Memo To: Doble & Doble LLP, Daniel Diamond
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Jurisdiction: Alberta, Canada
Date: December 9, 2020
Regarding: AB - Valuing Beneficial Interest in Discretionary Trust

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Issue

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

Conclusion

Unlike other provinces, such as Ontario, the Alberta legislation does not define "property" in the context of the division of matrimonial property. Both the *Matrimonial Property Act*, RSA 2000, c M-8 (repealed in January 2020) and the *Family Property Act*, RSA 2000, c F-4.7, (the successor legislation), state that the court may distribute property owned either jointly or separately between the spouses. The legislation exempts gifts, inheritances, and property acquired prior to marriage from the distribution. Section 7(4) of both acts requires the courts to distribute certain property, (including most property that is not a gift, inheritance, or property acquired prior to marriage,) equally between spouses unless it would not be just and equitable to do so. (*Family Property Act; Matrimonial Property Act*)

Courts are required to take the following factors into account when making distributions of property:

1. the contribution made by each spouse to the marriage;

2. the contribution made by each adult interdependent partner to the relationship of

interdependence and to the welfare of the family;

3. the contribution of a spouse to the acquisition, conservation, improvement, operation or management of a business, farm, enterprise or undertaking owned or operated by one or both spouses;

4. the contribution of a spouse to the acquisition, conservation or improvement of the property;

5. the income, earning capacity, liabilities, obligations, property and other financial resources of a spouse;

6. the combined duration of the marriage and the relationship of interdependence (if applicable);

7. whether the property was acquired when the spouses were living separate and apart;

8. the terms of an oral or written agreement between the spouses;

9. that a spouse has made a substantial gift of property to a third party, or transfered property to a third party other than a bona fide purchaser for value;

10. a previous distribution of property between the spouses by gift, agreement or family property order;

11. a prior order made by a court;

12. a tax liability that may be incurred by a spouse as a result of the transfer or sale of property;

13. that a spouse has dissipated property to the detriment of the other spouse or adult interdependent partner; and

14. any fact or circumstance that is relevant.

(Family Property Act, Matrimonial Property Act)

In *Kachur v. Kachur*, the husband was one of three trustees of a discretionary trust whose beneficiaries included the husband and the couple's children and grandchildren. The trustees had wide discretion with respect to making distributions and adding beneficiaries. The evidence showed that trust was established for the sole benefit of the children and not for the benefit of the husband. In a demonstration of this stated purpose of the trust, the husband signed an irrevocable renunciation of his entitlement as a beneficiary. The Court valued the husband's interest in the trust as nil for the purpose of division of family property. (*Kachur v. Kachur*).

In *Shopik v Shopik*, the husband was the sole trustee of a trust whose named beneficiaries included the husband and the couple's children. The husband, as sole trustee, had the discretion to pay out funds to himself as a beneficiary. The Court noted that there was a legitimate and realistic possibility that the husband could withdraw funds or terminate the trust for his own benefit and divided the trust into two equal parts with the husband being sole trustee of half and the wife the sole trustee of the other half. The Court required each spouse to pay to the other spouse a portion of any withdrawal that was made for their own benefit. Withdrawals from the trust for the children's benefit would not be divisible between the husband and wife as they would go to the children. (*Shopik v Shopik*).

In *Horne v. Horne*, the wife's contingent interest in a testamentary trust was held to be exempt from distribution of marital property. The Court held that an important factor in coming to the decision about whether the wife's contingent interest in the trust was exempt from distribution was whether the property was brought into the matrimonial regime, that is, whether it was to be used for the spouses' mutual benefit and account. In this case, neither party improved, maintained, enjoyed, or dealt with the contingent interest. It was not, therefore, “brought into the matrimonial regime”. The Court also held that the factors set out in section 8 of the *Matrimonial Property Act* (now the *Family Property Act*) should also be addressed to determine if certain property is exempt from division upon separation of spouses. (*Horne v. Horne*).

There is no presumption of equal division of the increase in value over the course of a marriage of property owned by one of the parties at the date of marriage. This rule does not apply to situations in which property was acquired during the course of a marriage. (*Horne v. Horne*).

