Family Relations Act Claims Against Trust Interests

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I. INTRODUCTION

The *Family Relations Act* has specific provisions which deal matrimonial property claims against trust interests. The relevant provisions are:

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 of 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;

(b) if property would be a family asset if owned by a spouse, property

(i) over which the spouse has, either alone or with another person, a power of appointment exercisable in favour of himself or herself, or

(ii) disposed of by the spouse but over which the spouse has, either alone or with another person a power to revoke the disposition or a power to use or dispose of the property;

II. CLAIMS UNDER S.58(3)(a)(ii)

In order to succeed with a claim pursuant to subsection 58(3)(a)(ii), the claimant must establish that:

(a) his or her spouse has an interest in a trust; and

(b) property owned by the trust was ordinarily used for a family purpose.

The first fact is usually evident and is generally not in issue. The litigation usually centers on the second requirement and, if it is met, the remedy available.

The assets of these trusts vary significantly. They can be liquid investments such as cash or securities or land, vehicles or other chattels. They often include shares in closely held family companies controlled by the beneficiary's family.

Ordinary use for a family purpose is easily established in the case of residential property which is occupied on more than a very occasional basis. Recreational property which is used for vacations, even once a year, over a period of years will be found to have been ordinarily used for a family purpose. Undeveloped land has been held to have been ordinarily used for a family purpose where it was adjacent to other property on which the parties vacationed and was used incidentally by the parties (for walks and boating): *MacLean v. MacLean (1990), 28 RFL (3D) 103 (BCSC)*. Such findings turn on the nature and frequency of use. The more difficult cases turn on the intended use of the asset(s). It has been held that where property was intended to be used for the future security or enjoyment of the family, such intention can amount to ordinary use for a family purpose: *Tezcan v. Tezcan (1990), 44 BCLR (2d) 343 (SC); MacLean*. In *Hefti v. Hefti (1998) 57 BCLR (3d) 171,* this approach was confirmed, and perhaps expanded by the following dicta of Finch, J.A. (at pp. 179-180):

> In my respectful view, in the absence of clear evidence to the contrary, it would seem to be a natural inference that monies inherited by one spouse would, in the usual course, be used to the mutual benefit of both parties to the marriage, whether for present or future purposes, accepting always that upon a marriage breakup such assets may be reapportioned in the inheritor's favour.

Counsel for the husband contends in the alternative that if the inheritance monies should be held to be family assets, they should be reapportioned 100% in his favour.

In my view, in the absence of any finding by the learned trial judge as to the use of these assets for future financial security, and in the absence of persuasive evidence that there was no such mutual intention, I would hold that the inherited accounts are family assets because they must be taken to have been held, as a matter of natural and probable inference, for the purposes of providing both parties with financial security in their later years.

As will be noted later in this paper, the dicta of Finch J.A were not adopted by the two other members of the Court of Appeal in *Hefti.* Nevertheless, they are an indication of the increasingly broad interpretation of "ordinary use for a family purpose". The provisions of s.60 are relevant, and sometimes decisive, where there is little or no evidence regarding the use of an asset:

> **Onus of Proof**
>
> **60** The onus is on the spouse opposing a claim under section 56 to prove that the property in question is not ordinarily used for a family purpose.

Where the asset of the trust is real estate, vehicles or other chattels, evidence of ordinary use tends to be more obvious. That may not be the same where the assets are securities, cash or other "passive" investments. The distinction that is made in the latter cases is between the use of income from the trust as opposed to capital held by it. It has generally been held that the "mere"

use of income alone from assets (including assets held by a trust) does not necessarily amount to ordinary use of the assets themselves for a family purpose: *Stuart v. Stuart (1996), 76 BCAC 30; Bastin v. Bastin (1996), 26 BCLR (3d) 223 (SC)*. However, consistent use of income, over many years for family purposes may convert the asset or trust interest into a family: *Starko v. Starko, [1986] BCD Civ*. 1682-02 *(SC); Tezcan*. The distinction is still an available defense, although its effectiveness has been weakened by claims based on intended use.

