Memo To: Doble & Doble LLP, Daniel Diamond
File: TEST
Research ID: #400027139d0599
Jurisdiction: Ontario, Canada
Date: December 7, 2020
Regarding: ON - Family - Beneficial Interest Valuation

Issue

For the purposes of an equalization claim under the FLA, how have the Courts in Ontario dealt with the issue of valuing a beneficial interest in a discretionary trust?

Conclusion

The Ontario Court of Appeal has not specifically addressed the issue of valuing a beneficial interest in a discretionary trust. Trial Courts in Ontario have taken different approaches to the issue.

The *Family Law Act* provides that, upon separation, spouses are entitled to equalization of net family property. Under the *Family Law Act,* "property" is defined as any interest, present or future, vested or contingent, in real or personal property. (*Family Law Act*).

In *Kochar v Kochar*, the ONSC held that there is no legal precedent for the proposition that the beneficiary of a discretionary trust, without any power of appointment, has a proprietary interest in the trust for the purposes of the definition of property in the *Family Law Act.* In this case, the Court ruled that the spouse's interest in the trust was "akin to the expectation of an inheritance" and that it did not form part of a spouse's net family property. (*Kochar v Kochar*).

In *Dillon v. Dillon*, the ONSC held that any potential interest a beneficiary may have in a discretionary trust is incapable of valuation. (*Dillon v. Dillon*).

In *Tremblay v Tremblay*, the ONSC held that the central question with respect to determining the proprietary character of a spouse's beneficial interest in a discretionary trust is the ability of the party to control whether distributions of trust property are made to themself for their own benefit. The Court set out a number of factors to assess control of the trust including:

> (i) any evidence with respect to the founding intent of the trust. Was the trust designed to effectively allow control by the beneficiary?;
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> (ii) the composition of the trustees, including whether the beneficiary is a trustee;
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> (iii) any requirement, including veto powers, that the beneficiary be part of any trustee decisions;
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> (iv) any history of past trustee actions which demonstrate direct or indirect control by the beneficiary;
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> (v) any powers of the beneficiary to remove trustees, or to appoint replacement or additional trustees;
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> (vi) the relationship of the beneficiary to the trustees. Are the trustees independent and at arm's length or are they instead family members or other persons who may not act independently?

None of those factors are necessarily determinative and the weight to be assigned to each will vary on a case by case basis (*Tremblay v Tremblay*). In *Tremblay*, the Court ultimately held that, in that case, the degree of control that the husband held over the test elevated his expectancy of receiving benefit from the trust into something more like a certainty and stated that the trust was property in the context of the *Family Law Act.*

In *Sagl v. Sagl*, the ONSC held that the husband's contingent interest in the assets of the family trust was property that was to be included in his net family property for equalization purposes. The Court's decision was based on the facts that the husband had considerable control over the trust as a trustee, that he was a trustee and a beneficiary, and that he treated the trust's property as his own. The Court valued the husband's share in the discretionary trust on a pro-rata basis with

the other trust beneficiaries. (*Sagl v. Sagl*).

In *Mudronja v. Mudronja*, the ONSC noted that the beneficial interest in a trust is not automatically excluded from a spouse's net family property merely because it is subject to discretion. The approach needs to be contextual, having regard to the particular circumstances of the parties, their financial situation and the terms of the trust in relation to the marital relationship on the day of valuation. In *Mudronja* the husband had the sole power of appointment and was granted the power to appoint himself as a beneficiary and had the discretion to distribute trust assets to himself alone. The Court held that the trust was property for both the husband and the wife for purposes of equalization pursuant to the *Family Law Act*. However, the Court took a contextual approach to its valuation of the parties' interests in the trust. Given the unfettered power of the husband over the distribution of the assets of the trust, the Court included the entire value of the trust as the husband's property for the purposes of family property division. A nominal value of $1.00 was attributed to the wife's interest in the trust for the purposes of the equalization calculation (*Mudronja v. Mudronja*).

In *Kushnir v. Lowry*, and in *LeVan v. LeVan* the ONSC valued the parties' beneficial interest in the discretionary trusts at issue on a pro-rata basis based on the number of beneficiaries who were entitled to benefit from the trust. (*Kushnir v. Lowry*; *LeVan v. LeVan*).

