

CANADA / JUDGMENT

Cottrell v. Cottrell

2023 BCCA 471

COURT

British Columbia Court of Appeal

DECIDED

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2023 BCCA 471 Cottrell v. Cottrell

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Cottrell v. Cottrell,

2023 BCCA 471

Date: 20231214

Docket: CA48597

Between:

Paul Edward Cottrell

Appellant

(Respondent)

And

Joanne Patricia Cottrell

Respondent

(Claimant)

Before:

The Honourable Mr. Justice Willcock

The Honourable Justice Griffin

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated

September 12, 2022 (Cottrell v. Cottrell, 2022 BCSC 1607,
New Westminster Docket E57587).

Counsel for the Appellant:

C.C. Godwin

Counsel for the Respondent:

D.R. Greig

C.R. Anninos

Place and Date of Hearing:

Vancouver, British Columbia

November 16, 2023

Place and Date of Judgment:

Vancouver, British Columbia

December 14, 2023

Written Reasons by:

The Honourable Justice Griffin

Concurred in by:

The Honourable Mr. Justice Willcock

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The appellant former husband appeals from an order dismissing his claim to his former wife's beneficial interest in property held in a discretionary trust established by her parents. The wife's father settled the trust while the couple was married, and she was listed as one of the beneficiaries. The husband submits that the trial judge erred in failing to divide the trust's increase in value. Held: Appeal dismissed. The trial judge did not err in interpreting the Family Law Act [FLA] as entitling the husband to the increase in value of the wife's "beneficial interest" in the property held in trust. The trial judge correctly concluded that the husband had failed to demonstrate the value of the interest had increased during the marriage.

Reasons for Judgment of the Honourable Justice Griffin:

Introduction

- [1] Paul Cottrell appeals from an order of the trial judge dismissing his claim to certain excluded family property in family law proceedings between him and his former wife, the respondent Joanne Cottrell. He submits that Ms. Cottrell's beneficial interest in property held in a discretionary trust established by her parents increased in value during their relationship, and the judge erred in failing to divide that increased value as family property.
- [2] Mr. Cottrell's position on appeal raises questions as to the proper approach to ss. 84(2)(g) and 85(1)(f) of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. These sections establish what property is included and excluded from the division of family property and family debt upon separation. Section 85(1)(f) treats a spouse's beneficial interest in property held in a discretionary trust as excluded family property, but any increase in value of that beneficial interest during the relationship is included as family property pursuant to s. 84(2)(g).
- [3] The appellant says that the judge erred in determining that there was insufficient evidence to enable him to conclude that the value of Ms. Cottrell's beneficial interest in the discretionary trust had increased during the parties' relationship.

Background

- [4] Ms. Cottrell and Mr. Cottrell began a relationship in approximately March 1993, began to live together in July 1994, and were married on June 17, 1995. They have two adult children who are pursuing post-secondary studies. Mr. Cottrell was the primary income earner for much of the marriage while Ms. Cottrell gave up her career and cared for the family at home. They separated on November 5, 2017, and Ms. Cottrell commenced the family law proceedings by filing a notice of family claim on May 13, 2019.
- [5] At the time of trial Ms. Cottrell was about to turn 54 and Mr. Cottrell was two years older than her.
- [6] In 1990, Ms. Cottrell's parents, Robert and Patricia Muster, won \$5 million in a lottery. Ms. Cottrell was a university student at the time and had yet to meet Mr. Cottrell.
- [7] The Musters initially gave \$50,000 to each of their children, Ms. Cottrell and her brother Bruce Muster, and then set up investment trusts for each child worth \$500,000 each, with the parents controlling the decisions regarding the investment and withdrawal of those funds.
- [8] Ms. Cottrell's trust (the "Joanne Muster Trust") paid her \$5,000 every three months. In 1991, the trust paid Ms. Cottrell \$190,000 to enable her to purchase a condominium in Burnaby.
- [9] The Musters also gave approximately \$500,000 of their lottery winnings to extended relatives.

