When Trust Law Meets Family Law: A Comparative Review of Discretionary Trusts and Marital Property Division

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1. Introduction and Overview

For the private client practitioner, the question of what value an interest in a discretionary trust has often elicits the answer that it is "nominal". This response has been the accepted orthodoxy based on traditional trust law concepts using "fair market value" as the enshrining principle. The assumption that an interest in a discretionary trust likely has only nominal value permeates general thought in estate planning, and impacts how we structure client's affairs in using discretionary trusts, whether for tax minimisation or general wealth protection, including on matrimonial breakdown and against creditors. As estate planners, in advocating to clients that the "magical umbrella" of the discretionary trust will serve and protect against the many stormy vicissitudes of life, the notion that a discretionary interest has negligible value is often implicit.

But recent developments in the arena of the matrimonial courts, as well as in emerging professional valuation theory, challenge what now appears to be the simplistic notion that no, or only nominal, value should attach to an interest in a discretionary trust. As advisors, it is important we take note, and assess and redefine the assumptions we make and the advice we give in creating and implementing tax minimisation and wealth protection strategies using discretionary trusts.

2. Traditional Trust Law Principles

In order to properly address the issue of valuation of an interest in a discretionary trust, it is first important to understand and characterise the nature of the property rights of a beneficiary of a discretionary trust.

Traditional trust law principles are clear that a person who is named as the object of trustee discretion to pay income or capital in his or her favour does not have an existing property interest. In contrast, a person who has a fixed, vested, vested subject to divestment, or purely contingent capital or income interest in a trust has an existing property interest.

What interest, if any, can the object of a discretionary power then be said to have? It would seem that from a pure property law viewpoint, he or she only has what is termed an "expectancy", but not an existing property interest. He or she has the right to be considered by the trustees as a recipient of benefits under the trust in accordance with its terms, and for the trustees to put their mind to this issue. If the trustees decide to distribute, he or she has the right to have the trustees exercise their discretion in good faith, taking into account proper factors and considerations. As such, he or she has rights which constitute what in legal terms are called equitable "choses in action".

But what value, if any, can be ascribed to what is a mere expectancy? If the discretionary power may never be exercised in one's favour, and if there is no legal right to ensure it is, or if exercised, to know the amount of benefit; and if the right to be considered is not assignable to anyone else by the object of the power, given the object has no proprietary interest to transfer since it is exclusive to the person named as the object[1], how can such an interest possibly have value? Is it any different than any other expectancy, which has no ascertainable value, such as the possibility that one may inherit in future under a living relative's will? Or receive a birthday gift from a friend or loved one? This is the conundrum faced by trust and property law commentators.

The response by trust and property law academics and others on the question of the value to be placed on an interest in a discretionary trust has often been cautious and tepid. The approach has been to see the cup "mostly empty", versus the cup "half full", and to take the view that there is negligible value.

But when trust law intersects with matrimonial courts charged with ensuring equitable treatment of spouses in the division of property, as courts of equity, such a response has been deemed wholly unsatisfactory, resulting in a far different response, as will be discussed below.

3. Approach of Matrimonial Courts in Several Common Law Jurisdictions

A. Canada

(i) The Threshold Issue: Is an Interest in a Discretionary Trust "Property"?

The treatment of trust interests by matrimonial courts in Canada for purposes of property division has been considered in a few, but growing, number of cases. New ground-breaking family law legislation in the province of British Columbia has, perhaps for the first time in any jurisdiction, expressly included aspects of a discretionary interest in a trust for purposes of marital property division.

In *Sagl v. Sagl*[2], the Ontario Court dealt for the first time with a factual situation involving whether an interest in a fully discretionary family trust was subject to equalisation under the *Family Law Act* (Ontario). Interestingly, the court did not deal in any considered way with the threshold interest of whether a discretionary interest is "property" under the relevant definition under the *Family Law Act*, which only refers to "any interest, present or future, vested or contingent…". The court referred to what was in fact a discretionary interest as being a contingent capital interest.