Law

The Ontario Court of Appeal has not specifically addressed the issue of valuing a beneficial interest in a discretionary trust. Trial Courts in Ontario have taken different approaches to the issue. Case law demonstrating these various approaches is set out below.

Under section 5 of the *Family Law Act*, RSO 1990, c F.3, spouses are entitled to equalization of net family property upon separation:

> Equalization of net family properties
>
> Divorce, etc.
>
> **5** (1) When a divorce is granted or a marriage is declared a nullity, or when the

> spouses are separated and there is no reasonable prospect that they will resume cohabitation, the spouse whose net family property is the lesser of the two net family properties is entitled to one-half the difference between them.

"Property" is defined by the *Family Law Act* as any interest, present or future, vested or contingent, in real or personal property:

> Definitions
>
> **4** (1) In this Part,
>
> [...]
>
> "property" means any interest, present or future, vested or contingent, in real or personal property and includes,
>
> > (a) property over which a spouse has, alone or in conjunction with another person, a power of appointment exercisable in favour of himself or herself,
> >
> > (b) property disposed of by a spouse but over which the spouse has, alone or in conjunction with another person, a power to revoke the disposition or a power to consume or dispose of the property, and
> >
> > (c) in the case of a spouse's rights under a pension plan, the imputed value, for family law purposes, of the spouse's interest in the plan, as determined in accordance with section 10.1, for the period beginning with the date of the marriage and ending on the valuation date;

In *Kochar v Kochar*, 2015 ONSC 6650 (CanLII), the Aston J. of the ONSC held that there is no legal precedent for the proposition that the beneficiary of a discretionary trust, without any power of appointment, has a proprietary interest in the trust for the purposes of the definition of property in the *Family Law Act.* In this case, the Court ruled that the spouse's interest in the trust was "akin to the expectation of an inheritance" and that it did not form part of a spouse's net family property:

[17] The Kochar Family Trust has never held any asset other than one common share of this numbered company. However, Cuckoo Kochar owns shares of 871442 Ontario Inc. which give him voting control over both the numbered company and Phoenix Group. During its entire existence, no dividends were ever paid to the Kochar Family Trust, nor was any income ever earned by or distributed from that Trust. More specifically, the applicant never received any benefit from the Kochar Family Trust. The Trust was essentially dormant from its inception in 1991 until it was wound up in 2012.

[18] Mr. Polowin, one of the trustees, has deposed clearly and unambiguously that the trustees had decided to wind up the Trust and distribute its only asset to Madhu Kochar before the parties' separation on March 11, 2011. It is significant that the decision to wind up the Kochar Family Trust, and to transfer its only asset to Mr. Kochar's mother, was made before valuation date. This is not a case of using hindsight. The actual winding up 14 months post valuation date was simply the implementation of a decision already made. Expressed another way, the winding up of the Trust without any distribution to the applicant was foreseeable on valuation date.

[19] This evidence comes from one of the three trustees and is based on personal firsthand knowledge. It is unambiguous and dispositive of the issue of whether the husband's net family property includes anything of value on the valuation date respecting this trust.

[20] With respect to the Kochar Family Trust, the husband's interest is merely that of a discretionary beneficiary. The first observation I would make about his interest in the trust is that he is not even a contingent beneficiary. There is no legal precedent for the proposition that the beneficiary of a discretionary trust, without any power of appointment, has a proprietary interest in the trust for the purposes of the broad definition of property in Part II of the *Family Law Act*. Mr. Kochar's "interest" is akin to the expectation of an inheritance, which has consistently been found not to form part of a spouse's net family property. However, even if he technically has an "interest in property", it is clear from the evidence in this case

that the value to the applicant husband is nil.