- [10] Ms. Cottrell's evidence at trial regarding the Joanne Muster Trust was to the effect that her parents made it clear at the time that what they had given to her was generous and that she was not to come back asking for more.
- [11] After Mr. Cottrell moved in with Ms. Cottrell in the summer of 1994, for a time Ms. Cottrell continued to receive \$5,000 per quarter from the Joanne Muster Trust and she put it in a joint account used by the couple for living expenses.
- [12] The Joanne Muster Trust dissolved in 2011, and all of the remaining funds were transferred into Ms. Cottrell's own account. She continued to have her father make the investment decisions for her, but she now controlled the spending in the account. She received \$5,000 quarterly payments from the account and also used it for family expenses such as their children's braces, home improvements and vacations.
- [13] At the time of trial, Ms. Cottrell still had approximately \$178,000 in her bank account leftover from when the Joanne Muster Trust was wound up and the balance was disbursed to her. She took the position at trial that it was excluded property under the FLA, and Mr. Cottrell did not contest that position.
- [14] In 2010 and 2011, Robert and Patricia Muster established two additional trusts. Robert Muster had suffered a heart attack and was thinking about estate planning. They had a number of companies which they amalgamated into a single company, Muster Management Inc. ("MMI"). They also set up two trusts in part to effect an estate freeze: (1) the Robert and Patricia Muster Family Trust settled on September 14, 2010 (the "Family Trust") and (2) the Muster Joint Partner Trust settled on January 5, 2011 (the "Partner Trust"), (collectively the "Muster Trusts").
- [15] The Musters' two children, Ms. Cottrell and her brother Bruce Muster, are each among the named beneficiaries of the Muster Trusts.
- [16] The terms of the Partner Trust are not relevant to the disposition of this appeal but are interesting as one example of a discretionary trust. The Partner Trust names the two parents as "Life Beneficiaries", and they are entitled to transfer assets to themselves. The trustees are Robert and Patricia Muster or either one. The income of the trust is to go to the parents, and they also have discretion to distribute the capital of the trust to themselves. The final distribution is not to be until both parents die. The "ultimate beneficiaries" if alive at time of final distribution are: Ms. Cottrell and her brother; every child of Ms. Cottrell (her brother has no children); every sibling of Robert and Patricia Muster; and any person subsequently added as a beneficiary. The trust contains terms as to the shares on final distribution, including various contingencies depending on who is alive, and the creation of a successor trust for any children of Ms. Cottrell under the age of 30. The trustees have considerable discretion, including power to change the beneficial entitlement of any beneficiary or appoint additional beneficiaries or to amend the terms of the trust (with provisions to protect the life beneficiaries).

- [17] The Partner Trust's main asset at the time of trial was a portfolio of savings and investments. The value of the trust had not increased during the Cottrell's marriage and so Mr. Cottrell did not seek any remedy in respect of Ms. Cottrell's beneficial interest in that trust.
- [18] The other trust established by Robert and Patricia Muster was the Family Trust. The parents were the original named trustees. Later, when Patricia died in 2012, Ms. Cottrell and her brother were added as trustees. However, this was on paper only and neither sibling was involved in the management of the trust assets. Once Ms. Cottrell became involved in the family law proceedings with Mr. Cottrell, she resigned as trustee at her father's request. They were transparent about this and there was no indication this was done in bad faith to defeat Mr. Cottrell's claim.
- [19] The Family Trust includes the following terms:
- a) Beneficiaries are each of Robert and Patricia Muster, and their two children Bruce and Joanne; every child born to or adopted by Bruce and Joanne before the time of final distribution; and any one else who the trustees in their complete discretion might appoint as beneficiaries;
 - b) If none of the above beneficiaries are alive at the time of final distribution, then Robert's three siblings and Patricia's two siblings are the beneficiaries;
 - c) The final distribution of the trust is September 1, 2031 or earlier if the trustees in their discretion decide to terminate the trust;
 - d) The trustees have the absolute discretion and power to pay out income or transfer assets out of the trust for the benefit of any one of the beneficiaries, unequally;
 - e) At the time of final distribution, if Robert Muster is still alive (he will be in his early 90s by then), the trustees have discretion to unequally distribute the balance of the trust to any one of the beneficiaries. If Robert is not alive, the trust is to be divided into two equal shares, the Joanne Share and the Bruce Share. If Ms. Cottrell is still alive in 2031, and her father is deceased, and the trust has not otherwise been terminated or amended, she will be entitled to receive the "Joanne Share", that is, half of the remaining assets of the Trust;
 - f) Either Robert or Patricia Muster acting as trustees may appoint any additional beneficiary, or remove a beneficiary, in their absolute discretion; and may amend the trust including the final distribution provisions;
 - g) During any time where there are three trustees, the trustees must act either by a resolution passed by the majority at a meeting or by written agreement signed by a majority; and
 - h) The trustees have absolute discretion in managing the trust.
- [20] Robert Muster manages the assets and makes all the decisions in both Muster Trusts. He considers himself to have full discretion to decide what to do with the assets in the trust, including collapsing the trusts if he so chooses. Although he had no present intention at trial

of distributing the entire Family Trust to people other than Ms. Cottrell and her brother, he made it clear that he retained power to change his mind about that. Some of his investments have been high risk loans to developers, and according to his evidence "he's had some losers".

