

CANADA / JUDGMENT

Williamson v. Williamson

2020 BCSC 108

COURT

Supreme Court of British Columbia

DECIDED

29 January 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 108 Williamson v. Williamson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Williamson v. Williamson,

2020 BCSC 108

Date: 20200129

Docket: 121449

Registry: Kelowna

Between:

Robert Morgan Williamson

Claimant

And:

Diane Louise Williamson

Respondent

And:

Lorne Jack (Trustee)

Respondent

Corrected Judgment: The place of hearing and place of judgment on the front page are corrected to show Victoria, B.C., on February 27, 2020.

Before: The Honourable Mr. Justice Punnnett

Reasons for Judgment

Counsel for the Claimant:

M.M. Sinclair

Counsel for the Respondent:

Diane Louise Williamson

N.W. Lott

Counsel for the Respondent: Lorne Jack

J.A. Hall and

C. Vaughan

Submissions Received:

From the Claimant

From the Respondent

From the Respondent

January 2, 2020

January 3, 2020

January 7, 2020

Place and Date of Hearing:

Victoria, B.C.

December 4, 2019

Place and Date of Judgment:

Victoria, B.C.

January 29, 2020

[1] The claimant seeks injunctive relief respecting a discretionary family trust, the trustee and protector of which is Lorne Jack, the respondent Diane Louise Williamson's father. The application arises because of actions and anticipated actions of the trustee, the latter of which arise from the "21-year rule" that will cause a deemed disposition of the Trust's assets at the end of December 2019.

[2] The specific orders sought are:

An order pursuant to s. 91 of the Family Law Act restraining the respondent, Diane Louise Williamson from instructing Lorne Jack to dispose of, transfer, hypothecate, encumber or dissipate any assets of the Trust except as set out in Schedule A hereto without prior court order or consent of the claimant in writing pending the trial of this matter.

An order pursuant to Supreme Court Family Rule 12-1 restraining Lorne Jack in his personal capacity and in his capacity as the trustee of the Trust from disposing of, transferring, hypothecating, encumbering or dissipating any assets of the Trust except as set out in Schedule A hereto or alternately, to add any additional beneficiaries to the Trust without prior court order or consent of the claimant in writing pending the trial of this matter.

An order that the restraining orders above shall bind any subsequent trustee appointed to the Trust.

- [3] Given the imminent deemed disposition on December 31, 2019, the application was dismissed on December 11, 2019 with reasons to follow. On December 16, 2019 counsel for the claimant raised with the Court the decision of the Supreme Court of Canada, *Yared v. Karem*, 2019 SCC 62, released on December 12, 2019. The Court invited counsel to provide submissions if they wished. They have now done so. Those submissions relating to Yared will be addressed later in these reasons.

Background

- [4] The parties Robert and Diane Williamson began to live together in a marriage-like relationship on either September 1, 1998, according to the claimant, or January 1999, according to the respondent, and were married on August 5, 2000.
- [5] The date of separation is also in dispute: the claimant asserting they separated on September 1, 2016 and the respondent stating it was in 2012. There are two children of the marriage, Connor Ian Williamson, born December 21, 1995, and Mackenzie Louise Williamson, born April 24, 2002. Connor is independent while Mackenzie is residing with the respondent.
- [6] The respondent's family owns and operates a family farm known as Firbank Farms, in Saanichton, British Columbia. There is an issue as to its acreage but it is somewhere between 70 and 115 acres.
- [7] The farm income is mainly derived from the sale of eggs and broiler chickens under quotas. The respondent's family has operated the farm since the 1940's, first in Cordova Bay, and now in Saanichton. Originally, the respondent's father and uncle handled the day-to-day operation of the farm but it is now managed by the respondent and her brother, Glen Jack.