In *Dillon v. Dillon*, 2014 ONSC 2236 (CanLII), Gordon J. of the ONSC held that any potential interest a beneficiary may have in a discretionary trust was incapable of valuation. In *Dillon*, the trustees had already given an indication that the husband would be receiving 1 million dollars from the trust:

> [24] A considerable focus of the parties' dispute is with the Dillon Family Trust and the interest, if any, Mr. Dillon may have to its funds.
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> [...]
>
> [27] The Dillon Family Trust is described as a discretionary trust, having regard in particular to paragraphs 3, 5, 7 and 15 in the agreement. Pamela Dillon has been the sole trustee since the death of her husband on November 2, 2010.
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> [...]
>
> [37] Relevant to this case are the account statements as at May 16, 2008 (date of marriage) and August 31, 2010 (date of separation). The portfolio value on the former date was $20,468,335. On the latter date, the value had declined to $17,585.148. The main reason for this reduction in value, according to Mr. Weiler, was a correction in the market. Others would simply describe it as the impact from the economic recession.
>
> [38] Four sub-accounts were created within the Dillon Family Trust investment portfolio in 2007. Mrs. Dillon reported the purpose of the sub-accounts as designating a "potential inheritance" for each of their three children, the fourth being for all of the grandchildren. The initial amount in each of the sub-accounts was $1 million. Mrs. Dillon indicated funds were paid out of the sub-accounts from time to time for specific purposes as she approved, such as a particular expense incurred by one of her children.
>
> [39] Several payments were made from the sub-account designated for Mr. Dillon prior to his marriage to Ms. Zivcakova, such as the initial gift of $10,000 and the

deposit on the condominium of $100,000.

[...]

[43] Mrs. Dillon described her understanding of the discretionary trust as meaning she had complete control of the assets and the sole authority to provide gifts amongst the class of beneficiaries, namely to some, all or none of them. She went on to say her son has no control over any of the assets in the Trust and no role in decision-making.

[...]

[283] The interest in a discretionary trust cannot be valued. In this regard, reference is made to Donavan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters Law of Trusts in Canada*, 4th ed. (Carswell, 2012). At paras. 1202-1204, the learned authors discuss the topic saying:

> Discretionary trusts … occur when trustees are vested with property and are required to allocate it as they think fit among a class of beneficiaries.
>
> The discretionary trust normally requires the trustees to dispose of the trust property to whom among the class they think fit and when they think fit.
>
> In practice the object of the discretionary trust is either to protect the beneficiaries from themselves, or from a heavier tax liability than might otherwise have been incurred in the transmission of wealth of the settlor or trustee.

[284] This passage accurately reflects the terms of the trust agreement and the intentions of Mr. Dillon's parents since 1999.

[285] At footnote 155, the authors above go on to say:

> If the person is a beneficiary (or object of a power) under a discretionary trust, his interest may be incapable of clear valuation (since it is a mere hope).
>
> [...]
>
> [292] The same documents also specify the inheritance at $1 million. While the trustee can ultimately exercise her discretion in another manner, including distributing a greater or lesser interest or no interest, this statement is likewise indicative of the trustee's intentions.
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> [293] Accordingly, I conclude that any potential interest Mr. Dillon may have in the Dillon Family Trust is incapable of valuation. At most that can be said is that the interest is $1 million. That amount was disclosed to Ms. Zivcakova.

In *Tremblay v Tremblay*, 2016 ONSC 588 (CanLII), MacDonald J. of the ONSC held that the central question with respect to determining the proprietary character of the husband's beneficial interest in a discretionary trust was his ability to control whether distributions of trust property are made to him for his benefit. The Court set out a number of factors to assess control of the trust including:

> (i) any evidence with respect to the founding intent of the trust. Was the trust designed to effectively allow control by the beneficiary?;
>
> (ii) the composition of the trustees, including whether the beneficiary is a trustee;
>
> (iii) any requirement, including veto powers, that the beneficiary be part of any trustee decisions;
>
> (iv) any history of past trustee actions which demonstrate direct or indirect control by the beneficiary;
>
> (v) any powers of the beneficiary to remove trustees, or to appoint replacement or additional trustees;

> (vi) the relationship of the beneficiary to the trustees. Are the trustees independent and at arm's length or are they instead family members or other persons who may not act independently?

The court stated that none of those factors are necessarily determinative and that the weight to be assigned to each will vary on a case by case basis.