- [21] The Family Trust owns shares of MMI. The key asset of MMI is a commercial property located on Underhill Avenue in Burnaby (the "Underhill Property"). It generates rental income. Financial statements of MMI were put into evidence but there was no business valuation of MMI.
- [22] During the marriage, Ms. Cottrell did not receive any distributions from the Family Trust. According to her evidence, she had no expectation that money controlled by her father would sometime be hers. She did not plan on having that money in the future, because of her understanding that it might never happen.
- [23] After separation, Ms. Cottrell borrowed some money from her father. She was struggling to manage household expenses and building a career was slow.
- [24] Ms. Cottrell commenced a family law claim against Mr. Cottrell, seeking orders regarding child support, property division and spousal support. Mr. Cottrell counterclaimed. In his counterclaim he claimed an entitlement to the increase in value of Ms. Cottrell's interest in family trusts, companies and assets.

Trial Judgment

- [25] The trial judge made orders for sale of the family home and division of the proceeds; division of Mr. Cottrell's pension; retroactive and ongoing spousal support payable by Mr. Cottrell to Ms. Cottrell; and dismissed other claims. Mr. Cottrell was ordered to pay Ms. Cottrell's costs in the amount of \$60,000.
- [26] The judge considered Mr. Cottrell's argument that all property and support issues should be decided on the basis that Ms. Cottrell would eventually receive a large sum of money through the trusts, and Ms. Cottrell's argument that this possibility ought not to be accounted for given the uncertainty as to timing and value of any amount she might get from the trusts in the future: at para. 9.
- [27] The judge noted at para. 26 that both trusts were discretionary trusts as the beneficiaries' entitlements could not be ascertained at the time of settlement, citing *Purtzki v. Saunders*, 2016 BCCA 344 at paras. 64-68.
- [28] The judge referred to the fact that Mr. Cottrell had tried to elicit evidence of the value of the trusts through examination of the witnesses at trial but there was a lack of reliable evidence. The judge held:

[28] A number of documents were entered into evidence in relation to the properties and assets held within the Muster Trusts. Attempts were also made by Paul's counsel to elicit testimonial evidence about these matters from Joanne, Mr. Muster, Mr. Kendler, and Paul. However, neither party was able to clearly set out and explain, through an expert report or otherwise, the precise nature and value of the Muster Trusts' assets during the relevant time period. This lack of reliable evidence limits the Court's ability to make detailed findings of fact in relation to these matters.

[Emphasis added.]

[29] The judge noted that under s. 85(1)(f) of the FLA the discretionary trusts were excluded from the definition of family property; however, any increases in value of excluded property were family property pursuant to s. 84(2)(g).

[30] Mr. Cottrell's approach to valuation of Ms. Cottrell's beneficial interest in the Family Trust was to take the present assessed value of the Underhill Property less the assessed value at the time the trust was established, subtract taxes at a rate he assumed would apply, and divide the net value by three to represent a one-third interest of Ms. Cottrell (her father and her brother having the other notional two-thirds interest). Mr. Cottrell proposed that the value of his equal share in this amount would be worth \$1,294,735.42.

[31] The judge rejected this approach and found Mr. Cottrell had failed to show an increase in value of Ms. Cottrell's beneficial interest in the trusts: paras. 42-43.

[32] While the judge declined to find an increase in value of Ms. Cottrell's beneficial interest in the discretionary trusts, he did consider Mr. Cottrell's arguments that the possibility of Ms. Cottrell receiving property from the trust in the future made it "significantly unfair" to divide other family property equally and justified reapportionment of family property in Mr. Cottrell's favour. The judge rejected this argument: at paras. 54, 59. Mr. Cottrell does not advance an alternative argument on appeal that the judge was wrong to decline reapportionment of family property.