- [8] The farm owns beneficial title to the lands on which it operates. The main Firbank Farm assets are the acreage and the quotas owned by a partnership of three companies, 575247 B.C. Ltd. ("247"), 575249 B.C. Ltd. ("249"), and 575262 B.C. Ltd. ("262"). The shareholders of 247 and 249 are the respondent's father and uncle.
- [9] 262 was incorporated in November 1998 and became a partner in the farm shortly thereafter. One-half (50) Class A equity shares in 262 are held by the Diane Murray Family Trust (the "Trust") and the other 50 are held by the Glen Jack Family Trust. Both the respondent and her brother each also hold 50 Class B voting shares without par value in 262. The respondent and her brother are the two officers and directors of 262.
- [10] The Trust was settled on January 1, 1999. At that time, the beneficiaries of that Trust were the respondent, the respondent's spouse (the claimant), and the respondent's children. When these proceedings were commenced, the respondent was, with her father, a co-trustee of the Trust. The Trust owns a 1/6 interest in the farm.
- [11] The 21-year deadline for disposition of the Trust set out in the Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.), expires on January 1, 2020. By letter dated August 19, 2019, counsel for the trustees of the Trust, gave notice that:
- a) Diane Williamson would be removed as a trustee of the Trust; and
 - b) Lorraine Jack, the respondent's mother, would be added as a beneficiary of the Trust.
- [12] In the August 19, 2019 letter, it was also noted that Lorne Jack, acting as sole trustee, intended to distribute all of the assets of the Trust before December 31, 2019 and although a final determination had not yet been made, distribution likely would not include the respondent.
- [13] The respondent's interest in the Trust appears to be the most valuable potential asset in these family proceedings. In January 1999, the partnership was valued at \$5,063,292. It is not in issue that its value has increased since then.

Position of the Claimant Robert Morgan Williamson

- [14] The claimant submits the respondent has an interest in the Trust given the Trust was allegedly set up for her benefit and she has entered into a contract of employment and provides services on behalf of 262 as a partner of the partnership. As such, she and her brother have taken over primary responsibility for running the farm.
- [15] The claimant alleges the proposed distribution to Lorraine Williamson and not the respondent attempts to defeat the claimant's claims. He goes so far as to declare it a "fraudulent conveyance."

- [16] His claim is against the increase in value of the farm pursuant to s. 84(2)(g) of the Family Law Act, S.B.C. 2011, c. 25 (FLA), as it is acknowledged the farm is excluded property under s. 85(1) of the FLA.

Position of the Respondent Diane Louise Williamson

- [17] The respondent submits that her interest in the farm is, and has only ever been, a beneficial interest in the Trust. That interest has always been subject to the trustee's absolute discretion. Her beneficial interest has never vested and has always been contingent. Any increase in the value of her beneficial interest is and always has been subject to the trustee's discretion. She opposes the relief sought stating it does not prevent the trustee from exercising his discretion but only delays it. Further, she submits that seeking to prevent a trustee from carrying out his obligations is not a basis for an injunction.

Position of the Respondent Trustee Lorne Jack

- [18] The respondent trustee opposes the injunctive relief sought stating he has taken the actions he has to preserve the farm as a family operation, to avoid it being broken up by having to sell assets and to address the 21-year deemed disposition deadline at the end of December 2019. He submits he has full discretion over the assets under the trust deed and that his actions are consistent with the Trust's history and its purpose. He notes as well that if he is prevented from disposing of the Trust's assets, very considerable tax consequences will ensue, resulting in the family facing an "enormous" tax bill. He submits irreparable harm will be the result, including possibly the sale of the farm.

Law and Discussion

- [19] The claimant relies on both s. 91 of the FLA and the Supreme Court Family Rules 12-1 for an injunction. As the order sought under s. 91 of the FLA depends on whether the injunctive relief is granted, I turn first to that relief.
- [20] The claimant seeks an order restraining Lorne Jack, the trustee, from distributing the Trust's assets as it is unlikely that any will be distributed to the respondent. It appears that is correct given the statements of intention of the trustee.
- [21] As various analogies were made respecting the nature of a trust, I turn first to what a trust is and is not.
- [22] A trust is not a separate entity like a corporation. It is a relationship that depends on trust property to exist. In *Bronson v. Hewitt*, 2013 BCCA 367, Newbury J.A. stated:
- [70] The trial judge noted -- correctly -- that a trust is not a separate legal entity but a "relationship". He cited the following passage from *Waters*, *supra*:

A trust comes to a close, and the trustee is entitled on a passing of his final accounts to a discharge, when the terms of the trust have been carried out. As we have seen, the terms may be of the simplest, requiring for instance the holding of land until the beneficiary is of age, or more complex, as when the trust creates a number of successive interests and confers upon the trustee extensive discretions and duties additional to those which are imposed by law. But whatever the terms, and in practice in almost all cases there is an instrument creating the trust which will contain those terms, the natural end of the trust is the moment when the trustee has properly transferred to beneficiaries all the remaining trust property in his name and possession, and has had his final accounts passed. [At 1173-74.]

