Memo To: Doble & Doble LLP, Daniel Diamond
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Jurisdiction: British Columbia, Canada
Date: December 11, 2020
Regarding: B.C. - Valuing Beneficial Interest in Discretionary Trust

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Issue

For the purposes of a matrimonial property division, how have the Courts in B.C. dealt with the issue of valuing a beneficial interest in a discretionary trust?

Conclusion

Unless an agreement or order provides otherwise, the value of family property must be based on its fair market value. (*Family Law Act*).

In *Purtzki v. Saunders*, the Court of Appeal found that an "if and when" order was inappropriate. Therefore, to ascertain the value of the spouse's interest in the impugned trust, the Court must determine what the nature of the spouse's interest in the trust is. Here, the Court found that the spouse's interest in the trust was, but for the illusory discretion reposed in the Trustees, effectively as the owner of the trust property. The spouse was the source of the trust property, and the history of the use of the trust asset demonstrated that the trust had been governed by the spouse’s convenience and objectives. (*Purtzki v. Saunders*).

A number of factors may be relevant to the valuation of an interest in a discretionary trust:

a) the circumstances of the owner-spouse, the trust, and the other beneficiaries;

b) the number and ages of the various beneficiaries;

c) the obligations of the trustee(s) under the terms of the trust;

d) the owner-spouse's overall estate planning;

e) the trustee's possible plans for the underlying assets of the trust;

f) the obligation of the trustee(s) to maintain an even hand when dealing with all beneficiaries;

g) the fair market value of the underlying assets of the trust; and

h) the expectations and legal rights of the other beneficiaries (*Stober v. Stober*).

The fair market value is the appropriate starting part for valuing the interest in a discretionary trust. The Court requires evidence of fair market value of the trust assets or, as the case may be, evidence that there is no fair market value for a particular type of property. (*Stober v. Stober*).

The characterization of the spouse's interest in a discretionary trust and the valuation of that interest are complex legal issues that are intertwined and should be resolved by the same judge. (*McCarlie v. Bogoch*).

Law

Section 84 of the *Family Law Act*, SBC 2011, c 25 provides that the amount by which the value of the excluded property has increased:

Family property

84 (1) Subject to section 85 [*excluded property*], family property is all real property and personal property as follows:

(a) on the date the spouses separate,

(i) property that is owned by at least one spouse, or

(ii) a beneficial interest of at least one spouse in property;

(b) after separation,

(i) property acquired by at least one spouse if the property is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either, or

(ii) a beneficial interest acquired by at least one spouse in property if the beneficial interest is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either.

(2) Without limiting subsection (1), family property includes the following:

[...]

(g) the amount by which the value of excluded property has increased since the later of the date

(i) the relationship between the spouses began, or

(ii) the excluded property was acquired.

Section 85 of the *Family Law Act*, SBC 2011, c 25 specifically lists a spouse's beneficial interest in property held in a discretionary trust in the definition of excluded property:

Excluded property

85 (1) The following is excluded from family property:

(a) property acquired by a spouse before the relationship between the spouses began;

(b) inheritances to a spouse;

(b.1) gifts to a spouse from a third party;

(c) a settlement or an award of damages to a spouse as compensation for injury or

loss, unless the settlement or award represents compensation for

(i) loss to both spouses, or

(ii) lost income of a spouse;

(d) money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for

(i) loss to both spouses, or

(ii) lost income of a spouse;

(e) property referred to in any of paragraphs (a) to (d) that is held in trust for the benefit of a spouse;

(f) a spouse's beneficial interest in property held in a discretionary trust

(i) to which the spouse did not contribute, and

(ii) that is settled by a person other than the spouse;

(g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).

(2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.

In section 1 of *Family Law Act*, SBC 2011, c 25, "excluded property" is defined as follows:

"excluded property" means property that would otherwise be family property but is excluded under section 85 *[excluded property]*

Section 87 of the *Family Law Act*, SBC 2011, c 25 provides for the valuing family property and family debt:

87 Unless an agreement or order provides otherwise and except in relation to a

division of family property under Part 6,

(a)the value of family property must be based on its fair market value, and

(b)the value of family property and family debt must be determined as of the date

(i)an agreement dividing the family property and family debt is made, or

(ii)of the hearing before the court respecting the division of property and family debt.

