THE VALUATION LAW REVIEW

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Family Law Decision

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Coady v. Coady, 2014 MBQB 182

In his opening paragraph, Justice William Johnston said:

> This is a case about spousal support. It is about compensation, conditions, means, needs, and circumstances. It is about contract, retirement, material change, the ability to pay, and whether a court should entertain a retroactive review.

And he covered them all.

The parties married in 1989. Both were members of the Canadian Military. The husband was a widower and had three children. It was agreed that the wife would stay home to care for the children. As a result, she left the Military 6 years short of pension eligibility.

A few years later, things changed. In 1992, the wife found employment and in 1993, the husband left the Military and became a private defense contractor. In 1998, the wife left her private job to join the husband's business. She continued in the business until 2007 when they separated.

Over the years, the parties entered into 3 domestic contracts. The first was a separation agreement which provided, amongst other things, that the husband would pay $3,000 monthly spousal support subject to variation based upon a material change of circumstances. The second was an agreement for a payout to the wife of part of the husband's military pension. The third was an amending agreement, made in 2012, reducing spousal support to $1,500 monthly (due, apparently, to a decline in the revenues of the husband's company).

In 2013, the husband applied to reduce or eliminate spousal support due to his desire to retire. The wife countered with a claim to set aside the contracts and for a total reconsideration of spousal support based on the actual performance of the husband's company.

1. Setting Aside the Contract

The parties knowingly and willingly entered into the contracts. They were bound by them.

Consequently, the Court could not enter into any retroactive revision of spousal support.

However, the Court could look to their "condition, means, needs and other circumstances" to determine current income for the variation issue.

2. Jurisdiction and Applicable Legal Principles

The trial judge determined that the application was a motion to vary under s. 17 of the *Divorce Act*. [*Ed note:* This may be incorrect. The divorce judgment was silent as to corollary relief. It is submitted that the proceeding must be an original application for corollary relief under s. 15.2 of the *Divorce Act*].

Nevertheless, he considered, appropriately, the competing bases for support enunciated in the cases of *Moge* and *Bracklow*. He concluded that he had to consider "the actual social and personal reality of the situation in which she finds herself and judge the matter fairly from that perspective": *Moge* at p. 822 and to "...apply the relevant factors and strike the balance that best achieves justice in the particular case before the court": *Bracklow*, para 32.

Having regard to the extensive divisions of property in their initial agreement and the later pension division, the Court concluded that the case was not one of compensatory support—absent hardship arising from the marriage breakdown (as opposed to the marriage itself).

3. Attribution of Corporate Pre-Tax Profits

i) Introduction
A "forensic accountant" engaged by the wife opined that the operating company was "siphoning off" money to related corporations by investing in land in those corporations (the land possibly being retirement property for the husband and his new partner). Secondly, the forensic accountant alleged that the operating company's profits were being "sprinkled away" to other beneficial interests.

How this was being done was not clearly articulated though it was alleged that it was being done by fraudulent means.

In contrast, the corporation's accountant testified that the loans were fully documented in the corporation's financial statements as "due from related parties" and that one of the corporations had no "related" status to the husband.

ii) Piercing The Corporate Veil
The Court accepted the corporate accountant's evidence that there was no fraud or improper conduct. The related transactions were fully documented and reported. They were of sufficient transparency to permit appropriate analysis to ascertain income for support purposes.

iii) Attribution Does Not Require Improper Conduct
The Court noted that attribution under s. 18 of the *Guidelines* does not require improper conduct. Normally, there is no difference in the methodology employed in the *Federal Child Support Guidelines* in their application to child support or spousal support: *Poirier* v. *Poirier*, 2010 ONSC 920. However, the Court stated that it detected a trend to apply attribution less rigidly in cases of spousal support citing *Martin* v. *Orris*, 2009 MBQB 290.

iv) Pre-Tax Income and Retained Earnings
The wife's "forensic accountant" placed considerable emphasis on the company's increase in retained earnings.

The Court noted that s. 18 permitted the court to attribute the corporation's pre-tax income as the starting point on the road to attribution.

The Court specifically noted that retained earnings are the cumulative net earnings of the corporation since its inception. They are the shareholder's equity in the company. They do not necessarily represent cash in the bank that shareholders can take out as income.