Law

Unlike other provinces, such as Ontario, the Alberta legislation does not define "property" in the context of the division of matrimonial property. Rather, the division of matrimonial property is guided by sections 7 and 8 of the *Family Property Act*, RSA 2000, c F-4.7. Both the *Matrimonial Property Act*, RSA 2000, c M-8 (repealed in January 2020) and the *Family Property Act*, RSA 2000, c F-4.7, (the successor legislation), contain the same provisions relating to the division of property upon the dissolution of marriage. The two acts both state that the court may distribute property owned either jointly or separately between the spouses. The legislation exempts gifts, inheritances, and property acquired prior to marriage from the distribution:

> Distribution of property
>
> 7**(1)** The Court may, in accordance with this section, make a distribution between the spouses or adult interdependent partners of all the property owned by both spouses or adult interdependent partners and by each of them.
>
> **(2)** If the property is
>
> > (a) property acquired by a spouse or adult interdependent partner by gift from a third party,
> >
> > (b) property acquired by a spouse or adult interdependent partner by inheritance,
> >
> > (c) property acquired by a spouse before the marriage, in the case of spouses who were not in a relationship of interdependence with each other immediately before the marriage,
> >
> > (c.1) property acquired by a spouse before the relationship of interdependence began, in the case of spouses who were in a relationship of interdependence with each other immediately before the marriage,

(c.2) property acquired by an adult interdependent partner before the relationship of interdependence began,

(d) an award or settlement for damages in tort in favour of a spouse or adult interdependent partner, unless the award or settlement is compensation for a loss to both spouses or adult interdependent partners, or

(e) the proceeds of an insurance policy that is not insurance in respect of property, unless the proceeds are compensation for a loss to both spouses or adult interdependent partners,

the market value of that property on the applicable date under subsection (2.2)(a), (b) or (c) is exempted from a distribution under this section.

[...]

(3) The Court shall, after taking the matters in section 8 into consideration, distribute the following in a manner that it considers just and equitable:

(a) the difference between the exempted value, as determined under subsection (2.2), of property described in subsection (2), referred to in this subsection as the "original property", and the market value at the time of the trial of the original property or property acquired

(i) as a result of an exchange for the original property, or

(ii) from the proceeds, whether direct or indirect, of a disposition of the original property;

(b) in the case of spouses who were not in a relationship of interdependence with each other immediately before the marriage, property acquired by a spouse with income received during the marriage from the original property or property acquired in a manner described in clause (a)(i) or (ii);

(b.1) in the case of spouses who were in a relationship of interdependence with each other immediately before the marriage, property acquired by a spouse with income received during the relationship of interdependence or the marriage from the original property or property acquired in a manner described in clause (a)(i) or (ii);

(b.2) in the case of adult interdependent partners, property acquired by an adult interdependent partner with income received, at any time on or after the date the relationship of interdependence began, from the original property or property acquired in a manner described in clause (a)(i) or (ii);

(c) in the case of spouses, property acquired by a spouse after a decree nisi of divorce, a declaration of nullity of marriage, a judgment of judicial separation or a declaration of irreconcilability under the *Family Law Act* is made in respect of the spouses;

(c.1) in the case of adult interdependent partners, property acquired by an adult interdependent partner after becoming a former adult interdependent partner;

(d) property acquired by a spouse by gift from the other spouse, including property acquired by a spouse by gift from the other spouse during any period in which they were in a relationship of interdependence with each other immediately before the marriage;

(d.1) property acquired by an adult interdependent partner by gift from the other adult interdependent partner at any time on or after the date on which the relationship of interdependence began.

Section 7(4) of both acts requires the courts to distribute certain property (including most property that is not a gift, inheritance, or property acquired prior to marriage) equally between spouses unless it would not be just and equitable to do so:

(4) If the property being distributed is property acquired by a spouse during the marriage or during a relationship of interdependence with the other spouse immediately before the marriage and is not property referred to in subsections (2) and (3), the Court shall distribute that property equally between the spouses unless it appears to the Court that it would not be just and equitable to do so, taking into consideration the matters in section 8.