The use of capital assets usually takes the form of either an advance or a loan by the trust to the beneficiary. In determining whether such transactions amount to ordinary use for a family purpose, the Court will look to the frequency and amount of the advances as well as to the use to which the funds were put: *Grove v. Grove, [1996] Fam. L.D. 61 (BCSC).*

III. CLAIMS UNDER S. 58(3)(b)

In *Francis v. Francis (1998)*, *53 BCLR (3d) 50 (SC)*, the claimant sought to apply the provisions of subsection 58(3)(b). Cases dealing with this subsection are rare because the necessary facts seldom arise in the matrimonial context. In that case, the parties had rolled their business assets into a family holding company in exchange for preferred shares. The voting shares of the holding company were held by a newly created discretionary family trust. The trust was of the type commonly used by high income families for income splitting. The beneficiaries were the parties' children and the wife. The husband was the sole trustee with absolute discretion with respect to the distribution of capital and income. By the terms of the trust indenture, the trustee had the power to name additional beneficiaries. The Court held that, in the absence of a specific restriction in the trust indenture, it was open to the husband to add himself as a beneficiary and to then distribute all trust assets to himself. This was held to amount to a "power of appointment exercisable in favour of " the husband. A reading of this case indicates that the Court was persuaded that the trust was nothing more than a vehicle to minimize income and capital gains taxes. The case is also worth noting as one where the Court essentially "pierced" the trust and declared assets held by the trust to be family assets notwithstanding the position taken by the Public Trustee, on behalf of the infant beneficiaries.

IV. THE SCOPE OF S. 65(2)

Section 65(2) of the *Act* provides as follows:

Judicial reapportionment on basis of fairness

65(1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to

(a) the duration of the marriage,

(b) the duration of the period during which the spouses have lived separate and apart,

(c) the date when property was acquired or disposed of,

(d) the extent to which property was acquired by one spouse through inheritance or gift,

(e) the needs of each spouse to become or remain economically independent and self sufficient, or

(f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

(2) Additionally or alternatively, the court may order that other property not covered by section 56, Part 6 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.

(3) If the division of a pension under Part 6 would be unfair having regard to the exclusion from division of the portion of a pension earned before the marriage and it is inconvenient to adjust the division by reapportioning entitlement to another asset, the Supreme Court, on application, may divide the excluded portion between the spouse and member into shares fixed by the court.

As discussed earlier, in *Hefti*, Finch, J.A. was of the opinion that, in the absence of evidence to the contrary, the Court could conclude as a natural and probable inference that inherited funds were intended by the parties to be used for the future security of both parties. Such a finding could then be treated as an indication of ordinary use for a family purpose making those assets family assets.

His Lordship then dealt with an alternative submission on the following basis:

> During counsel's submissions, we raised the question whether these monies might fall within the ambit of "other property" in s.51 (now s.65(2)) which provides:
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> > "Additionally, or alternatively, the court may order that other property not covered by s.43 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse (my emphasis)."
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> This language appears to make available, for the purposes of alleviating unfairness, all property owned by either spouse, whether it is a family asset or not. In my view, even if the three inherited accounts did not qualify as family assets under s.43 they would still be available for reapportionment to redress any unfairness found to exist on the criteria set out in s.51. Assets falling under this provision would not, of course, be subject to the prima facie equal division provided for by s.43(2). But they could be used in whole or in part, for example, to assist a spouse in becoming or remaining economically independent or self-sufficient (s.51(c)). In view of my conclusion that the inherited accounts are family assets it is unnecessary to consider this provision further.

In separate reasons, concurring in the result (that the wife should receive a portion of the inherited funds), MacEachern, C.J.B.C. did not adopt the approach of Finch, J.A.:

> I am not able to agree, however, that the inherited property in this case was ordinarily used for a family purpose under either section 45(2) or 42(3)(c) of the Family Relations Act so as to become family assets. These assets were not used, ordinarily or at all, beyond talking and thinking about them as a possible source of future retirement income.

As Mr. Justice Finch notes, the trial judge found specifically against these assets being family assets, and I am not satisfied that the authorities cited by Mr. Justice Finch finally establish that inherited wealth becomes a family asset in the circumstances described in this case.(p.181)

The Chief Justice went on to concur in the result, but by holding that the inherited funds were available for division pursuant to s.65(2). The reasons do not elaborate on this conclusion. Cumming , J.A. concurred in the judgment of the Chief Justice.