In *Purtzki v. Saunders*, 2016 BCCA 344 (CanLII), the husband appealed an order that his interest in a trust was a family asset under s. 58(3)(a)(ii) of the *Family Relations Act*, RSBC 1996, c 128. The trust owned the parties' matrimonial home. Importantly, the Father also appealed an order that the value of his interest equaled the value of the matrimonial home, and an order reapportioning his interest 70% to him and 30% to the Mother. Kirkpatrick J.A. dismissed the appeal on valuation and found that an "if and when" order was not suitable in this case:

[72] The next issue is that of valuation. One way to avoid the potentially complex exercise of valuing a spouse's discretionary or contingent interest is to order that this interest be divisible if and when a distribution from the income or capital of the trust occurs. This kind of "if and when" order was made in *Grove* and *M. (H.R.)*.

[73] The judge found that it would not be appropriate to make an "if and when" order in the case at bar. At para. 230, she held:

[230] … Doing so will simply enable the Father to avoid the timely division of the family assets, because there will be no incentive for him to ask the trustees to either mortgage, sell, or transfer the Matrimonial Home.

[74] I agree that an "if and when" order is not suitable in this case. The reality is that the Father has always treated the trust asset as his own, and there is a virtual certainty that the legal interest in the asset will be transferred to him in the future.

[75] Absent an "if and when" order, the court must ascertain the value of the

> spouse's interest in the impugned trust. In the case at bar, the judge found that the value of the Home Trust was equal to the value of the Matrimonial Home, factoring in a modest discount to reflect the probable payment of property purchase tax. At para. 229, she added: "The risk that the trustees will not transfer the Matrimonial Home to the Father is so small that it is not appropriate to apply a further discount."
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> [76] The Father submits that if his interest in the Home Trust is confirmed to be a family asset, his interest must be valued to take into account the nature of his interest and the potential claims by the other beneficiaries, his children.
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> [77] In my opinion, quite apart from the expense and disruption such an exercise would have on the trial finding as to the value of the Father's interest in the Home Trust (which, if altered, would have a cascading effect on all other financial issues), the determination that the Father's interest is more or less equivalent to the assessed value of the Matrimonial Home is sound. The Father's interest is, but for the illusory discretion reposed in the Trustees, effectively as "owner" of the Matrimonial Home. The Father was the source of the trust property, and the history of the use of the trust asset demonstrates that the Home Trust has been governed by the Father's convenience and objectives.
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> [78] Finally, before turning to the issue of reapportionment, I note that the case at bar does not concern the interpretation or application of ss. 58(3)(b)(i) or 58(3)(b)(ii). Those subsections were considered by this Court in *Nowak*. The issue of whether s. 58(3)(b) applies in respect of the Home Trust is not before us.

In *Stober v. Stober*, 2015 BCSC 2505 (CanLII), the underlying family law dispute included whether the spouses' respective interests in a family trust known as the Mark Stober Family Trust was family property within the meaning of the *Family Law Act*, SBC 2011, c 25. The husband sought an order for joint valuation of the spouses' respective interests in the Trust. The Court allowed the order for valuation of the spouses' respective interests in the Trust:

> [32] The claimant notes, again, that there is no existing judicial consideration of the relevant provisions of the *FLA* and correspondingly, no established approach or methodology to valuing beneficial interests in discretionary trusts. She cites a

number of cases from other jurisdictions where the courts have taken different approaches. She also notes that there has been considerable academic commentary and debate on this issue and she refers, as an example, to Freedman and White, *Financial Principles of Family Law*, where the authors identify a number of factors that may be relevant to the valuation of an interest in a discretionary trust as follows:

a) the circumstances of the owner-spouse, the trust, and the other beneficiaries;

b) the number and ages of the various beneficiaries;

c) the obligations of the trustee(s) under the terms of the trust;

d) the owner-spouse's overall estate planning;

e) the trustee's possible plans for the underlying assets of the trust;

f) the obligation of the trustee(s) to maintain an even hand when dealing with all beneficiaries;

g) the fair market value of the underlying assets of the trust; and

h) the expectations and legal rights of the other beneficiaries (at 28-13-28-14).