In *Tremblay*, the Court ultimately held that, in this case, the degree of control that the husband held over the test elevated his expectancy of receiving benefit from the trust into something more like a certainty and stated that the trust was property in the context of the *Family Law Act:*

> [26] However, even if the Respondent compelled dividends to issue from Nictor, dispersing all the funds in that holding company to its one common shareholder, it remains that the recipient of the money, the Jeff Tremblay Family Trust No.2, receives it to hold in trust. The Respondent is both a trustee and a beneficiary in the Jeff Tremblay Family Trust No.2. The question is: does his beneficial interest in that trust constitute property as defined in section 4 of the *Family Law Act*?
>
> [27] Traditional trust law principles are clear that a person who is the object of trustee discretion to pay out capital in his favour does not have an existing property interest. From a pure property law viewpoint, he has only what is termed an "expectancy". He has the right to be considered by the trustees as a recipient under the trust in accordance with its terms and for the trustees to consider this issue acting in good faith in accordance with their fiduciary duty. As such, he has rights which constitute equitable "choses in action".
>
> [28] An important related question is this: what value, if any, can be put to what is a mere expectancy? A discretionary power may never be exercised in one's favour, and one does not have the right to compel that result. Moreover, the right to be considered by the trustees is not assignable by the right-holder since there is no proprietary interest to transfer. It is exclusive to the person named as the object. How can such an interest possibly have value?
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> [...]

[31] In my view, the central question with respect to determining the proprietary character of the Respondent's discretionary interest in the Jeff Tremblay Family Trust No.2 is his ability to control whether distributions of trust property are made to him for his benefit. His having meaningful control in that regard would undermine the separation as between the entities.

[32] Assessing the level of control that a beneficiary actually has in respect of a trust can involve a contextual analysis, informed by the nature of the relationships as between the parties and the concept of fairness touched upon by Cory J., above. Without trying to set out an exhaustive list, this may involve consideration of the degree to which he as beneficiary can directly or indirectly control the actions of the trustees, which may include consideration of such factors as:

> (i) any evidence with respect to the founding intent of the trust. Was the trust designed to effectively allow control by the beneficiary?;
>
> (ii) the composition of the trustees, including whether the beneficiary is a trustee;
>
> (iii) any requirement, including veto powers, that the beneficiary be part of any trustee decisions;
>
> (iv) any history of past trustee actions which demonstrate direct or indirect control by the beneficiary;
>
> (v) any powers of the beneficiary to remove trustees, or to appoint replacement or additional trustees;
>
> (vi) the relationship of the beneficiary to the trustees. Are the trustees independent and at arm's length or are they instead family members or other persons who may not act independently?

[33] None of those factors are necessarily determinative. The weight to be assigned to each will vary on a case by case basis.

[34] While it is important to recognize that trust law is trust law, whether in a commercial relationship or a family one, it is equally important to recognize that none of the transactions involved were arm's length. I find that the fundamental purpose of the Jeff Tremblay Family Trust No.2 was to provide for the Respondent's family in both the near and future sense. Indeed, the evidence of Michael Tremblay was that Nictor itself was meant to enhance the lives of Nicholas and Taylor and this intention surely extends to the intended recipient of the Nictor funds, the Jeff Tremblay Family Trust No.2. The fact that this intention was not meant only for the distant future is demonstrated by the fact that the Respondent caused $130,345.00 to be paid to himself from the trust as recently as October 1, 2012 to pay for Nicholas' then ongoing private school education as well as other family living expenses.

[35] The Applicant, the Respondent and the two children constitute the beneficiaries of the Jeff Tremblay Family Trust No.2. Unless the children are over 18, there can be no distribution to them so long as either Jeff or Catherine are alive. I take from this an intention on the part of the trust that so long as the children are minors, their parents, the other two beneficiaries, would be entrusted to act in their best interests.

[36] The Respondent and his two parents, Michael and Heather Tremblay, are the trustees. While decisions in the discharge of the trustees' fiduciary obligations to the beneficiaries are made by majority rule, the Respondent has the sole ability to appoint more trustees. I find that his ability to name additional trustees is, in a practical sense, an ability to control the trust, at least insofar as an ability to cause the trust funds to come into his hands should he deem that to be in his and the other beneficiaries' best interests. While I acknowledge that each added trustee would have a personal fiduciary obligation, in my view, practically speaking, the Respondent's ability to select additional trustees' amounts to an ability to ensure his wishes about the best interests of his family will ultimately carry the day. In fact, it would appear that in giving him alone the ability to increase the trustee roster, such a result was intended from the beginning. It is, after all, the *Jeff Tremblay* Family Trust. The overwhelming evidence is that the larger Tremblay family is close and has a history of cooperatively sharing their considerable wealth. Even if that close

relationship were ever to break down the Respondent has the ability to appoint additional trustees with the result that he could prevail over any dissent.