The significance of *Hefti* is that it represents a clear ruling that s.65(2) can be used by a trial judge to effectively divide and apportion an asset which is found not to be a family asset in order to address unfairness under s.65(1). In the earlier decision in *O'Riordan v. O'Riordan (1985)*, *46 RFL (2d)180 (BCSC),* Chief Justice MacEachern considered a submission that s.65(2) made assets that were not found to be family assets nevertheless available for division on the same basis as family assets. He rejected that analysis and described the application and scope of s. 65(2) in this way at p. 182:

> I cannot give effect to this creative submission. To do so would be to wipe out all need for the restrictive provisions of s.51(a) to (f) (now s.65) and would permit the court to vest any property of a spouse in the other spouse if unfairness results from an equal division of family assets. Perhaps that is what the law should be, but I do not think that is what the legislature has said. Rather, I think the passage just quoted empowers the court to adjust property ownership wherever an equal or unequal division of family assets is unfair, such as by giving a family asset to one party rather than having it liquidated or divided, and by compensating the other party, if necessary, by vesting a non-family asset in the other spouse in order to achieve fairness. There was nothing unfair about the division of this couple's family assets except that they were practically non-existent. The plaintiff's claims under s. 51 must be dismissed.

It must be assumed that the Chief Justice's judgment in *Hefti* is consistent with *O'Riordan* and that s.65(2) is not a general licence to treat assets, other than family assets, as being equally available for distribution. It appears that, in order for the subsection to come into play, there must at least be a reapportionment issue under s.65(1) and an inability to address the perceived unfairness by resorting only to the family assets. Beyond that, there are no clear principles governing the application of s.65(2).

V. VALUATION OF THE INTEREST

The valuation of the interest of a contingent beneficiary of a trust is difficult, if not impossible. A fixed monetary judgment is generally only available where the trust interest in fully vested by the trial date and hence no longer "contingent". *MacLean* was such a case as the trust assets had vested absolutely in the spouse who was the beneficiary upon his thirtieth birthday. They remained undistributed only because of a restraining order in the matrimonial proceedings.

In most cases, the trust is discretionary with respect to both income and capital. The trustee has an absolute discretion to retain or pay out all or none of the capital and to prefer one or more beneficiaries over others. The beneficiary's entitlement to a share of the trust assets may not vest until a particular date or the happening of a specified event. However, the authorities have viewed this as a valuation issue only and not one of entitlement.

The usual approach taken in valuing and dividing contingent trust interests is to impose a constructive trust on the beneficiary requiring him or her to share any future benefits received from the trust in such proportion as the Court deems fair. Such an order was made in *Grove.* This appears to be the only practical method of dividing such interests without requiring the beneficiary to account immediately for benefits which may not be received for many years, if ever.

VI. DISCLOSURE OF TRUST DOCUMENTS AND FINANCIAL RECORDS

The disclosure of documents relating to the trust interest is sometimes a contentious issue in matrimonial cases. The general rules applicable to discovery of documents apply in these cases, so that the beneficiary must list and produce all relevant documents within his or her possession or control. This would include all documents which he or she could demand from a trustee. The issue becomes contentious when the beneficiary denies having access to the documents. In *Fortier v. Fortier [1996] Civ. L.D. 334 (BCSC)*, the husband was the trustee of the family trust and the wife sought disclosure of trust documents in his possession or control. The husband refused to produce the documents on the basis that he received them only in his capacity as a trustee. The Court held that, because the wife was a contingent beneficiary, she had a right to inquire into the affairs of a trust. Such an inquiry entitled her to demand access to the documents from the trustee. The case would not apply to situations where neither of the parties was the trustee. In such cases, the applicant would have to resort to rule 26(11) for an Order compelling production of documents in the possession of the trustee as was done in *Bergen v. Gooodwyn, [1998] Civ. L.D. 316 (BCSC).*

If the matrimonial action includes a claim for child support against the beneficiary, s.21(1)(g) of the *Federal Child Support Guidelines* requires a party who is a trust beneficiary to produce a copy of the trust settlement and its three most recent financial statements.