Section 8 of both of the acts sets out the factors that courts should take into consideration in making a distribution of property under section 7. These factors include:

Matters to be considered

8 The matters to be taken into consideration in making a distribution under section 7 are the following:

(a) in the case of spouses, the contribution made by each spouse to the marriage, to any relationship of interdependence with the other spouse immediately before the marriage and to the welfare of the family, including any contribution made as a homemaker or parent;

(a.1) in the case of adult interdependent partners, the contribution made by each adult interdependent partner to the relationship of interdependence and to the welfare of the family, including any contribution made as a homemaker or parent;

(b) the contribution, whether financial or in some other form, made by a spouse or adult interdependent partner directly or indirectly to the acquisition, conservation, improvement, operation or management of a business, farm, enterprise or undertaking owned or operated by one or both spouses or adult interdependent partners or by one or both spouses or adult interdependent partners and any other person;

(c) the contribution, whether financial or in some other form, made directly or indirectly by or on behalf of a spouse or adult

interdependent partner to the acquisition, conservation or improvement of the property;

(c.1) in the case of spouses who were in a relationship of interdependence with each other immediately before the marriage, any contribution referred to in clause (b) or (c) that was made during the relationship of interdependence;

(c.2) in the case of adult interdependent partners, any contribution referred to in clause (b) or (c) that was made during the relationship of interdependence;

(d) in the case of spouses, the income, earning capacity, liabilities, obligations, property and other financial resources

(i) that each spouse had at the time of marriage, or if the spouses were in a relationship of interdependence with each other immediately before the marriage, that each spouse had on the date the relationship of interdependence began, and

(ii) that each spouse has at the time of the trial;

(d.1) in the case of adult interdependent partners, the income, earning capacity, liabilities, obligations, property and other financial resources

(i) that each adult interdependent partner had on the date the relationship of interdependence began, and

(ii) that each adult interdependent partner has at the time of the trial;

(e) in the case of spouses,

(i) if the spouses were in a relationship of interdependence with each other immediately before the marriage, the combined duration of the marriage and the relationship of interdependence, or

(ii) if subclause (i) does not apply, the duration of the marriage;

(e.1) in the case of adult interdependent partners, the duration of the relationship of interdependence;

(f) whether the property was acquired when the spouses or adult interdependent partners were living separate and apart;

(g) the terms of an oral or written agreement between the spouses or adult interdependent partners;

(h) that a spouse or adult interdependent partner has made

(i) a substantial gift of property to a third party, or

(ii) a transfer of property to a third party other than a bona fide purchaser for value;

(i) a previous distribution of property between the spouses or adult interdependent partners by gift, agreement or family property order;

(j) a prior order made by a court;

(k) a tax liability that may be incurred by a spouse or adult interdependent partner as a result of the transfer or sale of property;

(l) that a spouse or adult interdependent partner has dissipated property to the detriment of the other spouse or adult interdependent partner;

(m) any fact or circumstance that is relevant.

In *Kachur v. Kachur*, 2000 ABQB 709 (CanLII), the husband was one of three trustees of a discretionary trust whose beneficiaries included the husband and the couple's children and grandchildren. The trustees had wide discretion with respect to making distributions and adding beneficiaries. The evidence showed that trust was established for the sole benefit of the children

and not for the benefit of the husband. In a demonstration of this stated purpose of the trust, the husband signed an irrevocable renunciation of his entitlement as a beneficiary. Burrows J. of the Court of the Queen's Bench of Alberta valued the husband's interest in the trust as nil for the purpose of division of family property:

> [1] What is the interest of the children of this marriage in the discretionary family trust which has been held to be property owned by the spouses for purposes of division matrimonial property? This is the question to be determined in this trial of a preliminary issue. It arises in the following context.
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> [...]
>
> [7] The trust itself was settled by Mrs. Kachur's mother. The trustees were Mr. Kachur and two close friends, David K. Cox and David Rostrup. A trust deed was drafted by a lawyer from Mr. Cox's firm.
>
> [8] The important features of the trust deed are these:
>
> > a. The beneficiaries are identified as Donald Kachur, his children and grandchildren. There are no grandchildren at present.
> >
> > b. The trustees may make any distribution of income or capital from the trust to any of the beneficiaries as they may in their absolute discretion deem appropriate. There is no requirement that distributions among beneficiaries be for any particular purpose or that they be equal. The trustees' discretion is plenary and entirely unfettered.
> >
> > […]
> >
> > f. The trustees may advance the trust funds by way of loan to any person or corporation.
> >
> > g. The trustees may in their sole discretion amend the terms of the trust.

[…]

[15] Mrs. Kachur's position is that, given the wholly discretionary nature of the trust, the children do not have a quantifiable interest in the trust. They have a right to enforce the trustees' obligations, but no right to any particular portion of the trust assets. She says that for purposes of the matrimonial property division, nothing should be subtracted from whatever value the trust property has. The trust property, in its entirety, should be subject to division between the parties.

