NOTE: 1. This is an open book examination. A candidate may bring the following into the examination room:
   - all or part of the case and statutory materials posted on Connect;
   - the Syllabus, Course Notes and anything else posted on Connect for the course;
   - downloads of any cases listed in the Syllabus or the Course Notes;
   - the candidate's own notes.

2. ANSWER ALL THESE QUESTIONS. You may answer them in any order. PLEASE budget your time.

THIS EXAMINATION CONSISTS OF 3 QUESTIONS.
Alan (now deceased) was a successful businessman who accumulated substantial wealth during his lifetime. With his first wife he had two children, Bonnie (now age 53) and Charles (now age 45). Bonnie has been independently successful in business. Charles has never “found his passion”. While he earns some money through self-employment, he has been and continues to be financially reliant on Alan (and then Alan's estate). During his lifetime Alan was generous to Charles, and even to some of Charles' friends who were also struggling financially. Given her own success, Bonnie did not resent this.

Alan and his first wife were divorced over 20 years ago, and then Alan married Denise (also now deceased). Denise had two children by a former marriage, Elinor (now 37) and Frank (now 34). Alan and Denise subsequently had another child, Grant (now 19).

A substantial part of Alan's wealth was in a private investment company (Investco) that was owned 80% by Alan and 20% by Bonnie. Alan managed the investments successfully. Some years before his death he transferred all his shares of Investco to a validly created trust (“Trust”) of which Alan and Bonnie were the trustees. The Trust document provided that all the income of the Trust must be distributed annually to Alan and Denise, and then to the survivor. Following the death of the survivor, the capital must be divided, as to 25% each to Bonnie, Charles and Grant, and as to 12.5% each to Elinor and Frank. The Trust document contained usual powers to invest, sell and reinvest the trust property.

Before and after the creation of the Trust, Alan and Bonnie were directors of Investco, which paid Alan a salary and paid regular dividends to Bonnie, and to Alan and then to the Trust, which distributed the dividends to Alan and Denise as provided by the Trust. The salary and dividends that Alan received from Investco (directly and then through the Trust) supported the lifestyle of Alan and Denise, including raising Grant, and paying for the education of Elinor and Frank.

Alan died approximately 10 years ago. His will provided as follows:

(a) Bonnie and Frank were appointed as Executors;
(b) $1,000,000 and the family home were given to Denise outright;
(c) the sum of $2,000,000 was set aside as described under 3 below;
(d) the residue of Alan's estate was held in trust to pay the income to Denise for her lifetime and on her death to divide the remainder among Alan's children;
(e) the Executors were given equal powers of sale and retention with respect to the assets of Alan's estate, and application of the rule in Howe v. Lord Dartmouth was excluded.

In a letter that Alan left for Bonnie, he explained that, since Denise was a beneficiary of his estate, he wanted to appoint one of her own children as co-executor, even though neither Elinor nor Frank had any financial acumen, but that Alan was relying on Bonnie to assume substantial responsibility for the estate and keep Frank on the right track. (Bonnie has never shown this letter to Frank or anyone else.)

Following Alan's death the following happened.

1. Bonnie was left as sole trustee of the Trust and sole director of Investco. She took no salary from Investco but stopped paying any dividends to the Trust or herself. She explained that Denise was adequately provided for by Alan's will, and Bonnie wanted to focus on growing the value of Investco. She succeeded in that, tripling its value in the 10 years since Alan's death.

2. The residue of Alan's estate consisted at the time of his death of shares in public companies with a value of $3,000,000, and 15% of the shares of Hankco, which was run by Alan's friend Hank, who owned 30% of the shares of Hankco (more on this under 5 below). Bonnie was concerned that the public company shares could decline in value (which happened, dramatically, two years later) so she and Frank agreed to sell all the public company shares and put the proceeds into bonds. This has preserved the capital value of these assets, but, with the unexpected low interest rates of the last few years, produced relatively little income for Denise. Since Denise also received nothing from the Trust after Alan's death (see 1. above), Denise used up most of the $1,000,000 she received from Alan's estate in supporting herself and Grant from the time of Alan's death until Denise herself died a few months ago, shortly after Grant turned 19. Neither Bonnie nor Frank paid any attention to the shares of Hankco.