[33] Further, the judge considered Mr. Cottrell's arguments that his obligation to pay spousal support should cease in the year 2031, which would be the year he would turn 65 and Ms. Cottrell could receive assets from the Family Trust. The judge declined to make this order, consistent with his findings that the future was too uncertain in this regard: at para. 65. However, he acknowledged that if Ms. Cottrell were to receive assets in the future from the Muster Trusts or from her father, Mr. Cottrell would have the right to apply for a variation of his spousal support obligation on the basis of a material change in circumstances: at para. 66. No appeal is taken from the judge's order in relation to spousal support.

Analysis

[34] I will address in turn Mr. Cottrell's arguments as to the correct statutory interpretation of the FLA as well as his challenge to the judge's approach to the evidence.

Statutory Interpretation

- [35] The relevant provisions of the FLA should be interpreted in accordance with the modern approach to statutory interpretation, which requires that, "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1. S.C.R. 27 at para. 21, 1998 CanLII 837. Statutory provisions should be interpreted in a manner as to avoid absurd results by searching for internal coherence and consistency in the statute: *R. v. Wust*, 2000 SCC 18 at para. 34.
- [36] The FLA approaches property division on breakdown of a spousal relationship by categorizing property either as "family property", which is subject to presumptive equal division under s. 81, or excluded property. In summary, all property owned by a spouse, including a beneficial interest in property, at the date of separation, and all property and beneficial interests derived therefrom after separation, is family property unless it is excluded property: ss. 81, 84(1).
- [37] The FLA describes assets that are excluded from the definition of family property in s. 85:
- 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.

[Emphasis added.]

- [38] As set out above, s. 85(2) provides that the onus of proof is on the party seeking to demonstrate that the property is excluded property.
- [39] As seen by the language of s. 85(1)(f), the nature of the trust and who settled and contributed to it will dictate whether or not it is family property or excluded property.
- [40] Providing more guidance with respect to trusts, s. 84(3) includes in family property:
 - (3) Despite subsection (1) of this section and subject to section 85(1)(e), family property includes that part of trust property contributed by a spouse to a trust in which
 - (a) the spouse is a beneficiary, and has a vested interest in that part of the trust property that is not subject to divestment,
 - (b) the spouse has a power to transfer to himself or herself that part of the trust property, or
 - (c) the spouse has a power to terminate the trust and, on termination, that part of the trust property reverts to the spouse.
- [41] Ms. Cottrell satisfied the burden to establish that her beneficial interests in the Muster Trusts was excluded property pursuant to s. 85(1)(f): she did not contribute to the trust; it was settled by someone else; and as found by the trial judge, it was discretionary. The FLA does not define a "discretionary" trust; however, Mr. Cottrell concedes that the judge was correct in finding that the Muster Trusts were discretionary trusts.
- [42] Looking in overview at the scheme of the FLA, the operating presumptions are that upon breakdown of a spousal relationship, it is generally considered fair to equally divide property that the spouses acquired during the relationship; and unfair to divide property that a spouse brought into the relationship or obtained by way of gift or inheritance.
- [43] Both the presumptive equal distribution of family property, and the presumptive non-distribution of excluded property, can be varied at trial where a judge concludes that it would otherwise be "significantly unfair": s. 95 in the case of unequal division of family property, and s. 96(b) in the case of division of excluded property. Establishing significant unfairness is a high bar: *Banh v. Chrysler*, 2022 BCCA 74 at para. 27, leave to appeal to SCC ref'd 40156 (12 January 2023).
- [44] The FLA includes in the definition of family property the amount by which the value of excluded property has increased since the parties' relationship began, excepting out any property already received from a trust, in ss. 84(2)(g) and 84(2.1) as follows:

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:
- (a) a share or an interest in a corporation;
 - (b) an interest in a partnership, an association, an organization, a business or a venture;
 - (c) property owing to a spouse
 - (i) as a refund, including an income tax refund, or
 - (ii) in return for the provision of a good or service;
 - (d) money of a spouse in an account with a financial institution;
 - (e) a spouse's entitlement under an annuity, a pension plan, a retirement savings plan or an income plan;
 - (f) property, other than property to which subsection (3) applies, that a spouse disposes of after the relationship between the spouses began, but over which the spouse retains authority, to be exercised alone or with another person, to require its return or to direct its use or further disposition in any way;
 - (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.

(2.1) 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.

[Emphasis added.]

