

Planning for the Unexpected

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A Manitoba Court of Queen's Bench decision highlights the importance of planning for all contingencies when setting up a family trust.

The case of *Shinewald v. Putter et al*, 2014 MBQB 254 (CanLII) was an application under s. 59 of *The Trustee Act*, C.C.S.M. c. T160 to vary the terms of a family trust to add an income beneficiary. The main point at issue was whether the variation could be made retroactive. Canada Revenue Agency opposed this request and the court agreed with their position.



Sophie Shinewald had set up the family trust to hold shares of her son Ed's corporation. Ed, his wife Sharon and their children were all capital beneficiaries of the trust. Sharon and the children were income beneficiaries of the trust but Ed was not. The intention of the settlor was that Ed would benefit from the income distributions made to Sharon.

Sharon died in 2009. The trust began to distribute income directly to Ed in 2008 even though he was not an income beneficiary. In 2013 Sophie brought an application to court to vary the terms of the trust to add Ed as an income beneficiary.

Mr. Justice Dewar agreed that the variation was justified. All of Ed and Sharon's children were adults and consented to the variation. The variation was justifiable under subsection 59(7) of *The Trustee Act* as it was consistent with the intention of the settlor to provide benefits to Ed and his family.

The applicants had requested that the variation be made retroactive to the date of Sharon's death. This request was opposed by Canada Revenue Agency. The issue here was that if the variation was not made retroactive, payments made from the trust to Ed between 2009 and the date of the variation would be subject to additional tax liability as unauthorized distributions from a trust.

The court refused to make the order retroactive. The trust was set up as part of a tax planning scheme and in tax planning the form of the documents is critical. There was no evidence that the failure to make Ed an income beneficiary when the trust was first set up was a clerical error. The trust was set up by experienced tax professionals. The exclusion of Ed as an income beneficiary was part of the original plan. Taxpayers are entitled to arrange their affairs to attract the least amount of tax but they are bound by what they have done.

They are not entitled to rearrange their affairs retroactively to obtain some further tax advantage if things do not work out as planned.

The variation of the trust was approved effective as of the date of the filing of the application in 2013.

When setting up an estate plan, it is important to take into account different possibilities. In this case the trust was set up based on the assumption that Sharon would outlive Ed. There was nothing in the original trust that allowed for the possibility that Ed would outlive Sharon. The family therefore had to go to court to seek approval for a trust variation.

A trust cannot be varied without approval of the court even if all beneficiaries consent. In this case, the family was fortunate that all of the beneficiaries were adults and did give their consent to the variation. If there had been minor children involved, or some of the parties did not agree to the variation, the case would have been much more difficult.

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