(See also Underhill and Hayton, *supra*, at 385-6 and E.E. Gillese and M. Milczynski, *The Law of Trusts* (2nd ed., 2005) at 85: "A trust cannot exist without trust property ...")

[23] In *Quinn Estate*, 2018 BCSC 365, Funt J. reiterates this point:

[30] Unlike an individual (or a corporation), a trust is not a legal person; it is a relationship ...

[31] Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, eds., *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) at 3, describes the relationship as follows:

However, the relationship between the trustee, having duties and powers, and the beneficiary or purpose, having rights to compel performance of the trusts (or obligations upon which terms the trustee holds), is the traditional way in which the "trust" has been analyzed. And among lawyers of the common law tradition [the] following definition is generally regarded as being one of the best:

A trust is the relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one, and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust.

[Footnotes omitted.]

[24] As noted earlier, the trustee, Lorne Jack, is also the protector of the Trust. A protector is described in Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012), after describing the roles of a settlor of a trust, the trustee and the beneficiary at pp. 134-135:

But suppose the settlor chooses to retain powers, not as settlor, but in a manner in which he or another can exercise the power or powers. This is where the "protector" makes an entrance. The title of "protector" - guardian, committee, curator, adviser, among other names given to this role in trust instruments - is entirely a creature of practice. The term "protector" is not defined in Canadian case law, or in Canadian federal or provincial legislation.

[25] A trust is not an entity capable of holding property or commencing proceedings, such must instead be done in the name of the trustee: Taylor Ventures Ltd. (The Vincent Taylor Family Trust), 2005 BCSC 11 at paras. 53-55.

[26] At p. 47, Waters notes that trusts do share common features with other fiduciary relationships, such as the relationship between a company and a director:

As indicated above, the trust shares common features with other fiduciary relationships in terms of the duty of a fiduciary to act in good faith in the interests of the person to whom the fiduciary obligation is due. There are, however, important differences. The requirements for establishing a fiduciary relationship, as suggested above, are quite different from, for instance, the three certainties required for existence of an express trust. Further, a trust, whether express, resulting or constructive, involves property. A fiduciary relationship does not necessarily involve property ...

[27] The Trust Settlement Agreement in this instance provides:

(e) "Beneficiaries" means Diane Murray, the lawful spouse of Diane Murray from time to time (except the lawful but estranged spouse of Diane Murray as of the date of this Settlement) and the children of Diane Murray, whenever born or adopted,

...

(k) "Protector" means:

(i) Lorne Jack;

(ii) if Lorne Jack becomes incapable the persons, other than the Settlor, who are from time to time the attorney in fact, committee or other legal representative of Lorne Jack; and

(iii) after the death of Lorne Jack, the persons, other than the Settlor, who are from time to time the executors and trustees of the last will and testament of Lorne Jack, or if Lorne Jack dies intestate, the administrators of the estate of Lorne Jack;

...

LEGAL TITLE TO TRUST ASSETS

6. Any Assets from time to time constituting the Trust Fund will be held by and registered in the name of the Trustee or in the name of the Trustee's nominee or otherwise as the Trustee may decide. The Trustee is not liable for any loss to the Trust resulting from any act of the nominee in whose name an Asset is held.

...

TRANSFER TO ANOTHER TRUST

13. Notwithstanding any of the Trusts, powers and provisions herein, and subject to paragraph 14 hereof, the Trustee may in the Trustee's absolute discretion at any time and from time to time, transfer and convey the whole or any share, portion, part or parts of the Trust Fund, save and except any such share, portion, part or parts thereof which is indefeasibly vested in possession of one or more of the Beneficiaries, to any other trust or settlement (the "New Trust") whether established under or pursuant to the laws of the Province of British Columbia, any other Province of Canada, or any other jurisdiction whatsoever, to be held by the trustees of the New Trust with and subject to the powers and provisions of the New Trust, provided that the Beneficiaries of the New Trust must be one or more of the Beneficiaries of the Trust alive at the date of such transfer and that the respective interests and rights of the Beneficiaries with respect to the share, portion, part or parts of the Trust Fund so transferred and conveyed will under the New Trust be the same as or substantially the same, insofar as is possible under the laws of the jurisdiction governing the New Trust, as the interests and rights of the Beneficiaries to the Trust Fund under this Settlement. Upon such a transfer being made, the Trusts herein declared concerning the property comprised in such transfer will cease and determine and the said property will for all purposes be subject to the trusts, powers and provisions contained in the New Trust.