3. Alan's will provided the following with respect to the $2,000,000 fund referred to under (c) above (the "Charles Fund"):

"My executors shall set aside and hold in trust a fund of $2,000,000 for the benefit of my son Charles. He may use as much as he wishes for his own needs, and he may give away a portion to any of his close friends who, like him, are still finding their way in life. Whatever Charles does not need or give away will be divided among my children and
Bonnie considered that the executors could preserve the capital value of the Charles Fund while earning $100,000 in income (pre-tax) annually, which Bonnie proposed to Frank they would distribute to Charles. They have proceeded in this way over the last 10 years, and the capital of the Fund is still worth about $2,000,000. Charles has complained periodically to Frank that it sounds from Alan’s will that he (Charles) should have more say over how much of the Fund he gets. Frank says that he really does not know much about it and does not want to get between Charles and Bonnie on this, so he (Frank) leaves it to Bonnie. Charles is intimidated by Bonnie and has not raised the matter with her.

4. Denise died a few months ago. Her will appointed Elinor and Frank as executors and gave her whole estate (mainly the home she inherited from Alan) to them, stating that Grant was provided for sufficiently under the Trust and Alan’s will. (PLEASE DO NOT ADDRESS any claim by Grant for variation of Denise’s will.)

5. A month ago Acquireco (not related to any of the other people) made an offer to the shareholders of Hankco to acquire their shares, conditional on acquiring more than 50% of the shares. As noted under 2. above, Hank and Alan’s estate between them hold 45% of the shares of Hankco. Hank acknowledged to Bonnie that Acquireco was offering a good price, but assured her that he can increase Hankco’s value further, and is sure that he can persuade at least one other shareholder to hold onto their shares and so defeat Acquireco’s offer. Frank is (rightly) concerned that, if all the other shareholders of Hankco (none of whom either Bonnie or Frank know) sell to Acquireco, Hank and the estate will be left in a devalued minority position. Bonnie wants to refuse Acquireco’s offer so as to support Hank, because of his friendship with Alan. Frank considers this to be ridiculous because Alan has been dead for 10 years, and neither Frank nor Bonnie know anything about Hankco, or Hank, or the intentions of Hankco’s other shareholders in relation to Acquireco’s offer. Bonnie’s position is that even if Alan’s estate loses money on the Hankco shares, they are only a portion of the estate.
Please answer the following questions arising from the foregoing.

- What claims may anyone have, and what proceedings may be brought, with respect to:
  
  (i) the operation since Alan's death of the Trust (which holds the Investco shares), including with respect to any breach of duty by Bonnie as sole trustee of the Trust;
  
  (ii) the entitlements and responsibilities, and any breaches of duty, with respect to the Charles Fund; and
  
  (iii) the administration of the residue of Alan's estate (other than the Hankco shares),

  and, in each case, what remedies may be available?

- What can anyone do about the response of Alan's estate to Acquireco's offer for the Hankco shares?

MARKS

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2. Janice is the owner/operator of a company that manufactures components used in equipment for hydraulic fracking. Until 12 months ago the business was growing and Janice wanted to expand. She considered moving to new premises, but would prefer to expand the company's existing facility, for which more land is required. Appropriate land was owned by Kyle, whom Janice knew slightly. She approached Kyle but he refused to even talk to her about possible sale of his land, because of his strong opposition to extractive industries in general and fracking in particular.