Commentators even predating *Sagl*[3] suggested that, notwithstanding the niceties of pure property law, a family law court would likely be inclined to give a broad definition to the term "property" in light of the objectives of the legislation and in particular, judicial recognition of the concepts of "fair value" and "value to owner" as distinct from "fair market value".

This was certainly the case in *Kachur v. Kachur*[4], where the Alberta Court considered whether the husband's interest in a discretionary trust under which he and his children were discretionary objects was "property" under the Alberta *Matrimonial Property Act*, which has a broader meaning than the Ontario legislation. The court approached the issue by determining whether the children had an interest in the trust, on the basis that the children had whatever could not be property of the spouses. By deduction of the children's interest, the amount of the husband and wife's interests would thus be determined.

The issue of whether an interest in a discretionary trust is "property" under the Ontario *Family Law Act* may still be a live issue since it has never been fully considered and decided by an Ontario court, notwithstanding a lot of water that has passed under the bridge on this issue since *Sagl*, and undoubtedly a multitude of marital property settlements that have been arrived at where this assumption has been made.

Given the stance of matrimonial courts, and the expansive interpretation that would likely infuse the meaning of "property" should this issue be considered in future, and in particular in the context of the notion of "value to owner" (as distinct from "fair market value"), as will be dealt with later in this article, the possibility that a family court would come to any other conclusion but that a discretionary interest is property for the purposes of the Ontario legislation appears to be a non-starter. To achieve the overall objectives of the Ontario legislation, there would appear no rational basis for distinguishing between a discretionary interest and other types of trust interests for purposes of inclusion in family property. The issue then becomes one of valuation.

Any ambiguity which exists in many jurisdictions with regard to whether a discretionary interest is "property" for purposes of division of marital property has been put to rest in the province of British Columbia as a result of new legislation effective March 18, 2013. The *Family Law Act* (British Columbia) expressly provides that the increase in the value of a beneficiary's interest in a discretionary trust which is settled by a person other than the spouse and to which the spouse did not contribute is subject to division, although the value of the discretionary interest itself is excluded property. No provisions deal with valuation. Family property has a broad definition and includes all property in which one spouse has a beneficial interest, subject to certain exclusions.

(ii) Valuation of a Discretionary Interest in a Trust

How have Canadian matrimonial courts dealt with the challenging issue of valuing an interest in a discretionary trust?

A survey of what minimal case law exists on point is relevant with a view to developing applicable principles on this issue. Critical to this analysis is the definition of value used by matrimonial courts. Case law has established that, given there is no definition of value under Ontario's *Family Law Act*, the court can apply different definitions than simply fair market value, including "value to owner".

The concept of "value to owner" refers to all of the economic and non-economic benefits that accrue from property ownership.[5] The definition of fair market value often used by Canadian courts is the highest price available in an open and unrestricted market between informed and prudent parties, acting at arm's length and under no compulsion to act, expressed in terms of cash.[6]

Using the concept of value to owner, the issue becomes not what one would pay for a discretionary interest as in a commercial transaction, but what one would pay *not* to lose the discretionary interest, i.e. its value to the owner. The concept of fair market value is considered not appropriate in valuing trust interests in order to achieve a fair result since they may not be readily sold, nor in the case of discretionary interests are they transferable.

It is fair to say the courts have often been faced with making decisions on value in a vacuum without benefit of actuarial or professional valuation reports or other expert evidence. What has emerged as a result are several decisions in the Canadian setting which arguably are generally *ad hoc*, with little evident methodology. There is an acute need for a principled approach to the issue of valuation of discretionary trust interests, including from the stance of professional valuation theory, where this subject appears to be in its infancy.

For example, in *Sagl*, the sole asset of the family trust of which the husband, his children and remoter issue were dicretionary beneficiaries, was 98% of the common shares of a holding company controlled by the husband through his preferred shares, which in turn owned the shares of the husband's operating company. The trust was established prior to the husband's marriage, as part of an estate freeze to minimise capital gains liability on the husband's death. The original trustees were the husband, and two close friends and business associates.[7]

The court rejected the wife's argument that the value of all of the common shares held by the trust should be included in the husband's net family property, and held the trust was legitimately created after receiving income tax and estate planning advice two years prior to marriage, with no evidence that it was done so in order to defeat the wife's interests, and stated that the trust was not a sham.