4. Re-Partnering

Citing *Beattie* v. *Beattie*, 2013 SKQB 127, the Court accepted the proposition that repartnering enhances the payor's ability to pay—if the new spouse contributes to the common household expenses.

The Court went on to state that the enhancement will be greater if the payor has the ability to "sprinkle income" to his new spouse.

Without articulation, the Court stated that the forensic accountant's evidence on this issue was "favourably received."

5. Retirement

The husband contemplated immediate retirement. He was 62. The wife was 58. She testified that all of her investments were structured to enable her to retire at age 62.

The Court articulated the following proposition:

> ...a payor of spousal support should make his or her retirement plans on the basis that support will continue until the aggregate retirement savings plans can be expected to keep both former spouses at a reasonable standard of living.

The Court also noted that early retirement, while under a support obligation, is a voluntary act that will not find favour with the court.

The Court refused to terminate support on the retirement argument.

6. Double dipping

The Court applied the "hardship" exception to the rule against double dipping. The Court noted the 4 year age differential and concluded that it was not reasonable to make the wife rely, even partly, on her retirement resources at this stage.

7. Spousal Support Advisory Guidelines

The Court noted that the parties were married for 18 years and the husband had paid support for 6.25 years. Thus, terminating support immediately would be outside the shortest duration range.

The quantum range, based on their incomes was between $1,767 and $2,357 monthly. The median was $2,067.

8. The Outcome

The Court ordered $2,000 monthly for 4 more years at which time support would terminate.

The Court noted that it was unrealistic not to decline to place a termination date on the support award. It was not reasonable to await the husband's actual retirement.

Due to the high cost of family law litigation, neither party should be required to repeat the process shortly into the future. In the interests of "proportionality," the Court should make the final determination as practically as possible to enable the parties to go forward with certainty.

Vogler v. Vogler, 2015 ONSC 424

Although there were numerous issues in this case, only that portion of the decision relating to the value of the husband's shares is reported here.

In 1996, he founded Universal Engraving Inc. His financial records recorded a loss for every year thereafter continuing past the parties' separation in late 2008. The husband's tax returns showed his income to be:

2009	$23,826 (entirely RRSP withdrawals)
2010	$2,633
2011	zero
2012	zero
2013	zero

At trial, he and his mother produced a series of I.O.U.s totalling $395,730.17 which represented advances by the mother to the husband who, in turn, would loan it to the company.

Despite the absence of profit, he testified that between 1996 and 2006, the family lived by withdrawing money from the company and depleting RRSPs accumulated from prior employment. His parents also provided them with gifts or loans that were apart from the $395,730.17 in corporate loans.

In 2010, the wife obtained a preservation order under s. 12 of Ontario's *Family Law Act*. Despite this, certain corporate tax refunds were used to pay down corporate bank debt.

1. Valuations

The wife engaged a professional, Mr. D., to value the husband's interest in the company. The husband engaged Mr. C. to prepare a "limited critique" of Mr. D.'s report.

The Court noted that it is the responsibility of the owner of the asset to provide evidence of its value. It described the process engaged by the husband as one "…that would hardly engender confidence in its reliability."

2. The Wife's Valuation

Mr. D. concluded that the business should be valued on a "going concern" basis despite its alleged losses. The parties enjoyed a reasonable lifestyle and the husband continued to operate it. Therefore, he concluded that the company documents did not fully show the true financial activity and it was reasonable to assume it would show profits in the future.

He testified that the shares were valueless due to the deficit registered on the company books year-after-year.

Accordingly, he looked at the amounts due to its one and only shareholder—the husband. He noted that there was some question as to the legitimacy of the debt and whether they would ever be repaid.

His opinion had two scenarios:

1. The debts owed to the mother are valid—$170,000
2. The amounts owed by the company are owed solely to the husband—$307,000. In so doing, he valued the company inventory at its book value.

3. The Husband's Critique

Mr. D. critiqued the wife's expert valuation. Mr. D. took pains to point out that:

- he was not retained to do a business valuation
- he was only retained to critique the valuation prepared by the wife's expert
- he worked exclusively from documentation provided by the husband

He criticized Mr. C's approach to valuation on a going concern basis in light of the absence of profit. He opined that the proper approach would be an approach on a liquidation basis. That meant that the only real value of the company lay in its inventory. Finally, he concluded that the inventory value would be entirely dependent on finding a purchaser for the inventory.