TRUSTEE'S POWERS

14. In addition to all other powers conferred upon the Trustee by the other provisions of this Settlement or by any statute or general rule of law, the Trustee has and is hereby given the power and authority in the Trustee's absolute and uncontrolled discretion at any time and from time to time to administer the Trust Fund in whatever manner the Trustee may determine and will have the right to take any action in connection with the Trust Fund and to exercise any rights, powers and privileges which may exist or arise in connection therewith to the same extent and as fully as an individual could if the individual was the sole owner of the Trust Fund. Without in any way limiting the generality of the foregoing, the Trustee will have the powers and authority set out in Schedule "A" attached hereto.

...

APPOINTMENT OF BENEFICIARIES

18. Lorne Jack, acting personally and not as a fiduciary, shall have the power to declare that any person or class of persons shall be included as a beneficiary or beneficiaries in addition to those persons defined in the definition of "Beneficiaries" in paragraph 1(e) provided that no person may be a beneficiary in respect of the Trust Fund if that person is the Settlor. If a Trustee who is the sole Trustee of the Trust is appointed as a Beneficiary of the Trust, the Protector must concurrently appoint a replacement Trustee, who is not a Beneficiary and the Trustee who is appointed as a Beneficiary will be deemed to have resigned immediately with notice being waived by the Protector. Any such addition will be made by deed naming

or describing the person or class of persons to be added and specifying the date or the happening of the event (not being earlier than the date of execution of the deed) upon which the addition shall take effect.

...

SCHEDULE "A"

TRUSTEE'S POWERS

Without in any way limiting the generality of paragraph 14, the Trustee will have the power and authority:

PROCEEDINGS AFFECTING THE TRUST FUND

- (r) to institute, prosecute and defend any suit or actions or other proceedings affecting the Trustee or the Trust Fund or any part thereof, to compromise or settle any matter of difference or to submit any such matter to arbitration, to compromise or compound any debts owing to or by the Trust upon evidence that to the Trustee seems sufficient, to make partition in whole or in part at public auction or private sale or otherwise upon any terms the Trustee deems advisable with any co-owners or joint owners having any interest in any properties comprised in the Trust Fund and to make such partition either by sale or by setoff or by agreement or otherwise (including where deemed desirable, provision for equality or exchange);

DISTRIBUTIONS

- (s) upon any distribution or division of the Trust Fund or of any part thereof to distribute or divide the same either wholly or in part in money or in other Assets of the Trust Fund and for the purpose of such distribution or division, and for any other purpose hereunder, to place a value on the Assets or of any share therein as the Trustee deems just and proper and any valuation is absolutely final and binding upon all persons entitled hereunder; to determine what share of any specific Asset will be given or allocated to any particular Beneficiary upon any distribution from or division of the Trust Fund and to distribute or divide the same subject to the payment of any amount as will be necessary to adjust the shares of the various Beneficiaries;

...

AMOUNTS PAYABLE TO BENEFICIARIES

- (z) to make amounts payable to one or more of the Beneficiaries by signing a trust minute under seal which irrevocably declares an amount to be payable to a Beneficiary at which time the Beneficiary will have a legally enforceable right to payment of that amount;

PAYMENTS TO BENEFICIARIES AND THIRD PARTIES

(aa) to issue promissory notes as negotiable instruments as payment in full of any amounts made irrevocably payable to a beneficiary or any other outstanding debt;

NON-ARM'S LENGTH TRANSACTIONS

(ab) to engage in any transaction authorized or empowered whether express or implied hereunder, with either the Trustee personally, and of the Beneficiaries or any persons related to them, including companies in which the Trustee, Beneficiaries or related persons are interested, provided that such transactions are on the same basis as might reasonably be negotiated with any stranger;

RECTIFICATION AND AMENDMENTS

(ac) provided any alteration, amendment, enlargement, change, correction or modification does not, in the opinion of the Trustee, prejudice the rights of the Beneficiaries hereunder:

- i. the Trustee may without reference to or the consent or concurrence of any Beneficiary, by supplemental indenture or otherwise, make any changes or corrections in this Settlement or any indenture supplemental hereto, which in his opinion are corrections or changes required for the purposes of curing or correcting any ambiguity or defect or inconsistent provisions or clerical omissions or mistakes or manifest errors contained herein or therein; and
- ii. the Trustee may, by supplemental indenture or otherwise, alter, amend, enlarge or modify the provisions contained in this Settlement or any indenture supplemental hereto if such alteration, amendment, enlargement or modification is, in the opinion of the Trustees, beneficial to the Beneficiaries or required for the purpose of complying with any statute of Canada or any Province thereof, or any order, rule or regulation made pursuant to such statute, or for the purpose of overcoming difficulties in the administration of the Trusts hereof.