Janice mentioned this to Len who runs a small accounting firm that prepares financial statements and tax returns for Janice's business and Janice herself. She told Len that she would have to rely on someone else to deal with Kyle for her. Len told Janice that he knew Kyle quite well, since both were avid curlers, and would try to talk to Kyle about his plans for the land. Len was able to talk to Kyle but did not mention his relationship with Janice. Kyle told Len that he (Kyle) had been diagnosed with a progressive form of cancer but said that he was telling only Len this in confidence, and did not want him to tell anyone else. Kyle told Len that he was keen to sell his land and hoped to get $2.5 million for it, but might be forced into a quick sale at a lower price.

Len told Janice only that Kyle's asking price for the land was $2.5 million. Janice said that seemed high, but in the circumstances she might be prepared to pay that much, and asked Len if he thought Kyle would take
less. Len said he thought not. They left matters there, as by this time the sharp drop in oil prices led Janice to defer expansion. Janice asked Len to tell her if he learned anything further, which Len agreed to do.

Six months ago Kyle approached Len and told him that his condition had worsened and he was going abroad to try a costly experimental therapy, and so needed a quick sale of the land. Len offered Kyle $2 million, which he said was all he could afford, but that if and when he sold the land he would feel obliged to give Kyle 50% of anything he received over $2 million. (Please assume that this does not represent an enforceable contract for further payment.) The sale to Len completed within a week. Len told Janice nothing about this.

Kyle's therapy had little effect and he died three months ago, after which Janice thought she might have a better opportunity to buy the land. She was distressed to learn that Kyle had sold it, but relieved that Len had bought it, since she expected Len would sell it to her for whatever price he had paid. She was therefore shocked when Kyle told her that he had bought the land for $2 million, but wanted $3 million to sell it to Janice, of which he would give $500,000 to Kyle's widow.

What potential legal claim(s) may arise from these circumstances, and what remedies may be available for any such claim?

MARKS

20 3.

Marty was born with a serious illness that restricted him in many ways throughout his life, including his ability to work. He never married or had children. He inherited a house on his parents' death and enough money to support himself, when added to what he received from government programs. His sister Natalie watched over Marty's financial affairs and ensured that appropriate care arrangements were in place (Natalie did not pay for any of these). Natalie's daughter Olivia took an increasing role in this regard as Natalie aged.

Marty's illness meant that he walked very slowly. Three years ago he was a pedestrian at the site of a head-on vehicle collision. In connection with ensuing legal proceedings, a lawyer for one of the drivers claimed that Marty was jaywalking and that the driver had swerved to avoid him which caused the accident, for which Marty was therefore responsible and might face legal proceedings. The lawyer made this threat to try to persuade Marty to give evidence in favour of the lawyer's client. (Please assume that there is no likelihood of a damage award of any kind against Marty.) Marty was terrified of being involved in any court proceeding and refused to give evidence, but was sufficiently scared by the threat that he thought he should transfer his house to his niece. He saw a lawyer who
suggested that a trust be established with Olivia as trustee to receive the house in trust, to be held for Marty for life and then for Olivia after his death. The lawyer drew up a trust document to this effect and Form A Land Transfer in favour of Olivia, both of which were validly executed by Marty. The lawyer then told Marty he would have to pay property transfer tax ("PTT") on the transfer to Olivia in trust. Marty said that he did not have the money for that, but asked the lawyer to give him the executed documents and said that he would work it out with his sister and niece. Marty then gave a copy of the trust document and the original Form A document (properly executed) to Olivia and said "As far as you and I are concerned this is a done deal, but do not register this document until something happens to me. That way you will not have to come up with the PTT till later."

Marty continued to pay the property taxes and other expenses related to the house until his recent death. His Will was made a few years ago and named Natalie as executor and gave his estate to the St. Paul's Hospital Foundation. Natalie is probating the Will. After Marty died Olivia consulted the lawyer who prepared the Form A and trust instrument. He advised her to register the Form A, which was done, so that legal title is now in Olivia's name.

What entitlements arise, and what claims can be made, in relation to the house arising from the foregoing?

END OF EXAMINATION