He stated that Mr. D's valuation of the inventory at book value was unreasonable because of "…Mr. Vogler's assessment of the inventory, including unsuccessful efforts to market the inventory." In cross-examination he admitted that he was not given any information or details about the company's inventory.

4. The Outcome

The Court gave little reliance to the critique as:

- it was incomplete
- its source material was determinedly one-sided

Moreover, the husband was in the best position to provide a complete evaluation of the business but chose not to do so.

While the Court noted that the husband's mother had made substantial advances to him, the Court questioned whether he will ever be obliged to repay his mother. On the facts, the Court concluded that he would never do so.

Thus, $570,000 was added to the husband's net family property.

Cosentino v. Cosentino, 2015 ONSC 271

The parties had a long marriage. They separated in early 2006 as a result of the husband's affairs. After 5 months apart, they reconciled at the urging of the husband. They separated, finally, in November of 2007.

The husband was a part-time commissioned real estate agent. He had negotiated a deal prior to the separation. It firmed up prior to the separation, but the closing was after the date of separation. It generated a commission of $10,000, paid to the husband after the separation.

At the time of the first separation, the parties owed the wife's sister over $200,000. When they reconciled, they took out a $400,000 credit line and repaid the sister. The husband used the credit line to make expensive purchases including a home entertainment centre ($8,000), a Persian rug ($20,000), another rug, several Group of Seven prints and other items.

After the separation, the husband removed $33,000, taking the credit line to its limit. He placed the funds in his own account and, ultimately, used $5,000 to purchase a 3 unit rental property for $610,000. The property was now valued at $950,000.

In 2008, the husband was audited by Canada Revenue Agency. They wanted to audit his 2005 and 2006 tax returns. As a result of the audit he was assessed $20,307 in taxes, interest and penalties.

The court had to deal with several issues:

1. was the $10,000 commission part of the husband's net family property
2. could the husband deduct the $20,307 CRA re-assessment

3. was the wife entitled to a share greater than equalization of net family property
4. could the wife claim an interest in the 3 unit rental property on the basis of unjust enrichment.

1. The commission

i) The Arguments

The husband argued that the commission was simply part of his income package. To treat accrued but unpaid income as property would mean that every wage-earner would have to add unpaid salary or wages to his or her net family property—an absurd and unintended result not contemplated by the drafters of the *Family Law Act*.

The wife argued that the unpaid commission was a "chose in action"—a legally enforceable right—long recognized as property. Moreover, it fell within the broad, sweeping definition of "property"—"any interest, present or future, vested or contingent, in real or personal property."

ii) The Decision

There is a distinction between salaries and wages paid at fixed intervals and a commission which is a large fixed amount attributable to unique individual transactions. It was a chose in action.

Moreover, its inclusion was consonant with the overall scheme of the *Act*—to enable spouses to equally share the monetary product of the marriage.

However, it was income that would be taxable. Section 4(1.1) requires the court to take into account any applicable contingent taxes in calculating a spouse's net family property. The Court applied the average tax rate on his taxable income for 2007.

2. The Subsequent Re-Assessment

i) The Husband's Argument

The husband argued that it was a "contingent liability" on the valuation date. As s. 4(ii) of the *Act* permits a deduction for contingent tax liabilities, he should be entitled to a $20,307 deduction in calculating his net family property.

ii) The Decision

On the valuation date, there was no knowledge of the re-assessment. It came into existence only after the valuation date. It is not a "liability" merely because it is calculated in respect of a year when the parties are still living together.
No deduction was allowed.

3. The Claims for Unequal Division

i) The Husband's Affairs

Morally objectionable or emotionally harmful conduct by a spouse is not a basis for an unequal award. There is no remedy under s. 5(6) of Ontario's *Family Law Act* for matrimonial misconduct that does not have an economic consequence that significantly affects the spouse's assets, debts or liabilities.