[28] The claimant submits the Trust Settlement Agreement does not permit the trustee to make advances to newly appointed beneficiaries, relying on the definition of "Beneficiaries," the wording at paragraph 18 and the provision regarding "distributions" in Schedule A.

[29] The wording of the Trust Settlement Agreement does not restrict distribution to the respondent, her spouse and her children. Distribution can be made to any beneficiaries and paragraph 18 gives Lorne Jack the power to declare who are beneficiaries. I conclude the trustee has the power to do what he proposes. The issue then is whether an order should prevent him from doing so.

[30] The trust deed gives the Trustee "power and authority in the Trustee's absolute and uncontrolled discretion at any time and from time to time to administer the Trust Fund in whatever manner the Trustee may determine ". Waters describes such powers at p. 985:

The settlor or testator may create a power which by its nature is discretionary, or he may add that it is to be exercised at the discretion or at the absolute and uncontrolled discretion of the trustees. In the latter situation, he is attempting to underline that he wishes no interference with the trustees, and, since the beneficiaries have no such power to intervene in any event, his meaning can only refer to the courts.

- [31] That power assumes the trustee is not acting in breach of trust (Waters at p. 985, footnote 339). Waters also observes that the court may intervene if a decision of a trustee is so unreasonable that no fair dealing trustee would make the decision or where the trustee considers factors irrelevant to the discretionary decision (at p. 989). However, the underlying principal is that where such wording exists, the courts are more inclined to defer to the discretion of the trustee: Waters at p. 986. If a trustee exercises their discretion in good faith and not for any improper purpose, the court should not intervene: *Edell v. Sitzer* (2004), 187 O.A.C. 189, 2004 CanLII 654 (Ont. C.A.) at para. 13.
- [32] The issue raised by the application is what deference the court should give to a discretionary trust in a family law proceeding. In *Gartside v. Inland Revenue Commissioners*, [1968] 1 All E.R. 121 (U.K.H.L.), the court found that a beneficiary under a purely discretionary trust had no proprietary interest in the trust property, hence any "interest" in it as beneficiary could not be quantified: also see *Purtzki v. Saunders*, 2016 BCCA 344. Such a beneficiary has only the hope that the trustee will exercise their discretion in his or her favour. Counsel for the claimant submits *Gartside* is the "high-water mark" of the court's deference to a discretionary trust in a family law context.
- [33] Similarly, in *Delesalle v. Delesalle*, 2006 BCCA 445 at para. 12, the court found that s. 58(3)(a) (ii) of the Family Relations Act, R.S.B.C. 1996, c. 128 (FRA), had no application to a spouse's interest in a discretionary family trust where "nothing in the trust vested in any of the potential beneficiaries."
- [34] This line of reasoning also prevents parties in family law litigation from asserting a claim in potential inheritances not yet bequeathed. In *H.S.S. v. S.H.D.*, 2018 BCCA 199 at para. 74, the Court held:
- [74] I consider it settled that it is inappropriate for a court, in considering the financial resources of a family law litigant, to delve into the question of potential inheritances: *Graham v. Graham* (1984), 59 B.C.L.R. 27 (C.A.).
- [75] In *Graham*, the husband brought an application pursuant to the then R. 28 of the Rules of Court seeking to examine his father-in-law on various matters, including contributions by the in-laws to family assets, the existence of a present bequest, trusts in favour of the wife, and the wife's expectation of an inheritance. The chambers judge held that a potential inheritance was not property within the meaning of the FRA. He reached the same conclusion in respect of contingent interests, although he allowed questions relating to trusts in favour of the wife and the source of contributions to family property.

[76] In brief reasons for judgment, Mr. Justice Taggart for the court rejected the appeal. Concerning the possibility of the wife inheriting in the future, he said at 28:

How it can be said that the possibility of a parent making a bequest to a child is a matter now in question in the action I cannot understand. I think those contingencies are clearly not matters within the provisions of R. 28(1) and, clearly, they are not matters comprehended by the matters in issue between the parties which arise out of the provisions of the Family Relations Act.