In coming to its conclusions on value, the court advised it did so after having regard to trust law, the definition of property (but with no explanation), and the evidence as to what the intention was at the time of creation of the trust. It accepted and applied the husband's "compromise" but simplistic submission that the court treat the trust fund as if there had been a deemed realisation among all of the capital beneficiaries on the date of marriage and on the valuation date, less contingent income taxes, which resulted in a *pro rata* allocation among the husband and children.

In *Kachur*, a family trust was set up in 1994 as part of an estate freeze to defer and minimise capital gains tax. The family trust purchased new common shares of the holding company which owned the shares of the husband's moving and storage company. The trustees were the husband, and two of his close friends, with the husband, his children and grandchildren discretionary objects, to whom the trustees could distribute income and capital in their discretion prior to, and at, the division date. Dividends were paid from the trust only to the three children of the husband and wife for income splitting purposes. These funds were administered by the wife for the children's benefit.

The court had ordered that the trust was owned by the spouses for purposes of distribution of their matrimonial property between them under the relevant Alberta legislation, as discussed above, but that the spouses' interest was subject to any interest that the children had in the trust.

Based on the evidence before it, the court held that the trust was created with the intention that only the children would have an interest in the trust property. It determined that there was no realistic possibility the trustees would add further beneficiaries, terminate the trust and give the funds to charity, or make an unequal

division among the children as allowed by the terms of the trust. Accordingly, it held that the children had a 100% interest in the trust, leaving no amount to be apportioned to the spouses.

B. United Kingdom

The seminal case of *Charman v. Charman*[8] has caused a major stir among U.K. family law and trust practitioners. It is a high-profile case which, among many issues, also involved whether the value of the assets of an offshore discretionary trust should be included in the husband's assets and be shareable, further to the parties' marital breakdown, and if so, in what proportions.

The case is of interest in illustrating relevant factors taken into account by a matrimonial court in considering the nature and extent of the husband's trust interest in order to achieve an equitable distribution of property between the spouses.

The husband settled assets on a Jersey discretionary trust in 1987 called the "Dragon Trust". The class of discretionary objects included the husband, his wife, their sons, and future children and remoter issue of the husband. The husband had the power to replace the trustees. It appears the objective of the trust was asset protection for the benefit of the husband and his family.

The parties later divorced, and in conjunction with those proceedings, the wife argued the value of the trust's assets, which was in excess of £68 million, should be included in computing the parties' total family assets. The husband's position was that the assets of the trust should not be attributed to him on the basis that the trust was "dynastic", i.e. it was for future generations and should not be considered his resource.

Under English matrimonial law, the courts, compared to many other common law jurisdictions, have very wide discretion in making an order to achieve the general rule of equality of division of assets established by the House of Lords in *White v. White*[9] and are to take into account a number of factors, including income, earning capacity, property and other financial resources which either party has or is likely to have in future, which may include trust interests.

The court, after a careful review of the facts, held that all of the trusts assets should be included in the spouse's total assets. A key question it put was whether, if the husband requested the trustees advance capital to him, were the trustees likely to do so? Some of the key facts considered included the purpose of the trust being for the husband's financial and tax planning; that the husband was included as a beneficiary; letters of wishes by the husband as settlor expressing the wish that he be given full access to the trust fund and be treated as the primary beneficiary while alive; legal advice in a letter his lawyer wrote to him on establishment of the trust with respect to how he could continue to exert control over the trust; the husband's power to replace trustees; and the lack of any documentary evidence to support the husband's alleged dynastic intention.