- [45] In order to appreciate the present day language of the FLA, a brief review of the prior governing legislation may be helpful.
- [46] There was much case law surrounding contingent interests in trusts under previous family legislation, the Family Relations Act, R.S.B.C.1996, c. 128 [FRA]. This jurisprudence was summarized in *Purtzki* at paras. 48-62. Section 56 of the FRA set out the presumption that "family assets" were to be divided equally between spouses. Property was a "family asset" if it was ordinarily used for a family purpose: s. 58 of the FRA.
- [47] A family asset under the FRA included an "interest in [a] trust owned by the spouse", if property in the trust would be a family asset if owned directly by that spouse: s. 58(3)(ii), and its predecessor, s. 45(3)(a)(ii) under the Family Relations Act, R.S.B.C 1979, c. 121. Thus, where a spouse had received some use of property from a discretionary trust and that property was used for a family purpose, the questions became whether an interest in the trust was owned by the spouse, and how to value or divide that interest.
- [48] The mere fact that the future interest in a trust was a contingent interest, with several uncertainties as to when, if, and how much the spouse might receive in the future, did not preclude a finding that the spouse had a type of property interest capable of valuation or division for purposes of the FRA. This was a finding of fact that required looking at the terms of the trust and the pattern of use of the property in the trust: see *Purtzki* at para. 68.
- [49] In *Purtzki*, the husband had arranged to transfer the family home to his mother, who transferred the property into a trust and appointed him and his friend as trustees: at para. 8. The trustees' discretion was "illusory" because they were expected to simply follow the husband's wishes. Accordingly, the Court held that the value of the husband's interest in the trust was equivalent to the assessed value of the family home: at para. 77. I pause to note that Mr. Cottrell's arguments urge this type of approach as a standardized approach to the valuation of beneficial interests in discretionary trust interests under s. 84(2)(g) of the FLA, despite the very different facts in this case as compared to the trust in *Purtzki*.
- [50] The present case involves a discretionary trust established by a parent of a spouse, where the parent retains control of the trust and there are multiple beneficiaries. These kinds of trusts are not unusual, and problems regarding their division or valuation arose under the FRA. Under the FRA, several authorities avoided the problem of valuing a contingent interest in a trust such as this by finding that the spouse's contingent interest was a family asset, and ordering that the interest would be divided in the future "if and when" the spouse who was the beneficiary received their interest: see review of authorities in *Purtzki*, at paras. 48-55, citing *Whittall v. Whittall* (1987), 19. B.C.L.R. (2d) 202, 1987 CanLII 2489 (S.C.), *Grove v. Grove*, [1996] B.C.J No. 658 (S.C.) and *M. (H.R.). v. B. (D.M.)*, 2004 BCSC 147.
- [51] Mr. Cottrell did not seek an entitlement to the final distribution of the Family Trust and takes the position that an "if and when" approach is impractical because it could draw out litigation for years to come, running contrary to the principle of finality.

- [52] The parties have not referred the Court to any authority which applies the "if and when" approach to these kinds of interests in discretionary trusts under the FLA. This may be because, unlike the former Act which considered the entire interest in a discretionary trust owned by the spouse, the FLA regime only applies to the increase in value of the interest for the relevant time period, and therefore a valuation of that increase must still occur even if the parties are directed to wait until a final distribution.
- [53] The parties also have not provided the Court with any authority in which a court has determined the valuation of the increase of a beneficial interest in a discretionary trust under the FLA. In *S.L.M.W. v. M.R.G.W.*, 2016 BCSC 272, the court found that the claimant was entitled to the increase in value of the respondent's beneficial interest in a discretionary trust that the respondent contributed to before the relationship began. However, the court directed the parties to provide further submissions addressing the nature of the family interest in that trust: at paras. 104-105. Ultimately the valuation issue was resolved out of court: *S.L.M.W. v. M.R.G.W.*, 2016 BCSC 919 at para. 2.
- [54] Mr. Cottrell submits that the legislature intended the FLA to create greater certainty as to how property would be divided on relationship breakdown, in comparison to the previous FRA regime. He submits that the trial judge's interpretation of ss. 84(2)(g) and 85(1)(f) of the FLA established a standard which makes it "impossible" to quantify the increase in value of a beneficial interest in property held in a discretionary trust, which in turn renders these sections inoperative.
- [55] Mr. Cottrell says that the proper interpretation of ss. 84(2)(g) and 85(1)(f) of the FLA, consistent with the goal of providing certainty, requires treating as family property all of the during-the-relationship growth in the value of property held in an otherwise excluded discretionary trust. He submits that the FLA instructs the court to deal with discretionary trusts as if there is a disposition of the trust assets as at the date of the valuation. He says the value of a spouse's beneficial interest in a discretionary trust must always be determined by taking the increase in the assessed value of assets in the trust during the relevant time period and dividing that amount equally by the number of named beneficiaries, less any tax consequences.
- [56] It is well accepted that greater certainty was a goal of the FLA but I cannot accept Mr. Cottrell's submission that this leads to his interpretation of ss. 84(2)(g) and 85(1)(f).
- [57] If the present scheme of property division under the FLA was illustrated by a Venn diagram, there would unfortunately still be an area of overlap where the circle representing family property overlapped with the adjacent circle representing excluded property. The variety of circumstances that can arise in this grey zone of overlap are anticipated by some provisions of the FLA, but inevitably some uncertainty still exists. This is seen by the abundant case law dealing with this grey zone since the regime was brought into force more than a decade ago. The answer to this is not to impose a single mechanical approach no matter the facts, where the language and scheme of the FLA do not bear that approach.

