

Varying a Trust

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Recently an application was brought to the Ontario Superior Court to permit the variation of a 1992 Trust. The court permitted the variation, resulting in a distribution and reorganization, largely on the basis of a significant capital gains tax that would be payable on the 21st anniversary if the variation was denied. Importantly all other beneficiaries, including the children's lawyer consented and the court confirmed the request met other basic requirements.

We have been involved in several trust variations over the years where the early encroachment of a trust was offset with the replacement asset being a life insurance policy.

Typically, this can be a beneficial transaction for all parties if properly done. For example, a 45 year old female, receiving a distribution of \$3M today, can provide for a replacement of those funds in the trust on her death with a fully paid up guaranteed insurance contract on her life for approximately \$600,000. Effectively this would provide a reimbursement of the \$3M previously distributed to the beneficiary. This would mean there is no loss to other beneficiaries should the unexpected - but possible - happen.

It is absolutely essential, that the contract be negotiated to include the best possible terms with respect to suicide and contestability in order to minimize the risk of non-payment of the claim. Further, tax on interest earned on deferred premiums must also be taken into account in the premium calculation. Finally, the cost of the insurance (\$600,000 in the example) can also be included in the death benefit so the net cost is zero - excluding interest, of course.

Not all insurance companies will alter the contract and fewer still have actual experience underwriting coverage for this purpose. For that reason, we believe it is important to work with knowledgeable and experienced advisors.