The criteria to be considered under s. 5(6) were carefully selected to exclude matrimonial conduct.

ii) The Reconciliation
The Court factually rejected the wife's argument that the reconciliation was a mere sham calculated by the husband to get the wife to enter into the line of credit.

iii) Running up the Line of Credit
The line of credit was run up for family purposes. It did not constitute an intentional, reckless or bad faith depletion of net family property. The decisions were simply unwise.

4. The Constructive Trust Claim

i) The Wife's Argument
The wife's argument was that the husband took $33,000 post separation from the joint line of credit. At the time he had only $2,500 in the bank. He then used the funds to make the $5,000 down payment on the three unit rental property. But for the removal of the funds, the husband could not have financed the purchase.

ii) The Decision
The Court rejected the argument that the husband was enriched by using the wife's money, it was the bank's money and he was equally liable on the credit line.

The contribution of the wife, if any, was a miniscule one in relation to the overall cost of the property. A monetary award was, consequently, appropriate. The husband was to pay down the loan by $33,000 plus any interest payable to the bank subsequent to the draw by the husband.

Wakeley v. Wakeley, 2015 ONSC 3561
By way of chronology, the parties were married in July of 1990. They had three children, twins born in 1996, and a daughter born shortly before the separation in 1999. They separated in June of 2000 after 10 years of marriage.

Shortly after the marriage, the husband founded his own printing business. Initially, the business was run out of the matrimonial home. However, in 1994, the wife won approximately $900,000 in a lottery. As a result, the parties incorporated a company to continue the printing business. They were 50/50 shareholders in that company. They each drew equal salaries from the company. A few years later, they incorporated a second company to operate as a holding company. Once again, it was incorporated on a 50/50 basis and each party drew equal salaries from that corporation.

1. The Separation Agreement
Approximately two years after the separation, the parties entered into a Separation Agreement. The husband was to receive the wife's interest in both corporations. The husband was obliged to pay spousal and child support based on an income of $120,000.

2. The Husband's Re-Marriage
In 2003, the husband remarried. Shortly before his re-marriage, a company was incorporated. Its sole shareholder was the husband's second wife. Over the years, it had various operating names but was referred to as 155. It was also a printing company. Steadfastly, from the time of its incorporation until the outset of the trial, the husband maintained that the corporation was owned solely and exclusively by his second wife.

3. The 2005 Variation Application

In 2005, the husband stopped paying spousal support. He claimed that he had suffered business reversals. He brought proceedings to reduce support. Following a trial, the judge concluded that the husband had suffered a financial set-back. He found that the husband was capable of earning $60,000 per annum. He reduced child support and found that the husband was no longer capable of paying spousal support (although he did not terminate spousal support at that time).

4. The current application

In 2010, the wife commenced the current application. She engaged the services of an accountant, known as Ms. M. Ms. M. prepared numerous opinions respecting the husband's income both retrospectively and prospectively. She was called as a witness at the trial. Her qualifications were not challenged on the *voir dire*. The husband attempted to challenge the weight to be given to Ms. M's opinions on cross-examination.

i) Ms. M's Opinion and Evidence

Shortly after her engagement, Ms. M. concluded that the husband's prosperous lifestyle could not be supported by his stated income. She indicated that she began to take on a more intense analysis akin to that of a forensic investigator. She stated that, in her capacity as a forensic accountant, she was to seek out corroboration and independent sources. She also stated that her approach was to look for "concealment and diversion of income and assets." In particular, the judge expressed his initial concern, although comforted, in large measure, by the second wife's refusal to provide any information about her involvement in the printing business. The trial judge expressed concern about Ms. M's mindset. He had this to say:

> "...in family law matters especially, every professional owes a duty to their clients to conduct themselves in a manner that is proportionate to the potential outcome. The costs of experts cannot be out of proportion to the potential gains that might be realized. In my view, when such costs escalate to the point of being excessive in relation to the potential outcome, the independence and objectivity of the expert may come into question."

ii) The Husband's Expert

The husband engaged the services of an accountant and business valuator known as "Mr. M." Despite the husband's initial position that his second wife was the sole and exclusive owner of 155, Mr. M. testified that her ownership interest was somewhere between 50 and 100%. He felt that the ultimate determination was to be that of the court and not that of the experts (a sentiment which found favour with the trial judge).

iii) The Divergent to Expert Opinions

Ms. M., for the wife, took the position that the husband was the sole owner of 155. She found primary support for this position because:

- initially, the companies seemed to have similar client bases
- initially, they operated out of the same premises
- over the years, employees were trained and substantial equipment were purchased by the second wife's company with the benefits of the capital costs and the training were transferred to the husband's company without compensation.