[16] Mr. Kachur's position is that the children have a 100% interest in the trust. He says that it was possible to set the trust up in 1994 because by that date he and Mrs. Kachur were financially secure and in a position to arrange for the devolution of property to their children in a tax efficient manner. The intent was only to benefit the children. He was named as a beneficiary only to provide an escape clause should some future event make it inadvisable to pass the property on to one or other of the children. No such event has happened to date. As things stand presently, he says, each of his children should be deemed to have a one-third interest in the trust property.

[24] Of course, the *Matrimonial Property Act* of Alberta has no equivalent definition. Section 7 of the Act permits the Court to make a "distribution between spouses of all the property owned by both spouses and by each of them" but there is no definition of property. The reasoning in *Francis* would not apply in Alberta to yield the conclusion that property in the categories described in the B.C. Act would be property owned by spouses under the *Matrimonial Property Act*. As Verville J. clearly recognized in his order, it is necessary in Alberta to determine whether the children have an interest in the trust – because whatever interest they have cannot be property of the spouses.

[29] Finally I have found the following excerpt from a case comment on *Sagl v. Sagl* written by one of the counsel on that case to be helpful. The article is Lorne H. Wolfson: *Sagl v. Sagl: Valuation of an Interest in a Discretionary Trust under Ontario's Family Law Act,* 16 Canadian Family Law Quarterly, page 521. At page

526 Mr. Wolfson writes:

> In *Rawluk v. Rawluk* (1986) 1986 CanLII 2792 (ON SC), 29 D.L.R. (4th) 754 (Ont. H.C.) the court held that "value" under the *Family Law Act* must be determined on the particular facts and circumstances in each case to permit the flexibility required to ensure an equitable result. In *Brinkos v. Brinkos* (1989), 1989 CanLII 4266 (ON CA), 20 R.F.L. (3d) 445 (Ont. C.A.) (which also involved the valuation on an interest in a trust), the court rejected the test of "fair market value" in favour of that of "fair value". What is "fair value"? According to Cole and Freedman,[*Property Valuation and Income Tax Implications of Marital Dissolution (*Toronto: Carswell, 1995) at 1-149] fair value describes a value that is just and equitable in the circumstances. Consideration of all the circumstances surrounding the valuation is critical to determining a fair value. Fair value is a notional concept and is much influenced by the nature of the property and the circumstances giving rise to the valuation.

How should a court determine the fair value of a contingent interest in a discretionary trust? According to Cullity: [M.C.Cullity, Q.C., *Trust Assets in a Family Law Case,* (Canadian Bar Association – Ontario, Continuing Legal Education, 2 October, 1995), at 17]

> For the purposes of the Family Law Act, the circumstances to be considered in valuing an interest that depends upon, or may be affected by, the exercise of a discretion would include . . . the intentions of the settlor, the fiduciary responsibilities of the holders of the power, the number of beneficiaries, and perhaps, the manner in which the power has been exercised in the past.

Analysis

[30] The question before me is: What is the children's interest in the discretionary trust? Whatever interest the children have in the trust is not the property of either of

their parents. The answer is needed so that the interests of the spouses in the trust can be taken into account in the division of matrimonial property upon the parents' divorce.

[…]

[32] The difficulty arises because the interest of the children is subject to several contingencies. It seems to me that the appropriate approach is to consider those contingencies in the light of the evidence before as to the reasons the trust was created and as to the operations of the trust since it was created to determine whether any of the contingencies have any real significance – whether they create a realistic possibility that the children will not some day receive the trust property.

[33] They identifiable contingencies affecting the children's interest are:

> a. that the trustees might distribute trust property unequally among the beneficiaries – or entirely to one beneficiary.
>
> b. that grandchildren might be born and increase the size of the group eligible for distributions.
>
> c. that the trustees might terminate the trust and transfer the trust property to a charity.
>
> d. that the trustees might exercise their discretion to amend the trust terms by adding more beneficiaries and exclude all the children from any distribution.

[34] Until Mr. Kachur signed the irrevocable renunciation of his entitlement as a beneficiary, the first contingency noted above included that the trustees might distribute the entire trust property to Mr. Kachur.