[77] By that statement I understand the court to say that the testamentary plans of strangers to family litigation do not bear on issues between the parties. Not only is this proposition solidly based in the concepts of relevance and materiality, it avoids consequential decisions built on the sandy foundation of speculation, prevents undue expansion of the court's field of inquiry, and respects the privacy and autonomy of strangers to the litigation.

[78] This conclusion from Graham has not been doubted in our jurisprudence: see *Nowak v. Nowak*, 2014 BCCA 409 at para. 109, leave to appeal ref'd, [2014] SCCA No. 561; *Todd v. Freeman*, 2005 BCCA 519 at para. 38; *D.I. v. S.I.*, 2011 BCSC 1788 at para. 94.

[35] However, Saunders J.A. for the court in *H.S.S.* then noted that contingent trust interests differ from potential inheritances:

[79] The law as it relates to contingent trust interests is more complicated, reflecting a variety of models of beneficial interests. Much of the jurisprudence was developed in cases requiring the identification of contingent trust interests as family assets, but certain cases under s. 65(1) also bear on this question.

[80] In my view, generally speaking, trust interests that are contingent and discretionary should not inform the analysis under s. 65(1)(e), though that analysis may admit of contingent trust interests that are not dependent on the exercise of another person's discretion. As I will explain, this distinction ensures the interests at issue are relevant because it avoids speculation and tracks the extent to which a party will actually derive or enjoy the benefit of those interests.

[Emphasis in original.]

[36] After reviewing several authorities, she stated:

[86] I take from this discussion that whether an interest in a trust qualifies as a family asset turns on how the substance of that interest is appropriately characterized and, in particular, the extent to which that interest can be described as being "owned". Generally speaking, this may be determined by whether the trust is discretionary or fixed. However, as the question is one of substance and not form, sufficient certainty that the trust assets will be transferred to the purported owner can fulfill this criterion. The enquiry, in other words, does not end with the analysis of discretionary words in the trust deed, but rather requires consideration of the possibility events will unfold as if the trust were fixed.

- [37] A party's interest in a discretionary trust can be vested and qualified as property to be divided in a family law proceeding. That however depends on "sufficient certainty" a party will "actually derive or enjoy the benefit" of those interests as if the trust were fixed. The facts then must move the potential interest from speculative to one that is more certain.
- [38] For example, in *Purtzki* the father brought a family home into the relationship and transferred it to a Home Trust. The trustees were friends of the father and likely to honour his wishes. He occupied the home and had the ability to ask the trustees to dispose of it to him or finance it. The Court found at para. 68, "although the terms of the Home Trust Agreement suggest that it is discretionary, in reality the Home Trust functions more closely to a fixed trust in that the Father has always enjoyed the unfettered use of the entirety of its only significant trust asset." In those circumstances the Home Trust was found to be a family asset under s. 58(3)(a)(ii) of the FRA.
- [39] The respondent trustee raises the application of cases decided under the FRA, not the FLA. Section 58(3)(a)(ii) of the FRA provided:

Family Asset Defined

58.(1) Subject to section 59, this section defines family asset for the purposes of this Act.

- (2) Property owned by one or both spouses and ordinarily used by a spouse or a minor child or either spouse for a family purpose is a family asset.
- (3) Without restricting subsection (2), the definition of family asset includes the following:
 - (a) If a corporation or trust owns property that would be a family asset if owned by a spouse,
 - (i) a share in the corporation, or
 - (ii) an interest in the trust

owned by the spouse;

[40] Section 84 of the FLA provides:

Family Property

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

- (a) on the date the spouses separate,
 - (i) property that is owned by at least one spouse, or
 - (ii) a beneficial interest of at least one spouse in property;
- (b) after separation,

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

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

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

...

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

(i) the relationship between the spouses began, or

(ii) the excluded property was acquired.

(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.

(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

Excluded Property

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

...

(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.

[41] The respondent trustee submits the FLA excludes discretionary trust property.

- [42] The claimant submits that ignores the central question of whether property was a "family asset" under the Family Relations Act in *H.S.S. v. S.H.D.* and whether the respondent's interest in the Diane Murray Family trust is "family property", remains the same. Further that it is a threshold question that decides whether the property is included in the property to be divided under the legislative scheme and that there are no further differences in the two pieces of legislation that would prevent the court from applying *H.S.S. v. S.H.D.* in this case.
- [43] The claimant submits the speculative gap is bridged so there is sufficient certainty the respondent will enjoy the benefit of her interest in the Trust assets based on several factors, including: the Trust is set up in her name, until recently she was co-trustee with her father, the beneficiaries until recently were herself, her spouse and her children, she has received disbursements from the Trust, there is evidence the Trust was set up to ensure continuation of the family farm for those members of the family who wished to continue as farmers, she and her brother ran the farm, she has stated she is effectively a partner, she and her brother hold a one-third ownership interest in the farm through 262, her remuneration is the same as the other three effective partners and she is a director and officer of 262.
- [44] The exercise of the trustee's discretion has not been shown to be for an improper purpose. His concern is the survival of the Trust and its assets for the family and their descendants. The injunctive relief sought by the claimant is potentially detrimental to that purpose.
- [45] I now turn to the s. 91 relief sought. Section 91 of the FLA states:

Temporary orders respecting protection of property

91.(1) On application by a spouse, the Supreme Court must make an order restraining the other spouse from disposing of any property at issue under this Part or Part 6 [Pension Division] until or unless the other spouse establishes that a claim made under this Part or Part 6 will not be defeated or adversely affected by the disposal of the property.

- (2) The Supreme Court may make one or more of the following orders:
- (a) for the possession, delivery, safekeeping and preservation of property;
 - (b) for the purpose of protecting the applicant's interest in property from being defeated or adversely affected,
 - (i) prohibiting the other spouse from disposing of, transferring, converting, or exchanging into another form, property in which the applicant may have an interest, or
 - (ii) vesting all or a portion of property in, or in trust for, the applicant.

- [46] The claimant submits the respondent's interest in the Trust is at issue as the claimant has asserted an interest in the respondent's legal or beneficial interest in 262. He argues that the order sought under s. 91 would not prevent the respondent from disposing of the Trust as she is no longer a trustee of that Trust and thus cannot dispose of it. What is sought is an

order preventing her from instructing the trustee to dispose of it because if an order is not granted the Trust assets will be disposed of. The claimant also says the respondent has not shown that the interest claimed will not be defeated or affected by the "disposal" of the property.

[47] The short answer is, the respondent is no longer a trustee, does not control the Trust and in any event, there is no evidence she asked or intends to ask the trustee to dispose of the Trust assets.

[48] I turn next to the effect, if any, of the Yared decision.

Yared Decision

[49] As the injunction application was dismissed with reasons to follow, the claimant in making submissions on Yared is apparently seeking to re-open the matter; however, there is no application to re-open before the court. Given that preliminary issue is not addressed by the claimant who bears the onus of persuading the court the matter should be re-opened, that concludes the issue.

[50] However, if implicitly the claimant is seeking to re-open, I will address the issue of re-opening and then the impact of Yared if re-opening were permitted, although for the reasons that follow, I decline to do so.

[51] The test for re-opening is well settled and was summarized by Burnyeat J. in *Wu v. Sun*, 2010 BCSC 86:

[3] In *Sykes v. Sykes* (1995), 6 B.C.L.R. (3d) 296 (C.A.), *Inmet Mining Corp. v. Homestake Canada Inc.* (2002), 23 C.P.C. (5th) 348 (B.C.S.C.) and *Lochhead v. Lochhead*, [2003] B.C.J. No. 549 (S.C.), the following principles were established for when it is appropriate for a trial judge to exercise his or her discretion to reopen a case to reconsider an issue:

- (a) A trial judge has an "unfettered discretion" to reconsider an issue after pronouncement of judgment but before entry of the final order: *Clayton v. British American Securities Ltd.*, [1935] 1 D.L.R. 432 at 440; [1934] 3 W.W.R. 257, at 295 (B.C.C.A.);
- (b) This power must be "exercised sparingly" to avoid fraud and abuse of process;
- (c) The underlying rationale for the unfettered discretion is to prevent a miscarriage of justice: *Clayton*, supra; *Kemp v. Wittenberg*, [1999] B.C.J. No. 810, (B.C.S.C.);
- (d) In general, reconsideration of an issue is not an alternative to an appeal. Reconsideration applications will not be entertained where they are motivated by tactical considerations, particularly where the argument advanced could have been advanced at trial: *Sykes*, supra;
- (e) where new, relevant evidence is adduced which was not available at the time of the original trial: *Sykes*, supra;