She also found comfort in the fact that an original assessment of the companies performed by the bank had listed the second wife as a mere "administrative assistant."

That narrative, in the bank's reports, never changed. She admitted in cross-examination that she did not interview the husband, his second wife, or the accountant for both corporations.

Mr. M., the husband's expert, took a different view. This included, based on interviews with both the husband and the second wife, that both parties played a significant role in the operation of the printing businesses. He toured the business premises to consider the integration of the businesses. He testified that the second wife, as the businesses matured, played a more active and aggressive role in recruiting new business. Her company had contributed to the training of employees and the purchase of equipment which, of course, were ultimately transferred to the husband's company. He discounted the description in the bank literature about her being a mere "administrative assistant." Finally, he noted that the bank, despite the corporations being "off covenant," that the sales were increasing, that the companies still had substantial cash, and that the bank was justified in granting forbearances based on these considerations.

5. The Court's Gate-Keeping Function

Although Ms. M's qualifications to give expert testimony were admitted, the Court made observations about the court's gate-keeping function. First, the Court noted that it had two functions. It could refuse to allow expert evidence. The second function was that, if the expert was allowed to give opinion evidence, it could assess the weight that it would attach to this function.

In dealing with the court's first function, the Court ruled that it would be quite rare that a proposed expert's evidence would be ruled inadmissible. The function of an expert is to provide the court with fair, objective and non-partisan evidence. An expert should not be disqualified unless the evidence is clear that there is an unwillingness or inability on the expert's part to do so. It is not measured objectively—in the sense of whether a reasonable observer would think that the expert is not independent. The question is whether the actual relationship or interest results in the expert being actually unable or unwilling to carry out his or her primary duty to the court to provide fair, non-partisan and objective assistance.

The Court noted that the mere relationship between the party calling the expert will not be sufficient to do so. However, if the expert has a financial interest in the outcome, if there is a very close familial or other relationship between the expert and one of the parties, or the expert assumes the role of an advocate for a party, it may be another question. In this particular case, the Court noted that Ms. M. did have a financial interest in the outcome. The wife was substantially indebted to her and had hidden security against the matrimonial home for past and future testimony. Moreover, Ms. M. had developed a close relationship with the wife. In this respect, taking on the duties of a forensic accountant launched Ms. M. into the role of an advocate. As a result, Ms. M. was not prepared to alter her testimony despite evidence to the contrary.
All of this had a significant effect upon the weight to be given to Ms. M's testimony.

6. Attribution of Corporate Income and Imputation of Income

The Court took note of sections 17, 18 and 19 of the *Federal Child Support Guidelines* which permit the attribution of corporate income to a shareholder or the imputation of the corporate income to a party. Briefly, the Court noted that section 18 permitted the attribution of corporate income to a shareholder. The Court noted that attribution may

be appropriate with respect to self-employed payors insofar as it permits the children of the payor to continue to benefit from the financial means of both spouses after a separation. In such an instance, the payor's children would remain part of the payor's household and would have the benefit of the payor's full disposable income and not just the payor's taxable income. Of course, the husband was not an actual shareholder in the wife's corporation.

The Court also noted that the imputation of income may play a significant role. Income can be imputed to a party where a deduction may be an appropriate deduction under the *Income Tax Act* as far as tax policy is concerned. It does not require that the tax payor acted improperly or outside the norm in deducting expenses. All that is necessary is a recognition that the tax payor has monies available for the support of the payor's children.

In the imputation of income, the categories of imputing income under section 19(1) of the *Guidelines* are not closed. They are merely categories listed as examples of situations in which income may be imputed. The burden will lie upon the party requesting imputation of income to demonstrate that a benefit is received by the tax payor spouse which is not reflected in the payor's T1 Income Tax Return. If demonstrated, the onus then shifts to the tax paying spouse to prove that the benefit is both reasonable and necessary in the circumstances.

