HULL & HULL LLP
Barristers and Solicitors

Trust Experience™

Irrevocability of Trusts

Clients will often seek our assistance in settling *inter vivos* trusts (also known as "living trusts") to allow for the assistance of an individual (the trustee) in managing property on behalf of one or more beneficiaries or to facilitate the transfer of assets from one generation to the next in a tax-efficient manner. Where it is possible that family dynamics might change over time in a way that alters the client's wishes regarding their ownership rights relating to an asset, the structure of a trust may or may not be suitable and there are a number of factors, including whether the trust is intended to be revocable or irrevocable, that should be considered during the planning process.

Inter vivos trusts are settled when the three certainties are established: (1) the certainty of the intention of the settlor (often set out in a written trust instrument); (2) the certainty of the subject matter of the trust (trust property); and (3) the certainty of the object of the trust (beneficiaries). Whereas a testamentary trust comes into effect only after death, typically pursuant to the terms of a Last Will and Testament, and can be revoked by the settlor while they remain capable anytime prior to death, the same cannot be said for *inter vivos* trusts, which are generally considered to be irrevocable.

If the settlor does not wish for a trust to be irrevocable, it is important that such intention is clearly set out in the trust instrument. While courts may, in limited circumstances, grant relief from the irrevocability of a trust where the trust arrangement is entered into without an understanding of its effect, clients should be discouraged from settling and transferring property to a trust if they wish to retain unrestricted control over the asset and/or anticipate that they may change their mind about who should ultimately receive an interest in the trust property. In some circumstances, a settlor retains the right to control and/or manage trust property to a certain extent, but their rights nevertheless become subject to the interests of the beneficiaries of the trust.

Cases where irrevocable trusts are set aside on the basis of a mistake of fact or mistake of law are relatively rare. *Re Horvath*, 2000 BCSC 117, was one such decision. The settlor had executed an irrevocable trust deed for the purposes of facilitating the transfer of his properties to his children at death. He later decided that he wished to sell one of the properties, was unable to do so, and brought an application to modify and/or revoke the trust agreement. The Court emphasized that the party challenging the validity of a trust bears the onus of establishing that there was a "fundamental misapprehension" as to the nature of the trust at the time that trust was settled. Justice Boyle found that the trust could be revoked, as the settlor had "no notion of the legal effect of the trust", believing only that the trust would protect the gift of the trust properties to his children in the context of any possible claims arising from future marriage, and that the applicant never intended to "alienate his property" and did not appreciate that he was doing so in settling the trusts without retaining an express power of revocation.

In light of the potential consequences relating to relinquished rights in the settlement of a trust and the difficulty that one may face in seeking to have a trust revoked if that ability is not specifically and clearly reserved, it is important that solicitors explore the mechanics of a trust with clients and confirm their intentions before any changes to how their assets are held may be implemented.