[35] The unchallenged evidence of Mr. Kachur is that the trust was created for the benefit of the children and to minimize the tax liability of both Mr. Kachur and Mrs. Kachur. Mrs. Kachur does not question the legal validity of the trust. All

> distributions from the trust in the 6 years it has existed have been to the three children. All distributions have been equal. There has never been any distribution to Mr. Kachur. There has been no amendment of the trust terms. The unchallenged evidence of Mr. Kachur was that he was named a beneficiary in case something happened to render it inappropriate to distribute trust property to the children. Nothing has happened of that nature and there is no present expectation that anything will. Mr. Kachur has renounced his entitlement as a beneficiary.
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> [36] I believe the evidence establishes that this trust was created with the intention that only the children would have any interest in the trust property. There is no realistic possibility that the trustees will add further beneficiaries by amendment of the trust deed or terminate the trust and give the money to charity.
>
> [37] Neither is there any realistic possibility that the trustees would make an unequal division among the beneficiaries. Even if there were this would not reduce the collective interest of the children.
>
> [38] I expect there is a realistic possibility that grandchildren will be born and that the class of beneficiaries will be increased. However if that occurs the interest of the children *and grandchildren* would then engage100% of the trust property leaving nothing for the spouses.
>
> [39] My answer to the question to which this preliminary trial was directed, is that the interest of the children encompasses 100% of the property of the Kachur Family Trust. The interest of the spouses is therefore nil.

In *Shopik v Shopik*, 2014 ABQB 41 (CanLII), the husband was the sole trustee of a trust whose named beneficiaries included the husband and the couple's children. The husband, as sole trustee, had the discretion to pay out funds to himself as a beneficiary. Yamauchi J. of the ABQB explored a number of options for dealing with the trust in the context of the couple's division of property. The Court noted that in this case, there was a legitimate and realistic possibility that the husband could withdraw funds or terminate the trust for his own benefit. Ultimately the Court divided the trust into two equal parts and made the husband the sole trustee of half and the wife the sole trustee of the other half. The Court required each spouse to pay to the other spouse a

portion of any withdrawal that was made for their own benefit. Withdrawals from the trust for the children's benefit would not be divisible between the husband and wife as they would go to the children:

> [25] The Husband is the sole trustee under the Trust. The beneficiaries are the Husband, all of the Husband's children and the Husband's spouse, from time to time. "Spouse" as defined in the trust deed, excludes a person who is "living separate and apart by reason of a breakdown of their marriage." Accordingly, the Wife is excluded from the definition of "Spouse." Article 5.1 of the trust deed gives the trustee unfettered discretion in the management and administration of the Trust. Interestingly, the Husband states that he considers the Trust to be "conditional" matrimonial property in the sense that if he were to receive any benefit from the Trust, he would share it equally with the Wife. However, he may never take anything out of the Trust, in which case, she would get nothing. In any event, he states that he set up the Trust to benefit the children, and not to benefit either himself or the Wife.
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> [...]
>
> [27] Because of the wording of the trust deed, the Husband, as sole trustee, has discretion to pay trust monies to himself as a beneficiary. The Husband testified that has never paid money to himself or to the Wife from the Trust. He has paid money out to the children and he produced bank statements showing money that he holds monies in trust for the benefit of each of the children. Of course, the children have to pay tax on this.
>
> [28] As the Husband did not consider the Trust to be matrimonial property, he did not include it in his matrimonial property statement. He did not fully explain to this Court why he set up the Trust, although he stated several times that it was for the children's benefit. This Court suspects that it might have been set up to allow for growth in the assets the Trust held and that the taxes that the children (or other beneficiary) would have to pay would be deferred until the money was withdrawn from the Trust. In that sense, it was an estate planning/tax deferral mechanism,

although the Husband did not expressly confirm this.

[29] The parties provided this Court with a few cases that have dealt with family trusts. The courts have taken different approaches in their handling of these mechanisms as part of a matrimonial property division. What is important, however, is that the courts in all cases, characterized the family trust, and how to deal with it, based on the unique facts before them. This case is no different.

[...]

[37] In the case before this Court, the Husband, although he testified that the Trust was created for the parties' children and, to date, the income from the Strip Mall was paid into trust accounts for the children's benefit, he did not dismiss the possibility that as sole trustee, he could make a distribution to himself. In that case, he conceded, such a distribution would be matrimonial property and one-half of it would belong to the Wife. Those comments make the Trust less certain than the trust with which Burrows J was dealing in *Kachur*. As well, the Trust was created with $38,000, and it does not appear that it was created to minimize the tax liability of either the Husband or the Wife. In *Kachur*, the parties were dealing with property of a value of $2.3 million, so an estate freeze was a logical estate planning device. Here, the parties have had to borrow money to meet their expenses, so the same considerations do not apply.