7. Piercing the Corporate Veil

Ultimately, the Court concluded that this was an appropriate case to "pierce the corporate veil." In this case, 155 Co. was incorporated with the husband's second wife being its sole shareholder. Both the respondent and his second wife hid behind that corporate veil, insisting that legal and title ownership of that corporation vested solely with the second wife. However, the Court concluded that all the corporations were operated by both the respondent and his second wife together. Thus, the Court made a declaration that the husband was a 50% owner of 155 Co. and issued a declaration to that effect. The Court concluded that the husband's income ranged between a low of $98,000 and a high of $162,000 over the 9 years since the incorporation of 155 Co.

8. The Court's Conclusions on Spousal and Child Support

Despite the fact that the parties had been married only for 10 years, and had now been separated for 15 years, the Court concluded that the wife was entitled to indefinite spousal support based on compensatory principles. Because her support was indefinite as to duration, it was set at the low end of the SSAGs. The compensatory principles relied upon by the Court were numerous and included:

- she delayed any career objectives to the care of the children both before and after the separation;
- she paid off the family debt with her lottery winnings. This freed up the husband's ability to borrow, post separation, for the printing businesses. The wife had to deplete her assets to keep up her standard of living as a result of the husband's refusal to pay spousal support;
- the children's needs, due to the disciplinary and other challenges of the children, increased markedly. The wife bore the sole brunt of meeting these needs.

Based on the husband's current income of $11,792.00 monthly and the wife's current income of $3,800.00 monthly, the Court set spousal support at $1,063.00 monthly

and child support in the amount of $2,485.00 monthly. In so doing, the Court appeared to overlook the fact that it was debatable as to whether the oldest child was currently a "dependent" child. The husband was ordered to pay support arrears fixed in the amount of $160,322.00 within 3 months following the release of the Court's reasons. The husband and his second wife were ordered to make annual financial disclosure which would include their combined printing businesses. The Court ordered the parties to make limited submissions regarding costs.

Horowitz v. Nightingale, 2015 ONSC 190
The parties separated following a 16 year marriage. There were 3 children, all of whom had ADHD.

The wife was a former chiropractic doctor. She had left practice in 2001 shortly before the birth of their first child. Following the separation, she saw a couple of patients per week in her home. The husband alleged that she could increase her income.

The husband was a lawyer. He was also a particularly astute stock market speculator. By way of example, in 2013, his investments increased from approximately one-half million dollars to $1.6 million. In the first eight months of 2014, his portfolio increased by another million dollars. Because most of these trades were in an RRSP, he was able to shield the annual gains from income tax. At the same time, he was engaged in the full-time practice of law. His 2013 income from the practice was $216,000. His 2014 practice income was unknown.

Finally, it appeared that his parents had traditionally given him approximately $50,000 annually by way of gifts.

The position of the parties was quite at odds. The wife's counsel said that his income should consist of his RRSP withdrawals, the increase in his investments, his law practice income, and the gifts that he received from his parents. By contrast, the husband suggested that his income should be $216,000—the amount that he earned from practicing law. He argued that the parental gifts were merely gifts and should not be included in income. He argued that ultimately, the RRSPs would be divided as capital and should not, for the purposes of interim support, be brought into income.

1. The Husband's Income

i) Income from Employment
It was common ground that the husband's employment income of $216,000 was income for spousal and child support purposes.

ii) The RRSP Withdrawals
Prima facie, withdrawals from RRSP's are income: *Fraser* v. *Fraser*, 2013 ONCA 815; *Stevens* v. *Boulerice*, 1999 CanLII 14995 (Ont. S.C.).

Over the past 4 years, Mr. Nightingale withdrew the following amounts from his RRSP:

2011	$15,000
2012	$99,859
2013	$166,373
2014	$1,699,944

Whether RRSP redemptions will be included in income will be purpose-driven. The RRSP withdrawals from 2011 until 2015 were to fund family expenses and outgoings.

The large 2014 withdrawal was purpose-driven—to provide the wife with funds to acquire the husband's half interest in the matrimonial home.