Charman has caused great consternation for private client lawyers and the trust industry, and has raised concerns with regard to the efficacy of the discretionary trust. In the recent text, *International Trust and Divorce Litigation*, it is stated with respect to the impact of the decision in *Charman* on future planning and practices:

> "Fixed interest or hybrid trusts may become more fashionable. Trusts may be made purely in favour of children where the reality is that only they are intended to benefit. Appointments may be made where otherwise assets would remain in a general discretionary pot. Undoubtedly, great care will be taken as to the location of trust assets and the wording of letters of wishes.[10]

Several recent U.K. cases have applied and built on the principles established in *White v. White* and *Charman* with regard to the treatment of discretionary trust interests. In *RK v. RK*[11] the court emphasised the need to look at the reality of the parties' situation where a trust is involved. Whether a trust is a resource of a spouse will include a determination by a court of whether it is likely, on a balance of probabilities, the trustee will advance capital now or in the foreseeable future. In *Whaley v. Whaley*[12], the English Court of Appeal upheld the trial judge's decision that £7 million of assets in two discretionary trusts which represented inherited wealth should be considered as resources of the husband out of a total of £10.4 million of resources and ordered a substantial lump sum payment be made to the wife of approximately £3 million. The trial judge found that, based on his factual review, it was likely the husband would be able to access trust funds when he wished to. The Court of Appeal emphasised the broad discretion of the court in looking not just at ownership but at resources.

C. United States

It is an understatement perhaps to suggest that the treatment of trust interests by U.S. courts varies significantly from state to state. In some states, courts have held that an interest in a trust is not property for purposes of property division unless the interest becomes possessory and the beneficiary has a present enforceable right to receive the trust assets. In such states, obviously an interest in a discretionary trust would be considered a mere expectancy and not includable. Some states even have legislation which expressly excludes a discretionary interest as not being an interest in property nor an enforceable right. Other states have a more liberal approach, including Oregon, where any interest in a trust is considered property for marital division purposes.

Some states have a more flexible approach and analyse the nature of the beneficiary's interest in the trust. Case law exists that an interest in a discretionary trust is a "mere expectancy" and not subject to property division. At the far extreme, some states go so far as to even having legislation to allow for self-settled trusts which are not subject to property division on divorce. It is fair to say that, in general, U.S. courts take a far more conservative stance to inclusion of a discretionary interest relative to the U.K., Canada and Australia, and do not appear to be as expansive in dealing with trust interests, but instead have a more formalistic, traditional and rigid approach.

D. Australia

Australian courts are authorised by section 79 of the *Family Law Act 1975* to make any order relating to the property of the parties to a marriage that is appropriate in the circumstances. Section 4 defines 'property' broadly as being "property to which those parties are, or that party is, as the case may be, entitled, whether in possession or reversion".

In the leading Australian decision of *Kennon v. Spry*, Chief Justice French confirmed that "[t]he word "property"…is to be read widely and conformably with the purposes of the *Family Law Act*".[13] Courts have used this broad definition to hold that an interest in or assets held by a discretionary trust were the property of the parties, or only one of them, and subject to division as being part of the marital property pool. In *Kennon v. Spry*, the Court ultimately found that, based on evidence that the husband had legal or *de facto* control of a trust and the wife had an equitable right as beneficiary to due administration of the trust, the trust assets fit within the scope

of property under the statute and formed part of their matrimonial asset pool subject to division. With respect to the wife's property interest, French CJ did note that the rights to due consideration and administration are "difficult to value…when the beneficiary has no present entitlement and may never have any entitlement to any part of the income or capital of the trust".[14]

Kennon v. Spry is seen as a leading Australian case for setting out the relevant factors in determining whether an interest in a discretionary trust is property or alternatively a financial resource. If not property, but a financial resource, the resource remains that of the party to whom it belongs, but is taken into account when determining the future needs of the parties in order to arrive at an equitable division of property.