[33] She says that all of these factors are ones that the trial judge will have to consider and determine based on evidence adduced at trial and that, as such, it is impossible to provide the expert with a set of factual assumptions that will enable him to produce a useful or meaningful report.

[34] The claimant submits further that the valuation of family property under the *FLA* involves issues of statutory interpretation and, with respect to the parties' beneficial interests in the Trust, the application of principles of trust law. She submits that the valuator cannot render the opinion sought without straying improperly into issues of law. She cites the *BDO* decision of Madam Justice Fitzpatrick that I touched on earlier as well as *Bahl v. Cadesky & Associations*,

2013 ONSC 1337 at para. 57 [*Bahl*] where the court declined to admit an expert opinion from Professor Donovan Waters about the application of trust law to the circumstances of that case on the basis that the opinion was argument rather than admissible evidence.

[35] One other key point made by the claimant is that s. 87 of the *FLA* does not mandate that fair market value must be the value used when valuing family property. Rather, it simply provides that the value of family property must be based on fair market value. She submits that it will be open to the trial judge to adopt a different approach to value which, in fact, is quite likely given the absence of a market for a beneficial interest in a wholly discretionary trust. For that reason, she submits that an opinion on the fair market value of the beneficial interests will be of no assistance.

[36] In coming to a decision on the application, I start with the observation that valuation evidence is regularly accepted in this and other courts as proper expert opinion evidence. The rationale underlying the acceptance of such evidence is that the principles of valuation and the methodologies employed are generally beyond the normal experience and knowledge of trial judges.

[37] In many cases in which such evidence is adduced, for example business disputes or personal injury claims, the governing principles are well known and the valuation occurs within a well-established context. For example, the experts will apply Generally Accepted Accounting Principles and statutory discount rates.

[38] The challenge in this case, as submitted by the claimant, is that the principles and methodologies are not well-known or established. There is no clear jurisprudence that guides the court or the expert in approaching the issue of the value of the interest in issue. It is not clear to me that the concept of fair market value, which is the central question to be posed to Mr. Spence, even has any meaning or application to beneficial interests in a discretionary trust, again, given the likely absence of any market for such interests. Frankly, that may, in fact, be Mr. Spence's response when the question is posed to him. We do not know.

[39] However, what we do know is that while s. 87 of the *FLA* leaves open the possibility that a value other than fair market value will be used when ascertaining and dividing family property, it nonetheless dictates that the value must be based on fair market value. Thus, when valuing family property for the purposes of division, the court must start with the fair market value and then go from there. In order to do so, the court requires evidence of fair market value or, as the case may be, evidence that there is no fair market value for a particular type of property.

[40] In my view, that evidence is properly obtained through the expert opinion sought by the respondent.

[41] I do accept that there are legal implications or elements involved in attempting to value the interests in issue, not the least of which are the terms of the Trust deed itself. However, that is not unusual. For example, in a dispute over real property, a valuator has to consider the legal implications of a restrictive covenant or easement on the value of the property. That is part of what the valuator does and it is not usurping the role of the trial judge. In my view, this is not a case like *BDO* or *Bahl* where the experts purported to instruct the judge on the applicable law which clearly crossed the line.

[42] The last point that I will address is the timing of the application. There is no question that it has been brought late in the process and there has been no acceptable explanation for the delay.

[43] That said, any concerns about what this might mean for the trial are speculative of this point. Moreover, it is essential in my view that the trial judge have available to him or her the best available evidence and, in this regard, the question of fair market value is integral to the valuation process that the court will be asked to engage in. Any prejudice resulting from the late application does not outweigh the likely benefit of the evidence and can be dealt with by way of costs at the conclusion of the matter.