[37] I find that in all meaningful respects, the Jeff Tremblay Family Trust No.2 was set up in a way that would allow the Respondent to access funds even though his interest is only a beneficial one. The bottom line is that the particular way he is positioned as trustee effectively allows him to direct the dispersal of the trust funds. Indeed, history shows that he as trustee had a direct ability to control the trust in his favour - he was able to swiftly access $130,345 from the trust when he determined that supplementation to his ordinary income was needed.

[38] The degree of control that the Respondent has over the Jeff Tremblay Family Trust No.2 elevates his expectancy into something more like a certainty. I find that degree of control to amount to the Respondent having a present property interest in the property held in Jeff Tremblay Family Trust No.2. As such, the holdings of the Jeff Tremblay Family Trust No.2 are to be considered property in the context of section 4 of the *Family Law Act*.

In *Sagl v. Sagl*, 1997 CanLII 12248 (ON SC), Macdonald J. of the ONSC held that the husband's contingent interest in the assets of the family trust was property that was to be included in his net family property for equalization purposes. The Court's decision was based on the facts that the husband had considerable control over the trust as a trustee, that he was a trustee and a beneficiary, and that he treated the trust's property as his own. The Court valued the husband's share in the discretionary trust on a pro rata basis with the other trust beneficiaries:

The Sagl Family Trust

[31] The Sagl Family Trust (the "Trust") was created in 1982, two years before the marriage. The capital beneficiaries are Mr. Sagl, his three sons from his first marriage and their issue. The income beneficiaries are Mr. Sagl and his three older sons and their children.

[32] The initial trustees were Mr. Sagl and two of his friends. The trust deed provides that Mr. Sagl, while he is a trustee, has the power to appoint or remove a

trustee. The trustees are to have absolute discretion. Decisions must be made by a majority of the trustees, provided Mr. Sagl is in the majority. Mr. Sagl was a trustee on February 21, 1992. He resigned on March 31, 1992. He says he did so after getting tax advice relating to his planned move to the U.S. The evidence suggests that he did get such advice. Mrs. Sagl believes that he resigned, to distance himself from the Trust, as to do so would buttress the legal position that he now takes to the effect that since 1992 he has no control over the most significant assets of BEL.

[...]

[36] [....] The fact is that the Trust was legitimately created after receiving income tax and estate planning advice from Mr. Lyle Hepburn. It was created some two years before the marriage. There is no evidence that it was done so to defeat Mrs. Sagl. She was very well provided for at the time. The Trust is not a sham.

[37] For purposes of calculating Mr. Sagl's net family property, the value of his *contingent* capital interest in the assets of the Trust is property and is to be valued. The valuation of a contingent interest in a discretionary trust under The Act is regarded as a difficult subject because the very nature of the "contingency" leans to uncertainty. The evidence does not suggest that in February 1992, there would have been any reason for the trustees to collapse the Trust and distribute capital to Mr. Sagl. To do so would have defeated the whole purpose of the Trust. The income tax consequences alone mitigate against such a scenario. I have decided to approach this difficult issue on a fair and equitable basis having regard to trust law, the definition of property and the evidence as to what the intention was at the time of the creation of the Trust. I have determined that Mr. Wolfson's compromise submission produces the fairest and most equitable result; it is that I should treat the Trust assets as if there were a deemed realization amongst all capital beneficiaries as at February 21, 1992. There were 5 capital beneficiaries on the date of marriage. There were seven on February 21, 1992. This produces the following calculation using the mid point of Mr. Freedman's values less contingent income taxes.

