

Estate freeze doesn't turn a pre-marriage gift into excluded property

By **Lorne J. Fine**

Law360 Canada (October 21, 2026, 11:38 AM EDT) -- For decades, the estate freeze has been a staple of succession planning for Canadian business families. The mechanics are familiar to any tax or estate practitioner: the owner exchanges growth shares for fixed-value preferred shares, and a newly settled family trust subscribes for fresh common shares that will capture all future growth. The tax benefits are well understood.

Less well understood, it turns out, is how that structure will be treated when a beneficiary's marriage breaks down.

The Ontario Court of Appeal's July 2026 decision in *Lang-Newlands v. Newlands*, 2026 ONCA 530, is a pointed reminder that a structure built for tax and succession purposes does not automatically protect wealth from an equalization claim. In that case, an estate freeze, implemented during marriage, did not place the growth of a pre-marriage gift beyond the reach of the *Family Law Act*. The result was an \$18-million equalization payment to the husband, and a lesson that family lawyers, estate planners and their clients would do well to absorb.



Lorne J. Fine

A freeze built on a pre-marriage gift

The parties married in 1987 and separated in 2019. Before the marriage, the wife's father had settled a trust, with his daughter as sole beneficiary, holding shares in a corporation, which in turn held shares in the family business. She was to receive the shares outright at age 39. On the date of marriage, they were worth approximately \$16 million.

The wife received the shares from the trust early, about six years into the marriage, after a health scare prompted her father to accelerate the transfer. Roughly eight years after that, the shares became the subject of an estate freeze, conceived by her father and carried out by his lawyers. Her father settled a new family trust with \$100, and a new holding company was created. The trust then bought 100 common shares of the holding company for \$100, at a time when the company had no assets; those shares entitled the trust to all future growth. The wife — who was the holding company's sole director and one of the trust's three trustees — then sold her shares to the holding company in exchange for preferred shares with a fixed value of approximately \$24.5 million. The trust's beneficiaries were the wife and the couple's four children.

The growth that followed was considerable. By the date of separation, the wife's 20 per cent interest in the new trust was valued at approximately \$134 million before valuation adjustments. (The trial judge ultimately valued her interest at approximately \$40.4, after applying discounts and adjustments later upheld by the Court of Appeal).

Before marriage or after? An \$18-million question

Under s. 4 of the *Family Law Act*, the timing of a gift makes an enormous difference. A gift received before marriage is a deduction: its value on the date of marriage comes off the spouse's Net Family Property, but any growth during the marriage is included in the spouse's Net Family Property and

becomes subject to equalization. A gift received by a spouse from a third party after marriage, by contrast, is excluded property, along with any appreciation. Income derived from such a gift is also excluded, but only if the donor expressly directed that result. Neither rule applies to a matrimonial home, which the Act treats differently, and would not be excluded property even if received as a gift from a third party during the marriage.

The wife's position was that the estate freeze created something new: an interest in a trust her father had settled during the marriage, and therefore a gift *after* marriage. She argued that, under her arrangement with her father, she had been unable to sell the shares for her own benefit until 2001, so his gift was not realized until after the marriage.

At trial, the wife succeeded. The trial judge held that he was bound by the Court of Appeal's earlier decision in *Shinder v. Shinder*, 2018 ONCA 717, in which a spouse's interest in a trust settled in similar circumstances had been described as excluded property. But the trial judge also set out a detailed alternative analysis, in case an appellate court disagreed. In that analysis, he accepted that the wife had received a gift from her father, but found that it had been made before the marriage. Apart from the \$100 used to settle the new trust, her father had given her nothing after the marriage.

The value of her beneficial interest in the trust, he found, arose from her own shareholdings. The *Family Law Act*, he reasoned, does not allow a spouse to shelter the growth of a pre-marriage gift from equalization simply by placing that growth in a trust.

Substance over form: The \$100 settlement

The Court of Appeal allowed the husband's appeal on this issue. It first held that the trial judge was not bound by *Shinder*, which it found distinguishable on its facts. Although *Shinder* also involved a freeze of shares the spouse had owned before marriage, the trust in that case included property contributed by the spouse's father after the marriage. The court acknowledged that this description of the trust's assets might have been factually inaccurate, but considered the distinction significant, nonetheless. The appeal in *Shinder* had also turned largely on allegations of non-disclosure, rather than on how the trust interest should be characterized for equalization.