[38] This Court is not convinced that the Trust was created solely with the intention of benefitting the children. Furthermore, the trust deed provides that the Husband, as sole trustee, could terminate the Trust or withdraw money for his own benefit. Unlike *Kachur* where Burrows J saw this as not being a "realistic possibility," in this case, the document that created the trust allows for it, so it is a realistic, and legitimate, possibility.

[39] Burrows J refers to the fact that the husband in *Kachur* signed an irrevocable renunciation of his interest as a beneficiary under the trust. Although, based on the evidence before him, Burrows J would have reached the same result with or without the renunciation, he said at para 40, that it "served both to fortify the evidence in

> that regard and to render it unarguable that his interest is now nil." In this case, the Husband did not offer to renounce his interest in the trust monies.
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> [...]
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> [47] This Court is not comfortable leaving control of the Trust in the Husband's hands. Thus, it sees two alternatives. First, make a direction that the Wife be a co-trustee along with the Husband, such that all decisions regarding the distribution of the trust funds be made jointly. This has the potential of a stalemate, which does not help anyone, including the children.
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> [48] The other alternative is to split the trust fund into two separate, equal trust funds, with the Wife controlling one and the Husband controlling the other, by being the sole trustee of their respective halves. Each half would be subject to the same terms as the Trust, such that the intent is that it be for the benefit of the children, although there will be an encroachment right on each parent's part. In other words, the children, along with the respective parent, will be a named beneficiary. Each party will provide the other with an annual accounting of the trust funds under their control, on or before June 30 each and every year, showing income and disbursements. If they encroach on the trust fund within their control, one-half of such amount will be payable to the other as matrimonial property.
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> [49] The Husband currently has trust accounts created for each child. Henceforth, he will not withdraw money from those accounts for his own benefit. That money belongs to the children. To maintain this control, he will provide the Wife annually with a copy of the bank statement for each of those trust accounts, along with an explanation of any deposits or withdrawals. In this way, the Wife will be free to make deposits into those accounts for the benefit of the children.

In *Horne v. Horne*, 2011 ABCA 116 (CanLII), the wife's contingent interest in a testamentary trust was held to be exempt from distribution of marital property. The Alberta Court of Appeal upheld the decision of the trial judge and noted that the wife's contingent interest was similar to an inheritance, which is exempt from distribution pursuant to section 7(2) of the *Matrimonial*

Property Act (now the *Family Property Act*). The Court held that an important factor in coming to the decision about whether the wife's contingent interest in the trust was exempt from distribution was whether the property was brought into the matrimonial regime, that is, whether it was to be used for the spouses' mutual benefit and account. In this case, the ABCA held that neither party improved, maintained, enjoyed, or dealt with the contingent interest because it was not possible to do so, given the nature of the contingency. It was not, therefore, "brought into the matrimonial regime". The Court also held that the factors set out in section 8 of the *Matrimonial Property Act* (now the *Family Property Act*) should also be addressed to determined if certain property is exempt from division upon separation of spouses:

> [6] [...] [The trial judge] found that Mrs. Horne's contingent interest in the trust was exempt from distribution as to its value on the date of marriage but that the increase in its value during marriage was potentially divisible pursuant to the provisions of ss. 7 and 8 the MPA. No appeal is taken from that decision.
>
> [7] However, after finding the increase in value of the contingent interest was potentially divisible under the MPA, she declined to divide it i.e. to order that Ms. Horne make an additional equalization payment to Mr. Horne in relation to it. She concluded that Mr. Horne should not receive any portion of that increase in value because, pursuant to s. 7(3)(a) of the MPA, it would be just and equitable for Ms. Horne to retain the entire value on the facts of this case. That is the most significant issue on appeal. No other aspect of the division of matrimonial property ordered at trial is under appeal.
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> [...]
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> [11] The trial judge found that the contingent interest was potentially divisible under the MPA but exercised her discretion to refuse to give Mr. Horne any share of it, with the result that he received no equalization payment on account of the contingent interest.
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> [...]
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> [29] An examination of these differences leads to the conclusion that the contingent

interest is more in the nature of an inheritance, which is expressly exempt from distribution pursuant to s. 7(2)(b) of the MPA, than it is to a pension. Had Ms. Horne's parents chosen to structure their wills in the typical format of the survivor inheriting everything, with their children to receive an equal division of the remaining estate upon the eventual death of the survivor, the assets contained in the contingent interest would have been expressly exempt from distribution.