- [58] I agree with the trial judge that what is being valued under s. 84(2)(g) of the FLA is the growth in value of the spouse's "beneficial interest in" the property held in the discretionary trust during the relationship, which is not the same as the growth in value of the property in the trust. The spouse's beneficial interest is not equivalent to a direct proportionate interest in the property. Sometimes there may be a close relationship between the two values, but not necessarily always. The terms of the trust itself are therefore highly relevant in determining the value of the spouse's beneficial interest.
- [59] Focussing on the nature of the beneficial interest does not render the FLA provisions regarding discretionary trusts inoperative, but rather gives effect to the wide variety of potential circumstances that might affect such interests. Therefore, contrary to Mr. Cottrell's submissions, Robert Muster and Ms. Cottrell's evidence regarding the degree of knowledge and control Ms. Cottrell had and has over the Family Trust is not an irrelevant consideration for the trial judge.
- [60] Rather than achieve certainty, Mr. Cottrell's proposed method of valuing a beneficial interest in a discretionary trust simply raises more questions. Mr. Cottrell's method requires the court to pay no heed to the terms of the trust or the relationship between the trustees and the beneficiaries. Although he considers that Ms. Cottrell's chance of receiving assets under the Family Trust is virtually certain given her apparently good relationship with her father, he chooses to ignore situations where the relationship between the trustee(s) and the beneficiary spouse might be quite distant, or even strained and where other beneficiaries have priority in receiving trust assets. He also does not propose a clear method for determining how many beneficiaries should be counted, as shown by the fact that at trial he proposed that the assets be divided by the number of three beneficiaries, yet on appeal he concedes the number should be five because the parties' adult children are also beneficiaries. He says nothing about the situation where the beneficiaries may have additional children in the future who could then become beneficiaries.
- [61] Contrary to Mr. Cottrell's submissions, there is nothing in the language of the FLA that suggests there should be a one-size-fits-all formulaic approach to valuing a spouse's beneficial interest in property held in a discretionary trust. Perhaps the legislature recognized the rather infinite creativity of lawyers in drafting trust instruments, and the wide variety of potential circumstances that might affect the value of a beneficiary's interest. Thus, despite the variety of complex factual disputes that arose under the FRA when considering the valuation of beneficial interests in trusts, when enacting the FLA, the legislature chose not to direct any particular method of valuation of these kinds of interests.
- [62] It is also important to bear in mind if there was a rigid approach to valuation that applied, it would mean the legislature considered such an approach to be presumptively fair under the FLA, leaving the spouse with the beneficial interest in a discretionary trust to meet a high burden of showing that such an approach is "significantly unfair".