Subsequent decisions have continued to focus on the question of whether a party has legal or *de facto* control of a trust based on the evidence. On appeal, the Court in *Harris & Harris* found that the evidence before it did not support the position that the husband had sufficient control (directly or indirectly) of the discretionary trust for it to be his property and a re-trial of the issue was ordered.[15] Similarly, a discretionary trust was not property in *Morton v. Morton*, where the spouse had insufficient control over the trust assets, and it was instead considered a financial resource to be taken into consideration.[16] Recent Australian decisions have shown that other factors the courts generally take into consideration when determining whether a trust interest or trust assets are property are the source of the trust assets, the trust's purpose, the beneficiaries and historical distributions. The case law has also shown that courts may make orders requiring a party who is in control of a trust to satisfy their liability under the *Family Law Act* directly from trust assets[17], as well as enforce subpoenas to trustees for documents relating to memoranda of wishes or preferences in determining whether an interest in a discretionary trust is property or a financial resource, as well as for the purpose of valuing the interest.[18]

E. New Zealand

New Zealand has a more orthodox trust law view towards the treatment of interests in discretionary trusts upon marital breakdown. The *Property (Relationships) Act 1976* entitles spouses on matrimonial breakdown to share equally in the relationship property unless an exception applies or the spouses have contracted out of the legislation. Section 2 of the statute defines property to include "real property; personal property; any estate or interest in any real or personal property; any debt or thing in action; any other right or interest".

As interests in discretionary trusts are not expressly included in the statutory definition of property, and despite the definition being non-exhaustively worded, Riddle summarises that the conventional view of the New Zealand courts has been that discretionary beneficiaries do not have a legal or equitable interest in trust assets until the trustees exercise their discretion in favour of the beneficiary – with the result that discretionary interests themselves are not seen as property within the meaning of the legislation.[19]

4. Towards the Development of Guidelines for the Valuation of Discretionary Trust Interests

It is fair to say that courts to date in those jurisdictions where family property is subject to division based on ownership, have not set forth a set of developed principles for valuing a discretionary trust interest. Neither would it appear that professional valuators have developed comprehensive evaluative criteria for this purpose, as there appears to be minimal literature on the issue.

In considering why this might be, firstly, case law on this issue is only beginning to emerge. In addition, it is submitted that valuation of a discretionary interest requires expert trust law advice with regard to a number of sophisticated, and often complex and subtle, legal issues, such as the meaning and scope of the dispositive terms of the trust, the powers of the trustees and any other persons, and the estate planning and other objectives for which the trust was established, taking into account established practice in the area and its intricacies.

With expert trust law advice in hand, the professional valuator can focus first on such matters as assessing various contingencies from an actuarial viewpoint, which may arise given the terms of the trust, and then determine appropriate discounts. For example, if a different distribution occurs based on whether or not a named individual such as a parent survives a critical date, which impacts the spouse's interest, the valuator can assess the likelihood of such an event based on life expectancy.

As well, the professional valuator can determine the value of the trust fund, taking into account the present value of all liabilities including contingent tax on inherent but unrealised capital gains, disposition costs of the various assets held by the trust, and projected future value based on an appropriate rate of return. This part of the valuation analysis is the hard, objective aspect, after which the analysis moves into less objective and arguably more complex evaluation criteria. A framework for this aspect of the valuation analysis is set out below.

(i) Control by Beneficiary

An important issue in determining the value of a discretionary interest is the ability of the beneficiary to control whether distributions of trust property are made for his or her benefit. This involves consideration of a number of factors, including:

(a) Is the beneficiary named as an existing discretionary object of the trust?

(b) Do the terms of the trust allow for the spouse to be added in the future as a beneficiary, and by virtue of his or her direct or indirect control, does he or she have the ability to achieve this outcome?

(c) Does or can the beneficiary directly or indirectly control the actions of the trustees, including consideration of such factors as:

  (i) the composition of the trustees, including whether the beneficiary is a trustee;

  (ii) any veto powers the beneficiary has, or requirement that he or she form part of any trustee decisions;

  (iii) any powers of the beneficiary to remove trustees, or to appoint replacement or additional trustees;

  (iv) the relationship of the beneficiary to the trustees, including are the trustees independent and do they act at arm's length or are they family members or other persons, including friends, who may not act independently?;

  (v) history of past trustee actions which demonstrate direct or indirect control by the beneficiary; and

  (vi) documentary and other evidence which supports that the trust was designed to allow control by the beneficiary, including legal advice on establishment of the trust, and any letters of wishes or memoranda to such effect.