- (f) if the original judgment is in error because it overlooks material evidence: Sykes, *supra*; Braun Investment Group Inc. v. Emco Investment Corp. (1985), 62 B.C.L.R. 397; and 429725 B.C. Ltd. v. Round Table Pizza Ltd., [1996] B.C.J. No. 177 (S.C.);
 - (g) if the original judgment is in error because it misconstrues material evidence: Sykes, *supra*;
 - (h) if the original judgment is in error because it misapplies the law: Sykes, *supra*;
 - (i) if the original judgment, although not in error on the day it was given, becomes erroneous because of a change in the law: Grigg v. Berg Estate, [2000] B.C.J. No. 1080;
 - (j) where there has been a change in circumstances between the date the judgment was pronounced and the time of the subsequent application, provided the change in circumstances relates to something fundamental to the original reasons for judgment: Cheema, *supra*;
 - (k) where the original judgment was "so expressed as to lead to uncertainty and confusion": Fame Construction Ltd. v. 430863 B.C. Ltd., [1997] B.C.J. No. 1053 (B.C.S.C.).
- [4] The burden of persuasion rests with the applicant who must show that a miscarriage of justice would probably occur unless the issue is reconsidered and decided in his or her favour: Vance v. Vance (1981), 34 B.C.L.R. 209 (B.C.S.C.);
- [52] As reasons for judgment have not yet been given, the only ground for re-opening is the alleged change in the law following Yared after the injunction application was dismissed on December 11, 2019.
- [53] Relevant to the re-opening is that because of the significant tax consequences faced by the Trust if not wound up at the end of December 2019, the trustee has, as he indicated he intended to do, distributed the Trust assets and wound up the Trust. The issue then is moot and an injunction would have no effect.
- [54] In addition, the decision in Yared would not affect the decision to dismiss the injunction application. While a decision under the Civil Code of Québec, S.Q. 1980, c. 39 (Civil Code), may have application in British Columbia, Yared is in any event distinguishable from the case at hand, both factually and legally.
- [55] Yared involved a claim in Quebec under its Civil Code. The appellants were the liquidators of the interest of their deceased sister, Ms. Yared. They sought a declaration that the value of the family residence held under a discretionary trust be included in the division of the family patrimony. The settlor of the trust was the sister-in-law of the respondent, Ms. Yared's husband, and the trustees were the respondent husband and his mother.
- [56] The majority of the Court concluded that Ms. Yared had a right to a share of the family patrimony that "cannot be denied by the use of a trust" (at para. 71). The decision rested on the interpretation of art. 415 of the Civil Code regarding "rights which confer use" in relation to a family patrimony.

- [57] In Yared the asset at issue was the family residence which was acquired by the trust using funds provided by the spouses. It was critical to the Court's eventual decision that the husband lived in and had effectively complete control of the family residence as trustee and "appointer" of the trust. In the case at bar the asset in issue is a farm that was not used as a family home or asset like the family residence in Yared. Here the trust assets are the acreage and farm business established by the respondent's family in prior generations. The parties in this case did not provide the funds to acquire the farm. The claimant had minimal involvement in the farm. The respondent is an employee of the farm operation with the Trust control resting with her father Lorne Jack in his capacity as protector and trustee. Hence, factually, Yared is distinguishable.
- [58] The claimant submits, "there is precedent for British Columbia courts applying the spirit of decisions from the Supreme Court of Canada despite the originating decision coming out of a different province with a different legislative scheme and there being substantial differences between British Columbia legislation and that of the other jurisdiction." The claimant for example refers to Hyrniak v. Mauldin, 2014 SCC 7, respecting summary trial procedures in Ontario and the fact the B.C. Court of Appeal considered Hyrniak in Morin v. 0865580 B.C. Ltd., 2015 BCCA 502 para. 48.
- [59] While the claimant advances several legal arguments as to why Yared should be applied in B.C., I need not address them as Yared involves the legal question as described by the Court as "the proper interaction between these two institutions of Quebec civil law: the family patrimony created by art. 414 of the Civil Code of Quebec (C.C.Q. or Civil Code) and the trust under art. 1260 C.C.Q" (at para. 2). In B.C. the FLA enacted in 2013 clarified that trust interests are family property. Yared has little relevance in this application for injunctive relief.
- [60] For these reasons, I would not permit re-opening of the matter. Even had re-opening been permitted, I am not satisfied Yared changes the analysis nor findings I have set out in these reasons. I make no determination respecting any potential application of Yared at trial.
- [61] The application is dismissed.

Costs

- [62] Unless counsel wish to make submissions on costs, the successful respondents shall have their costs of the application.

"The Honourable Mr. Justice Punnett"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/01/2020BCSC0108cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/williamson-v-williamson-2020>

Prepared on 29 October 2026 · Esheria