- [63] I do not accept that taking Mr. Cottrell's formulaic approach to valuing Ms. Cottrell's beneficial interest in the property in the Family Trust was a scenario the legislature implicitly deemed "fair", as a starting point for all discretionary trusts when interpreting s. 84(2)(g) and s. 85(1)(f).
- [64] Here Ms. Cottrell points out that she gave up her career and took care of the children and home, allowing Mr. Cottrell to advance in his career. At the end of their relationship, their major asset is the family home. If Mr. Cottrell's arguments were accepted, she would be required to notionally pay Mr. Cottrell one-half of his valuation of the growth of her beneficial interest in the trust, determined by treating her interest as though it is a fixed direct interest in real estate. In order to manage this, she would be required to trade off all of her interest in the one major asset they did accumulate during the marriage, the family home.
- [65] In other words, if Mr. Cottrell's arguments were accepted, Ms. Cottrell would be starting out after a lengthy marriage, trying to establish a new career, with next to no assets and nothing but a possibility of receiving some assets from the Family Trust in 2031, if her father does not otherwise distribute them or suffer a poor investment result or change the terms of the trust. Mr. Cottrell, on the other hand, would have no uncertainty about his financial future, having received all of the equity in the family home in compensation for Ms. Cottrell's uncertain future distribution from the trust. The obvious unfairness of this result explains why Ms. Cottrell argued in the alternative that if the court was to conclude that there was an increase in value of her beneficial interest in the Family Trust, it would be significantly unfair not to reapportion that interest entirely to her, pursuant to s. 95.
- [66] In short, as I read ss. 84(2)(g) and 85(1)(f) of the FLA, the judge's task was to determine as a matter of fact whether Ms. Cottrell's beneficial interest in the property held in the discretionary trust had increased in value during the parties' spousal relationship and by what amount. This required some consideration of the terms of the discretionary trust and circumstances regarding the management and distributions from that trust. That is exactly how the judge approached it: see para. 42.
- [67] I therefore do not accede to Mr. Cottrell's argument that the judge made an error of law in interpreting the FLA.

Evidence of Value

- [68] As mentioned, Mr. Cottrell chose a very simple way of approaching valuation of Ms. Cottrell's beneficial interest in the property in the Family Trust, namely, he:
- a) Took the most current assessment for property taxes of the Underhill Property, which was an assessment as of 2021, and subtracted the property assessment as of the approximate date of the initiation of the Family Trust in 2010, arriving at a notional gross increase in assessed property value;

- b) Added the increase in value of cash and long-term investments from 2011-2020 as determined from the financial statements of MMI;
 - c) Subtracted assumed taxes of 38.33% on that gross increase in assessed value (without the benefit of any expert evidence as to the taxes that would be payable);
 - d) Divided the result by three, representing the beneficiaries Robert Muster, Bruce Muster, and Ms. Cottrell (ignoring that Ms. Cottrell's two children were listed as beneficiaries); and
 - e) Thereby arriving at the increase in value of Ms. Cottrell's beneficial interest.
- [69] Thus Mr. Cottrell treated the valuation of Ms. Cottrell's beneficial interest in the Family Trust as equivalent to a fixed one-third direct interest in the assets of MMI as though MMI and the Family Trust could be liquidated and the proceeds distributed immediately without any costs other than the taxes he deemed might apply. On his approach, to the extent the Underhill assessed property value increased for the purpose of property taxes, so too did Ms. Cottrell's beneficial interest.
- [70] Respectfully, Mr. Cottrell's approach might have been suitable for a trust like the one in *Purtzki*, where it was clear that the trustees simply followed the husband's wishes and the property was the family residence, but the evidence here was very different from *Purtzki*.
- [71] Property tax assessments are used frequently in the valuation of residential properties for parties with limited means: see *Lawrence v. Mulder*, 2015 BCSC 2223 at para. 95; *Chung v. La*, 2011 BCSC 1547 at paras. 81-83; *Van Wieren v. Van Wieren*, 2008 BCSC 31 at para. 21. As this Court has noted, a property tax assessment can be admissible as evidence of the value of property in a family law proceeding either where the parties agree on the value, or where there is no other evidence available: *Dosanjh v. Liang*, 2015 BCCA 18 at paras. 60-61.
- [72] However, no authorities support the proposition that property tax assessments should be treated as reliable evidence in the valuation of shares in a corporation that owns commercial property. The Family Trust owns MMI, not the Underhill Property directly. The financial statements of MMI did not treat the company's assets as appreciating, and no expert opinion valuing MMI was provided. Accordingly, it cannot be said that the trial judge was wrong to be concerned about the reliability of Mr. Cottrell's valuation approach given the lack of a valuation opinion from a qualified expert.
- [73] The FLA states at s. 87(a) that family property must be based on its "fair market value". I agree that it is difficult to apply the concept of there being an open market for a contingent, beneficial interest such as in a true discretionary trust. However, in such a case, the fair market value is the starting point and the court can go from there to reach a different conclusion: *Stober v. Stober*, 2015 BCSC 2505 at para. 35. As indicated in *Stober* at para. 27, it is conceivable that a chartered business valuator might be able to value Ms. Cottrell's beneficial interest in the Family Trust.