These factors require expert trust law advice based on both a legal and factual analysis, which can form the basis for various assumptions made by the valuator and the courts in determining

value. However, control by itself cannot be viewed in isolation, but must be considered in conjunction with all relevant considerations, as set out below.

(ii) Purpose of the Trust

A critical issue is a comprehensive understanding of the purpose and objectives for establishment of the trust.

If the key issue is "value to owner", although it might be possible for distributions to be made to the spouse, if it is not likely this would occur or would be desirable, taking into account the purpose of the trust, then the "value to owner" is minimal.

By way of example, if a family trust is established in conjunction with an estate freeze in order to defer capital gains liability which might otherwise arise on the spouse's death, this objective would be defeated if part or all of the trust fund is distributed to the spouse. Often, a spouse may be added to provide additional flexibility given future unforeseen events should it be necessary or desirable to "undo" the freeze. Each case will turn on its facts. A disclaimer by the spouse of his or her interest may be considered clear and cogent evidence of the lack of value a spouse attaches to his or her discretionary interest.

Clearly, a factual determination must be made in each case of the value, if any, that should be ascribed to a discretionary trust interest based on the likelihood of whether or not any distributions will be made to the beneficiary.

In *Charman*, we see how the court, in determining whether the Dragon Trust should be included in division of family property, clearly framed the issue as whether if the husband requested the trustees to advance capital to him, were the trustees likely do so? The court concluded that the trust had been established for the husband's financial and tax planning, and took into account that letters of wishes expressed the wish he be given full access to the trust fund and be the primary beneficiary. The court found no documentary evidence to support that the purpose of the trust was "dynastic", i.e. to benefit future generations, and instead essentially found the trust was for the husband's benefit. Based on a "value to owner" analysis, it had significant value to the husband, to the point the court considered it wholly his resource and available to him, and included the entire value in family property. The control the husband had exerted, and could exert, in combination with the underlying purpose of the trust was key in the court's determination.

We may envisage other situations where the purpose of the trust is important in understanding what value a discretionary trust may have to its owners. For example, a discretionary trust set up for asset protection purposes, including to limit future matrimonial claims, or for protective purposes due to inability to manage property due to financial immaturity or medical or physical incapacity where the spouse is a primary beneficiary, would likely attract a high "value to owner".

(iii) Allocation of Income and Capital among Discretionary Objects

Where there is a class of discretionary objects, an important consideration is how the trustees would likely allocate income and capital of the trust fund among members of the class, of which the spouse may be one. A number of factors might be relevant to this analysis, including:

(a) history of past distributions from the trust;

(b) the settlor's intentions, for which initial instructions to legal counsel, legal correspondence, and letters of wishes or memoranda setting out the settlor's intentions would be relevant;

(c) the number of discretionary objects, their present and future needs and the extent of their financial resources, taking into account the purpose of the trust and the settlor's intentions;

(d) whether the trustees are obligated to distribute income and capital under the terms of the trust or can accumulate income or choose not to make any distributions of capital;

(e) any express trust terms which may affect the exercise of the trustees' dispositive discretions, for example, whether they are directed to take into account a beneficiary's own financial resources or whether there is a defined standard which limits the exercise of their discretion to pay income or capital or both; and

(f) whether the trustees can exclude persons from the class of discretionary objects, or add persons to it.

If, for example, a discretionary trust was set up for educational purposes for grandchildren, with a termination date when the youngest grandchild reached a specified age, such as age 30, it would be important to understand how many grandchildren there were, their individual educational needs and objectives, and the projected costs of attaining them to consider the "value to owner" of any individual grandchild's discretionary interest.