Notional Pro Rata Distribution of Trust Value Attributed to Mr. Sagl on February

21, 1992

[38]

> Value of Mr. Sagl's capital interest pro-rated among seven beneficiaries $2,351,016
>
> Less contingent taxes $1,649,199

In *Mudronja v. Mudronja*, 2014 ONSC 6217 (CanLII) Seppi J. of the ONSC noted that the beneficial interest in a trust is not automatically excluded from a spouse's net family property merely because it is subject to discretion. The approach needs to be contextual, having regard to the particular circumstances of the parties, their financial situation and the terms of the trust in relation to the marital relationship on the day of valuation. *Mudronja* involved a discretionary trust where the wife, children, and a business owned 60% by the husband and 40% by the wife were the beneficiaries, but the husband was the sole trustee. The husband had the sole power of appointment and was granted the power to appoint himself as a beneficiary and had the discretion to distribute trust assets to himself alone. The Court held that the trust was property for both the husband and the wife for purposes of equalization pursuant to the Family Law Act. However, the Court took a contextual approach to its valuation of the parties' interests in the trust. Given the unfettered power of the husband over the distribution of the assets of the trust, the Court included the entire value of the trust as the husband's property for the purposes of family property division. A nominal value of $1.00 was attributed to the wife's interest in the trust for the purposes of the equalization calculation:

> [80] On February 12, 1999 the Mudronja Family Trust (the Trust) was established. The settlor was Kresimir Mudronja, the applicant's father. The sole trustee is Eddy Mudronja. The beneficiaries are "Marijana Mudronja, the issue of Eddy Mudronja and Marijana Mudronja, whether born or adopted, and Mareddy Corporation". The assets upon the settlement were four one ounce silver ingots. The Trust subscribed for Class A non-voting common shares of Jitsu immediately upon the creation of the Trust.
>
> [81] The document establishing the Trust, which contains standard trust provisions

and is irrevocable by the settlor, was executed by the settlor and trustee, witnessed by Gerald Pressman. The powers granted to the trustee for the investment, disposition and management of the trust property are extensive and include the discretionary power of Mr. Mudronja to appoint others and himself as beneficiary. To the date of trial Mr. Mudronja had not appointed any additional beneficiaries.

[...]

[89] The more pointed issue in the circumstances of this case is the valuation of Mr. Mudronja's power of appointment granted to him by the trust settlement. Pursuant to s. 4(1) of the FLA, "property" for purposes of the equalization process is defined as any interest, present or future, vested or contingent in real or personal property and includes "property over which a spouse has alone or in conjunction with another person, a power of appointment exercisable in favour of himself or herself." This Court has the task of determining the fair value of Mr. Mudronja's unfettered discretionary power of appointment conferred on him pursuant to the terms of the Trust. On V-day he and he alone had power that could be exercised in favour of the existing beneficiaries, and/or other persons or entities of his choosing, including himself.

[90] On V-Day Mr. Mudronja not only had the power to appoint himself a beneficiary and at his discretion distribute the trust assets solely to himself, he also had, and continues to have, an unlimited and discretionary power to dispose of the trust assets in any manner he deems suitable. According to the settlement document the trustee's powers, as detailed in a Schedule attached to the Settlement, include the power

> to sell, transfer, assign, exchange, convey, mortgage, lease or otherwise dispose of any of the Assets from time to time constituting the Trust Fund in any manner the Trustee deems proper and at a price, upon such terms and for such consideration as the Trustee deems suitable; to give any option with respect to any property in the Trust Fund and generally perform all acts of alienation and ownership with

> respect to the Trust Fund to the same extent and with the same effect as if the trustee was the absolute owner of the Trust Fund."

In those circumstances I find the value of Mr. Mudronja's power of appointment in the Mudronja family trust, the assets of which are the Class A non-voting common shares of Jitsu, is properly included as property owned by Mr. Mudronja on V-Day, as defined in s. 4(1) of the FLA.

[91] This conclusion is supported by the following words of Donovan Waters in D. W. M. Waters, M. R. Gillen and L. D. Smith, eds., *Waters' Law of Trusts in Canada* (4th ed. 2012), at p. 97 stating that:

> A general power enables the donee to appoint the property to anyone, including the donee, unless the donee is a fiduciary, and is therefore tantamount to ownership.
>
> [...]

[93] In this case the trust indenture specifically states that the power is a personal power and not a fiduciary power.