[44] I want to be clear that, in permitting the question of fair market value to be put

> to Mr. Spence, I am in no way passing judgment on the ultimate admissibility of whatever opinion he comes up with, assuming again that he is able to produce an opinion. That will be up to the trial judge. However, in my view, it would be far more dangerous and prejudicial to the process for me to make a preliminary determination at this stage that the opinion should not even be sought, and thus potentially deprive the trial judge of important evidence, than it is to permit Mr. Spence to proceed with the necessary work and run the risk that the opinion will ultimately not be accepted.
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> [45] I would add that, not surprisingly, the majority of cases cited by the parties involve circumstances in which an expert report was prepared and then the court made a determination of admissibility. That is because, except in very rare cases, it is necessary for the trial judge to actually see the report and accompanying opinion in order to determine if it meets the threshold test for admissibility.

In *M.(H.R.) v. B.(D.M.)*, 2004 BCSC 147 (CanLII), Bauman J., as he then was, reviewed decisions which considered whether trusts were ordinarily used for a family purpose. He distilled the following principles:

> [146] I distil these principles in summary form from the cases:
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> ► a contingent interest in a discretionary trust can be a "family asset";
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> ► in determining whether the trust was ordinarily used for a family purpose, that is "in the customary mode of life of the family concerned," the fact that it is income that is used, not capital, is a factor to be considered, but it is not determinative;
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> ► presently holding assets, or an interest therein (whether contingent or vested), to secure the family's future, to provide financial security for the family, is a family purpose provided there is evidence to support such a conclusion beyond merely talk or thought about such a possibility.

In *McCarlie v. Bogoch*, 2002 BCSC 560 (CanLII), the parties were married for 8 years. the wife brought an application seeking several orders relating to the determination, re-apportionment and

division of family assets under Part 5 of the since repealed *Family Relations Act*, RSBC 1996, c 128. The major legal issue raised concerned the nature of the defendant's interest in the Bogoch Family Trust (the "Trust"). The bulk of the Trust's assets were shares in the capital of Bogoch Enterprise Ltd. ("B.E. Ltd."), a company effectively owned and controlled by the defendant's father, Dr. A. Bogoch. Throughout the parties' marriage, the Trust generated the majority of their family income. On the issue of valuation, the Court made the following observations:

> [31] Many of the cases that characterize a particular interest in a trust as a family asset also value that interest. Mr. Lamer concedes that even if I were to determine that the defendant's interest was a family asset, the task of valuation would be left to the trial judge. I agree with Mr. Mansfield that the defendant's interest, which is both contingent and purely discretionary, could have a value between $0.00 and $1,000,000. While actuarial evidence could be useful in determining the probability of the defendant surviving his parents, there is no method of assigning probabilities to the manner in which the Trustees may exercise their unfettered discretion to distribute income to the defendant.
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> [32] Were I to determine the initial question on the basis of specific case authority, the trial judge will, arguably, be restricted to relying on that same authority in the valuation of the interest. However, the trial judge may not prefer that line of authority. Indeed, after hearing all of the relevant facts, he or she may form the opinion that the cases in support of the proposition that the interest is not a family asset, are more applicable to the facts of this case. I conclude there is a real concern that the resolution of the trust question could "embarrass" the further trial of the proceeding.
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> [33] In ***Neylan v. Tindale***, [1987] B.C.J. No. 1068 (Q.L.) (C.A.), the Court of Appeal refused to resolve a narrow issue in complex proceedings because it "[tied] too closely with the other issues to be dealt with separately." Here, both the characterization of the defendant's interest in the Trust and, if necessary, the valuation of that interest are complex legal issues that should be considered and resolved by the same judge.

> [34] In the result, I conclude that it is not possible to determine the legal issue of whether the defendant's interest in the Trust is a family asset in isolation from the balance of the issues. Such a determination would interfere with subsequent proceedings involving the balance of the issues.