While various conclusions and assumptions might be arrived at in valuing a discretionary interest, they have no actuarial certainty, since, given the nature of a discretionary trust, the interests are not fixed. It would seem that a reasonable discount should in most cases be applied to take account of the inherent uncertainty that results when an interest is discretionary and not fixed.

5. Conclusion

It will be interesting to see how the courts, professional valuators and family law practitioners will deal with what is likely to be an increasing number of cases involving the division of family property involving a discretionary trust in those jurisdictions where a discretionary interest is subject to division, and valuation and related issues which arise as a result. What is critical to a fair and proper treatment of this important issue is the development of a coherent set of principles to ensure proper consideration, including valuation where applicable, which, it is submitted, involves the need for trust law expertise as well as professional valuation expertise. What may be observed in some of the cases to date is an apparent lack of this critical involvement.

From the viewpoint of private client lawyers, it is important to appreciate the "value to owner" approach used by some matrimonial courts in valuing a discretionary interest and as well the "resource" approach used by others, and in each client situation to carefully assess how this may impact planning using a discretionary trust, including its structuring and terms. In some cases, a fixed interest trust may in fact be more desirable, or not including a spouse as a discretionary object may be advisable. Simply including a person in a class of discretionary beneficiaries with no careful consideration of the impact of doing so, particularly in the context of matrimonial property division, is problematic.

Using a discretionary trust has always involved a level of sophistication and complexity, and now even more so in light of the treatment given discretionary trust interests by matrimonial courts.

Some pundits may posit that the discretionary trust is "under attack" by matrimonial courts, and that we are witnessing its demise as an effective estate planning and wealth protection vehicle, including for protection of inherited property. On the contrary, it is submitted that instead we are simply witnessing more challenging times ahead, and the need for a refined, considered and focused approach

to the use of the discretionary trust and the structuring of its terms and for an elevated appreciation of the discretion of matrimonial courts. We should have faith in the future of the discretionary trust, however, which has proven over time to be an enduring and resilient survivor.

Endnotes

1 "Fiduciary Powers", Maurice C. Cullity, (1976) 54 Canadian Bar Review 229 at p.283.

2 (1997), 31 R.F.L.(94th) 405 (Ont. Gen. Div.).

3 "Trust Assets in a Family Law Case", Maurice Cullity in *Family: Beyond Moge – The Theory and the Reality*, Canadian Bar Association – Ontario, October 2, 1995 at p.8 and p.16.

4 2000 A.R. Lexis 1307, 274 A.R. 323 (Alta.Q.B.).

5 *Canada Valuation Service*, Student Edition 2004, Ian R. Campbell, Howard E. Johnson, H. Christopher Nobes, Thomson Carswell.

6 *The Valuation of Business Interests*, Ian R. Campbell, Howard E. Johnson, 2001, The Canadian Institute of Chartered Accountants.

7 Lorne H. Wolfeson, "*Sagl v. Sagl*: Valuation of an Interest in a Discretionary Trust under Ontario's *Family Law Act*" (1998-99), 16 C.F.L.Q. 521 at p. 522.

8 17 EWCA Civ 503.

9 2002 FLR 981 (H.L.).

10 M. Harper *et al*. editors, Jordans, 2007, p. 8.

11 [2011] EWHC 3910 (Fam).

12 [2011] EWCA Civ 617.

13 [2008] HCA 56 at paragraph 64.

14 *Supra*, paragraph 77.

15 [2011] FamCAFC 245.

16 [2012] FamCA 30.

17 See for example *Kennon v. Spry*, *supra*.

18 *Dillion & Dillon* [2012] FamCA 319.

19 Rachel Riddle, "Turning Family Homes Into Castles: Testing the fortress of 'dynastic' trusts against relationship property rights", University of Otago, October 2012 at p. 15, footnote 58, citing Nation v. Nation [2005] 3 NZLR 26 (CA) at [74]; *Hunt v. Muollo* [2003] 2 NZLR 332 (CA) at [11]; *Johns v Johns* [2004] 3 NZLR 202 (CA) at [34].

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