[30] Mr. Horne argued that the absence of contribution by either party to the trust property should bear little weight on his entitlement to division because no such contribution was possible. However, this factor equally supports the suggestion that the property should not be divided because of its very nature, because it could not be "brought into the matrimonial regime".

[31] The Alberta Court of Appeal, in *Mazurenko* applied s. 8 of the MPA to find that the nature of the receipt of exempt property was a consideration in determining division. Justice Stevenson (as he then was) at para. 23 stated "... we must ask ourselves whether or not the exempt property was brought into the matrimonial regime; did it come in to be used for [the spouses] mutual benefit and account?" In that case he found the exempt property, farm land, had been brought into the regime as it was farmed, improved, maintained, enjoyed and dealt with as part of the family farm.

[32] Here neither party improved, maintained, enjoyed or dealt with the contingent interest because it was not possible to do so, given the nature of the contingency. It was not, therefore, "brought into the matrimonial regime". That is not the sole factor to be considered in determining division; needless to say the factors expressly listed in s. 8 of the MPA must also be addressed. It is, however, a consideration.

[...]

[34] While the division of the increase in value of exempt property in this case arises from statutory rights rather than pursuant to the common law, the concept of "joint effort" nonetheless has a place here. It is another method through which one

can determine whether the property in question was “brought into the marriage”. Mr. Horne argues that the fact his salary was used to support the family and that Ms. Horne was not required to sell the assets that she brought into the marriage to produce funds upon which to live creates an inequity; upon the termination of the marriage she retained her exempt assets whereas his income had largely been spent. The parties followed this pattern by agreement, but Mr. Horne now complains he was disadvantaged by that decision.

[35] Whether or not he should have negotiated a better arrangement with Mrs. Horne at the start of their relationship does not bear on the creation or maintenance of the contingent interest, however. Nor does the fact that the nature of that interest arguably made it harder to “ bring into the marriage” than, for example, the farmland considered in *Mazurenko*. This couple did not attempt to sell or mortgage the contingent interest. They did not spend other money in anticipation of receipt of that interest to fund their retirement. They did not address it at all in making plans for retirement. They discussed it rarely, if ever. Looking at their functioning as a unit in the real world, the existence of the contingent interest did not impact that functioning in any way. There is nothing that they did to bring the contingent interest “into the marriage” nor was it produced or maintained through their joint effort.

[36] The parties conceded that the standard of review to be applied to this issue requires this Court to decline to intervene in the absence of a misdirection by the trial judge or where the decision is so clearly wrong as to amount to an injustice, neither of which apply here. Deference should be accorded to her exercise of discretion in this fact-driven case.

[...]

[41] The appeal is dismissed.

In *Shopik*, the Court noted that, unlike the situation in relation to property acquired during the course of the marriage, there is no presumption of equal division of the increase in value over the

course of a marriage of property owned by one of the parties at the date of marriage:

> [12] There is no presumption of equal division of the increase in value over the course of a marriage of property owned by one of the parties at the date of marriage, unlike the situation in relation to property acquired during the course of the marriage. As stated by the Alberta Court of Appeal in *Mazurenko v. Mazurenko* (1981) 1981 ABCA 104 (CanLII), 15 Alta. L.R. (2d) 357 at para. 18, the approach to dividing an increase in value of otherwise exempt property differs from that in the vast majority of cases where most or all of the property owned at the date of divorce was acquired during the marriage; in the latter situation "the presumption of equality is expressed".
>
> [13] Section 7 of the MPA provides that the method of dividing an increase in value over the course of a marriage of property owned at the time of marriage is that this increase is divisible in such a manner that the court considers just and equitable after taking into consideration the matters listed in s. 8 of the MPA. There is no presumption it is to be divided equally.

Authorities

Family Property Act, RSA 2000, c F-4.7

Matrimonial Property Act, RSA 2000, c M-8

Kachur v. Kachur, 2000 ABQB 709 (CanLII)

Shopik v Shopik, 2014 ABQB 41 (CanLII)

Horne v. Horne, 2010 ABQB 32 (CanLII)

Horne v. Horne, 2011 ABCA 116 (CanLII)