In *S.L.M.W. v. M.R.G.W.*, 2016 BCSC 272 (CanLII), a significant issue in the family law dispute was whether the assets of the trust were family property and how should one spouse's interest in the trust be valued:

> [96] The general rule is that family property includes all property owned by a spouse on the date of separation (s. 84(1)(a)(i)), all beneficial interests of a spouse in property on the date of separation (s. 84(1)(a)(ii)), and property and beneficial interests derived therefrom after separation (s. 84(1)(b)). Subsection (3) extends the reach of s. 84 by deeming trust property to be family property if any of (3)(a) through (c) apply, whether or not the spouse owns, or has a beneficial interest in, the trust property.
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> [97] It is s. 85 which expressly describes what property is excluded from family property and it is conceded by the respondent that s. 85(1)(f) does not apply to exclude the WFT. As above, that subsection states that a "beneficial interest held in a discretionary trust", to which the spouse did not contribute and that is settled by a person other than the spouse, is excluded from being family property. It was amended in 2014 to substitute "beneficial interest in property held in a discretionary trust" for "property held in a discretionary trust" (*Justice Statutes Amendment Act*, 2014, S.B.C. 2014, c. 9, s. 13, in force May 26, 2014 as per B.C. Reg. 96/2014). However, the respondent's beneficial interest in the WFT predates the relationship, and therefore its pre-relationship value is excluded under s. 85(1)(a).

On the issue of valuation, the Court held:

> [100] Some discussion of that interest is necessary. Broadly speaking there is the issue of valuing a beneficial interest in a trust generally and there is an issue as to whether any of the trust property is derived from family property.

[101] More specifically, s. 84(1)(a)(ii) of the FLA states that it is the "beneficial interest" of the respondent which is family property. That is, the underlying trust property itself may not be family property. If it is, it is not clear how and in what form the interest of a discretionary beneficiary of the WFT can be transposed to a family interest in that trust under the FLA. In this regard I note s. 84(2.1) states that, for the purposes of subsection (2)(g), "any increase in value of a beneficial interest in property held in a discretionary trust does not include the value of any property received from the trust."

[102] A related issue is whether the bank account or accounts of the WFT are part of the respondent's beneficial interest in "property" under s. 84(1(a)(ii) of the FLA. The parties have not had the opportunity to make submissions on these issues. This is further complicated because the respondent has intermingled his personal finances with those of the trust in the trust bank account(s). For example, he put money from the sale of a mountain bike into a trust account and then used it to pay a personal credit card debt. As well, he has charged expenses for his business in Whistler to the trust account, even though he is no longer living in New Zealand.

[103] As further discussion of the nature of the family interest in the WFT, there is no dispute that the WFT was settled before the parties met in 2001. On this basis any family interest in the trust is perhaps analogous to the claimant's interest in Alpine Crescent; the Wanaka property, at least, was acquired by the respondent before the relationship between the parties began. When the parties were living in New Zealand the Diamond Harbour property was purchased in 2004 (during the marriage) by mortgaging the Wanaka property. The Wanaka property was then sold in 2007 when the parties decided to move to Whistler.

[104] Depending on the respective values of Wanaka and Diamond Harbour (and possibly other factors) it may be that the claimant is not entitled to the value of any family interest in the trust prior to the date the marriage-like relationship commenced in late 2001. In that event, she may be entitled to any increase in the value of the family interest in the trust since 2001, as valued on the date of separation in June 2013. The parties have not had the opportunity to make

submissions on this point as well.

[105] The parties are directed to provide further submissions to address the issue of the nature of the family interest in the WFT. As above, I have found the increase in value of the respondent's beneficial interest in the WFT is family property under the FLA and what is now required are submissions about the nature of that interest in the circumstances of this case. The respondent's beneficial interest in the bank account(s) of the trust will also be addressed in these submissions as will the use by the respondent of the trust account(s) for personal use.

Authorities

Family Law Act, SBC 2011, c 25

Purtzki v. Saunders, 2016 BCCA 344 (CanLII)

Stober v. Stober, 2015 BCSC 2505 (CanLII)

M.(H.R.) v. B.(D.M.), 2004 BCSC 147 (CanLII)

McCarlie v. Bogoch, 2002 BCSC 560 (CanLII)

Family Relations Act, RSBC 1996, c 128

S.L.M.W. v. M.R.G.W., 2016 BCSC 272 (CanLII)