[94] The question of whether the interest of the object in a discretionary trust is "property" within the meaning of the FLA has been implicitly considered by the courts in Ontario. Two cases are referenced by the applicant to support his submission that value ought to be attributed to the respondent's interest in the trust. In *Sagl v. Sagl*[2], Macdonald J. values the husband's interest in a family trust and includes it as property in his NFP for purposes of equalization. In *Kushnir v. Lowry*,[3], Snowie J., also without specifically analysing whether the interest of an object in a discretionary trust is "property" under the FLA, ascribes value to the wife's discretionary interest in a family trust. In *Kushnir* there is no analysis regarding the valuation of the wife's interest. The Court accepts the wife's position that 50% of the trust assets be included in the NFP on the basis that she was one of two beneficiaries and, therefore, she and her daughter are each entitled to a 50% interest in the trust. In that case the family trust had been established seven years

before the parties were married, apparently to protect the wife's assets for her and her child from her previous marriage.

[95] In a later Ontario case, *LeVan v. LeVan*[4], the husband's interest was valued at 25% of a discretionary trust fund based on the terms of the trust agreement and the mother's evidence with regard to the intention to treat the 4 children of the family equally. The Reasons in *Kushnir* and *LeVan* do not offer an analysis of whether the interest of a spouse, who is the object in a discretionary family trust, is "property" within the meaning of the FLA.

[96] According to one authority who is knowledgeable in the area of trusts and estates, "Traditional trust law principles are clear that a person who is named as the object of trustee discretion to pay income or capital in his or her favour does not have an existing property interest."[5] It is noted that this is in contrast to an existing property interest of "a person who has a fixed, vested, vested subject to divestment, or purely contingent capital or income interest" in a trust. From a pure property law viewpoint it is an "expectancy".[6]

[97] This expectancy has been included in spouses' NFP when courts seek to fairly calculate equalization under the FLA, as in the cases referenced above. The property law distinctions between various forms of beneficial trust interests have not been rigidly applied to exclude discretionary trust interests from a spouses' net family property, where to do so would not achieve the overall objectives of the FLA.

[98] Based on the above-noted authorities, and the need to provide for a fair property settlement following marriage breakdown, I find an interest in a discretionary trust is an interest in property for purposes of equalization pursuant to the FLA. That statute in its preamble endorses the necessity of providing "the orderly and equitable settlement of the affairs of the spouses upon the breakdown of the [marriage] partnership". Having regard to the numerous and varied methods spouses choose to arrange their financial affairs during marriage, and the need to ensure an equitable result on marriage breakdown, a beneficial interest in a trust is

not automatically excluded from a spouse's net family property merely because it is subject to discretion. The approach needs to be contextual, having regard to the particular circumstances of the parties, their financial situation and the terms of the trust in relation to the marital relationship on V-day.

[99] The real question therefore is one of value. What is the value of the respondent's discretionary interest as an object in the Mudronja Family Trust, in circumstances where she has no status or right to enforce the allocation and distribution of any capital or interest from the assets of the trust? On V-day she had no right or power to either require or prevent the disposition, transfer or encumbrance of the entire trust value, nor does she currently have such a right or power.

[100] In the circumstances of this case the entire discretionary, unfettered power in relation to the distribution and all dealings with the Trust's assets rest with the applicant. He is her adversary now and was also adverse in interest when the parties separated. I find therefore that the V-day value of the respondent's interest in the Trust is nominal. To allocate otherwise would have the effect of artificially increasing her NFP, thereby unfairly and inequitably diluting her equalization entitlement arising from the applicant's significant business interests. A value of $1.00 is therefore attributed to the respondent's interest in the Mudronja Family Trust for purposes of the equalization calculation.

In *Kushnir v. Lowry*, 2004 CarswellOnt 530, the wife was a beneficiary of a discretionary trust where the wife and the couple's daughter were the beneficiaries. The Court accepted the wife's position that 50% of the discretionary trust's assets be included in her net family property on the basis that she was one of two beneficiaries and, therefore, she and the other beneficiary, being her daughter, were each entitled to a 50% interest in the trust:

[21] I do not accept this. I accept the petitioner's position that the Amlor Family Trust is a valid trust and that 50% of the trust assets including but not limited to 34 Hillholm Road should be included in her net family property calculation as she was one of only two beneficiaries of the trust entitled to receive a 50% interest on the

valuation date.

[...]