- [74] Further, as already indicated, I do not accept Mr. Cottrell's approach of ignoring the terms of the Family Trust, when valuing Ms. Cottrell's beneficial interest.
- [75] In the present case, unlike in *Purtzki*, Ms. Cottrell does not control the Family Trust, her father does, and Ms. Cottrell is not the only beneficiary, there are currently five beneficiaries including her two children. There are a large number of uncertainties as to when, if, and how much Ms. Cottrell might receive a property distribution from the Family Trust, including: the life expectancy of Robert Muster; Robert Muster's future investment decisions managing the trust; the potential that the investments might decline in value due to market conditions or unsuccessful investment decisions, prior to any anticipated distribution of the same to beneficiaries; the potential future needs of Robert and Bruce Muster, including whether they might have special medical needs when they age that are not provided for by other means; any special needs of Ms. Cottrell's children, now and in the future; Ms. Cottrell's own future needs and life expectancy; and whether Robert Muster might change the terms of the trust or beneficiaries in the future.
- [76] These uncertainties existed at the formation of the Family Trust, and had not diminished during the time of the parties' marriage. Robert Muster's pattern of dealing with the trust over time could be seen as not creating any greater certainty as to what might happen in the future in terms of potential distributions to Ms. Cottrell, than the uncertainty that existed when the trust was established. He had not, for example, established a pattern of regularly distributing assets of the trust to Ms. Cottrell over those years. There was no evidence to suggest that Ms. Cottrell could expect a distribution of assets in the Family Trust in the near future.
- [77] Two values must be determined under s. 84(2)(g): the value of the spouse's beneficial interest at the later of the time the relationship began or the property was acquired; and the present value of the spouse's beneficial interest at the time of trial. The two values then need to be compared to determine if there has been growth in value of that beneficial interest. A number of factors could potentially affect these starting and end values, including the uncertainties just mentioned.
- [78] In *Stober*, the court cited a party's submission and reliance on academic commentary regarding the types of factors that may be relevant to valuing beneficial interests in discretionary trusts:
- [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).

[79] These factors recognize that valuating a beneficial interest in a discretionary trust is a fact-specific inquiry, based on both the language of the trust instrument and the various circumstances affecting that interest.

[80] The judge was not wrong to conclude that:

[43] I agree with the submissions of Joanne's counsel that the uncertain nature of Joanne's contingent beneficial interest in the Muster Trusts is such that it cannot be said that, at the time of the trial, there has been an "increase in value" of this interest. This uncertainty stems from the fact that Joanne has never had the actual or even an apparent ability to compel a distribution of the Muster Trusts, and has no reliable assurance regarding the specific extent to which she may receive such a distribution in the future. In these circumstances, the Court cannot find that Joanne's beneficial interest in the property held in the Muster Trusts is greater now than it was when the trusts were settled. In the absence of such a finding, there is no "increase in value of excluded property" to which a s. 84(2)(g) FLA claim can be asserted. Paul's request for a remedy in relation to such a claim must therefore be dismissed.

[47] Before completing my consideration of this issue, however, I wish to be clear that my finding that Paul has not established that there has been an increase in value of Joanne's beneficial interest in the Muster Trusts should not be taken as a conclusion of law that it is impossible to make a family property claim in respect of a spouse's beneficial interest in a discretionary trust under the FLA. My finding is based on the evidence presented in this case, particularly the terms of the Muster Trusts instruments, as well as Mr. Muster and Joanne's testimony about their intentions and expectations regarding these trusts. That evidence does not justify a conclusion that Paul is entitled to a remedy in relation to Joanne's beneficial interest in the Muster Trusts. A different conclusion could well be reached in another case involving different trusts, trustees, beneficiaries, and spouses.

[Emphasis added.]

[81] In short, this case involves a true discretionary trust with no established pattern of distributions providing predictability about the future, and very little evidence of the value of Ms. Cottrell's beneficial interest at the time the trust was established versus at the time of trial. On the spectrum between certain pending receipt of trust property, and uncertain future receipt, Ms. Cottrell's interest fell closer to an uncertain future receipt of property. In my view, it cannot be said that the judge made a palpable and overriding error in concluding that there was no increase in the value of Ms. Cottrell's beneficial interest in the Family Trust during the relationship.

Disposition

[82] For the foregoing reasons, I would dismiss the appeal.

"The Honourable Justice Griffin"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

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