On the facts of *Lang-Newlands*, the court agreed with the trial judge's alternative analysis. The father had made a valid gift to his daughter before the marriage when he transferred the shares into a trust for her sole benefit. The shares that went into the freeze were those same pre-marriage assets. Apart from the \$100 used to settle the new trust, the father gave his daughter nothing during the marriage that she did not already own, and divested himself of nothing more.

The court held that it would favour form-over-substance to treat the wife's entire interest in the trust (which was about \$40 million after a 50 per cent minority and illiquidity discount) as a post-marriage gift solely because her father had seeded it with \$100. It was also artificial, the court said, to treat her as having been "given" an interest in the growth of shares she already owned, since she was already a beneficiary of the trust when she sold them.

The wife's interest in the new trust was therefore included in her net family property, subject to a \$16-million deduction for the value of the underlying shares on the date of marriage.

The outcome was not a full equal division, however. The trial judge had found, in his alternative analysis, that an equalization payment of the full amount would be unconscionable under s. 5(6) of the *Family Law Act*. The wife had received only 17 per cent of the distributions made when the trust was reorganized after separation, which reduced her net family property by over \$11 million. She had also paid a disproportionate share of the family debt, while the husband had mismanaged the finances and forged her signature. Full equalization would have left him with a higher net worth than hers.

In his alternative analysis, the trial judge concluded that the otherwise-payable equalization amount of about \$25.75 million should be reduced to \$18 million, payable over eight years. The Court of Appeal adopted that analysis, replacing the original equalization award of approximately \$1.18 million with \$18 million. It also upheld the trial judge's alternative support order, under which the husband would receive retroactive spousal support but no ongoing support after his first equalization payment

was made.

(In a notable footnote to the litigation, the husband still bears liability for a \$2.8-million costs award, upheld on appeal, largely because of his conduct before and during the trial, and because he had rejected the wife's reasonable pre-trial offers.)

What advisers should take away

The decision does not mean that every estate freeze is exposed to equalization. It turned on its facts, and particularly on the fact that the new trust's value derived entirely from property the wife already owned before marriage. Also noteworthy is that the court refrained from taking any position on more complicated scenarios, such as those involving mixed-asset trusts, or where a spouse brings gifted property into the marriage, divests herself of it for longer than a mere formal step in the freeze, and is later re-gifted the same traceable property.

Nonetheless, the decision does establish that the date a trust is settled will not, on its own, determine how a beneficiary's interest is treated. Courts will trace where the value actually came from.

For advisers, that suggests several practical steps. Existing freeze structures should be reviewed with this question in mind: whose property is the growth truly attributable to? Where the answer is a married beneficiary's own pre-marriage assets, the assumption that the trust interest is excluded property may no longer hold.

Most importantly, a properly drafted domestic contract remains the most reliable way to protect family wealth from an equalization claim. The *Family Law Act* expressly permits spouses to agree on the ownership and division of property, including the treatment of future growth (subject to the statutory requirements respecting domestic contracts). A marriage contract, negotiated alongside the freeze and addressing the wife's interest in the family business, could have spared this family years of litigation.

Conclusion

Lang-Newlands confirms that estate planning and family law cannot be handled in separate silos. A freeze can achieve its tax and succession objectives flawlessly and still fail as a shield against a spouse's claim where the trust's value traces back to the beneficiary's own pre-marriage property. When significant family wealth is involved, it is imperative to retain a family lawyer at the outset of a marriage to draft a marriage contract, rather than waiting until the marriage has ended to seek legal advice.

Lorne J. Fine is the principal of Fine & Associates Professional Corporation in Toronto, where his practice is dedicated exclusively to family and divorce law. He has over 30 years of experience representing clients in complex family law matters. Lorne is a qualified arbitrator (Q.Arb) with additional training in negotiation, collaborative law and mediation. He has been regularly featured in media on family law issues, including appearances on Global Television, CHCH and as a recurring legal contributor on AM740's Goldhawk Fights Back.

The opinions expressed are those of the authors and do not reflect the views of the authors' firm, its clients, Law360 Canada, LexisNexis Canada or any of its or their respective affiliates. This article is for general information purposes and is not intended to be and should not be taken as legal advice.

Interested in writing for us? To learn more about how you can add your voice to Law360 Canada, contact Analysis Editor Yvette Trancoso at Yvette.Trancoso-barrett@lexisnexis.ca or call 905-415-5811.