with a staff of 40 at a cost of $7 million per annum. Latimer, who was OMERS Vice President of Property Investments, had been instrumental in OMERS decision to buy OPG.

Late in 2008, OMERS' directors made the decision to contract out the property management that it had inherited from its take-over of OPG. Latimer was directed to negotiate with an appropriate property management firm. Latimer, who personally knew both Collier and Nobrega, approached Dorset Capital to gather their interest. Dorset Capital had no prior experience in the property management business.

A contract between OMERS and Dorset Capital was soon signed. Under the contract, OMERS agreed to transfer its existing property management staff and business to Dorset Capital in return for $5 million. This was considerably less than the existing business was worth. Dorset Capital was then contracted for

5 years to manage OMERS property. The contract price for this service was $35 million (over five times what it was paying in-house at OPG for the same services). Another term of the contract provided that Latimer would be employed by Dorset Capital as a company director in charge of property management. Finally, a further term provided that should OMERS terminate the management agreement before the expiration of five years, Latimer, Collier and Nobrega would be entitled to a buy-out payment (buying out their directorships in Dorset Capital) of $5 million each, and be given secure and comparable employment positions back with OMERS.

In 2010, after a shake-up in the management of OMERS, Paul Haggis, the new CEO for OMERS, terminated the management services agreement with Dorset Capital, paid a further $45 million early termination fee, and brought the property management back in-house, significantly reducing the costs of property management back to earlier costs. Latimer, Collier and Nobrega, were paid $5 million each and given senior management positions back with OMERS.

Wyman MacKinnon is a municipal worker for Ottawa City Corporation, and is required to make pension contributions to OMERS. He is most annoyed that his hard earned pension funds are being wasted in such a fashion. Your law firm is interested in taking his case on and using it to launch a class action suit. You are asked to draft a memo outlining the possible trust avenues of liability that could be pursued and against whom.

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