23 The Amlor Family Trust was settled by Gertrude Sax, Lorri Kushnir's mother, in 1985. A memorandum of agreement was entered into by Gertrude Sax, Lorri Kushnir, Jonathan Levine as trustee, and Maria Hoffstein as trustee on February 28, 1985. This trust is a Discretionary Trust.

[...]

26 The petitioner is seeking an equalization payment in favour of herself in the amount of $7,106,459.34. This figure assumes that she has only a 50% beneficial interest in the Amlor Family Trust. I accept this figure as owed based upon the totality of the evidence.

[...]

28 The respondent, however, is seeking an equalization payment from Ms. Kushnir on the basis that all of the assets were transferred into the alleged "fraudulent" Amlor Family Trust; therefore, all the said assets contained therein should be calculated as the personal assets of the petitioner. The respondent is also seeking an unequal division of the net family property in his favour on the basis of unconscionability.

In *LeVan v. LeVan*, 2006 CanLII 31020 (ON SC), the Court valued the husband's beneficial interest in a discretionary trust at 25% based on the terms of the trust established by his mother and evidence with regard to her intention to treat her four children equally:

[17] By 1996, the husband and his three siblings each held 25% of the common shares of 3 companies: Ryvan Inc., Grannyco Investments Ltd. and RWL Investments Ltd. In addition, all four siblings were the beneficiaries of the LeVan Family Trust in which there were significant assets. It was the opinion of Linda Brent, the wife's valuator, that the midpoint value at the date of marriage of the husband's business assets, after applying significant discounts and deducting

contingent taxes, was over $14 million.

[...]

[53] On June 13, 1996, Ms. Bales wrote Mr. Ross, stating that the husband had significant interests in family companies and trusts which controlled a substantial portion of the shareholdings in Wescast Industries Inc., the value of which had been built up by his parents and siblings over the past number of years. The letter described the LeVan Family Trust, pointing out that it was a discretionary trust under the discretion of the husband's parents. Ms. Bales did not point out that it was the intention of the trustees to treat their children equally. The children had always been treated equally under the trust until after these proceedings were commenced and the husband's mother testified at trial that it was the intention of her and her late husband who were the trustees to treat all four children equally. The husband believed that it was always the intention of the family to treat the beneficiaries equally.

[...]

[147] At both the marriage date and date of separation, the husband and/or his holding company held shares that represented a minority interest in a company that was controlled by either of his parents. At the date of separation, 11250238 Ontario Ltd. held a minority interest in FWDAJ, over which his mother had voting control. At the date of marriage, the husband held a minority interest in Grannyco, over which his mother had voting control and in RWL over which his father had voting control. In addition, at the date of marriage, the husband had a contingent income and capital interest in the LeVan Family Trust which was controlled by his parents.

[148] In addition to the above, 11250238 Ontario Ltd. and the husband held a 25% interest in RyVan at the date of separation and date of marriage, respectively, which represented 25% of the votes of this company. The husband or his holding company was an equal shareholder of RyVan with his three siblings. [...]

[...]

[243] I accept Ms. Brent's evidence that the husband had more liquidity at the date of separation than at the date of marriage due to significant changes in the corporate structure. I accept that "prohibited transfer" in the Youdan report does not mean that a sale of the husband's shares cannot occur. Rather, it is a defined term that triggers the right of first refusal by the siblings and then a conversion of the shares into Class A shares. I accept her evidence that the husband had the right to redeem his preference shares in RyVan, that the right of first refusal by his family created a market and some liquidity and that there is a wider market in block trades through institutional investors or through a secondary offering. I am satisfied that in the discount rate she used, Ms. Brent took into account that the Wescast shares are thinly traded.

[244] I have no hesitation in accepting her midpoint value of the husband's business interests after applying significant discounts and deducting debts and contingent disposition costs. I find that the husband's business interests were valued at $33,277,161 at the date of separation and $14,664,500 at the date of marriage.

[...]

[275] In my opinion, $5.3 million which is all that is requested, is not unconscionable. I base this conclusion on the fact that the shares did not decrease in value immediately. The husband could have protected himself by a disposition. He chose not to. Placing the entire loss on the wife would be unfair. Sharing it more or less equally results in a net family property of $5,000,000 plus the house or $5.3 million.

Authorities

Family Law Act, RSO 1990, c F.3

Kochar v Kochar, 2015 ONSC 6650 (CanLII)

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