Accordingly, the Court treated the 2011 through 2013 withdrawals as income. They averaged $93,744. The Court rejected the husband's argument that the division of RRSP funds should abide the equalization of net family property. After all, there had been continuing gains in the RRSPs post-separation.

iii) Parental Gifts

Prima facie, gifts from third parties will not be included in income. In the case of *Bak* v. *Dobell*, 2007 ONCA 304, the Court noted that the court can impute "gift income" to a recipient. Amongst the considerations, which were not all-inclusive, would be the following:

a) the regularity of the gifts;
b) the duration of the gift-giving;
c) whether the gifts were part of the family's lifestyle and entrenched it;
d) any unique circumstances that would earmark the gifts as being exceptional;
e) whether the gifts provided more than a standard of living;
f) the income generated by the gifts;
g) whether the gifts were to support the recipient through a temporary crisis;
h) whether the gifts were likely to continue; and
i) the true purpose and nature of the gifts.

In this case, it appeared that the gifts were regular and recurring. Because the husband had failed to adduce appropriate evidence of the amount of each particular annual gift, an adverse inference was drawn against him. The Court imputed $50,000 annually to the husband which it concluded should be "grossed-up" to reflect the fact that it was received on a tax-free basis.

iv) Gains and Investments

The wife's expert argued that the husband's investment gains (which were, it may be recalled, over $2,000,000 in two years) should also be included in his income. In making this submission, counsel for the wife relied upon the case of *R. (C.M.M.)* v. *R. (R.W.A.)*, 2011 NBQB 159. However, the Court distinguished this case on two different bases:

a) the respondent in the *R. (C.M.M.)* case had no other form of income. In this case, the husband had substantial forms of income—namely, his salary, the gifts from his parents, and the RRSP redemptions;
b) second, the gains from his investments appear to have been capital gains. In any event, disclosure was not yet complete.

2. The Wife's Income

The Court imputed modest income of $15,000 annually to the wife. She had testified that she saw 3 to 4 patients weekly, charging approximately $50.00 per treatment. All of the services were performed in the matrimonial home.

J.S.P. v. J.H.S., 2015 BCSC 1239

The father was the beneficiary of two separate trusts considered in this summary—the "home trust" and the "grandfather's trust." The issue was whether he "owned" an

interest in either of these discretionary trusts within the meaning of s. 58(3)(a)(ii) of the B.C. *Family Relations Act* and if so, what was their value. Issues relating to the re-apportionment of the family assets and spousal support are omitted from this summary.

In 1988, approximately 10 years before the marriage, the husband bought residential property in his name for $408,000. He renovated the property, spending about $157,000. By 1996, four years before the marriage, the property had a value of $865,000.

Fearing potentially adverse tax consequences in the future, he transferred the property to a trust in his mother's name. The mother signed a trust document and a conveyance regarding the residence transferring it to the trust. She then resigned as trustee, leaving the husband and a lawyer friend of the husband as trustees of the home trust. The trust was fully discretionary. Its major terms were that:

- the trust had an expiration date during the husband's lifetime or 30 days following his death;
- the trustees had absolute discretion to make decisions regarding occupancy of the premises, dealing with potential income, encroachment on capital…etc.;
- the husband was one of the beneficiaries (as were his yet unborn children and grandmother).

It was contemplated that the husband would live there as long as he wished. In fact, the parties lived there throughout the period of their marriage.

The value of the property was appraised at $2.75 million at the time of separation in 2011 and $3.75 million at trial.

The "grandfather's trust" was a trust established by the grandfather's Will. It was also fully discretionary. Its initial capital was $250,000—an amount equal to ¼ of the grandfather's estate. It made substantial capital gains over the years. For tax reasons, the husband borrowed against the capital on numerous occasions for various family purposes. Its co-trustee never objected to any borrowing. The beneficiaries were the husband and his then unknown children. It was a term of the trust that no payments—income or capital—could be made out of the trust without the husband's consent. The father's Will provided that the trust would not be a "family asset."

Shortly before the separation, the husband learned that the wife had seen a lawyer about a possible separation. He took legal advice and, thereupon, resigned as a trustee of the home trust.

1. Interest in a Trust

The husband argued that he did not have an "interest" in the home itself or the home trust. The corpus of the trust was subject to the control of the trustees. Therefore, at best, he had a "mere expectation." He likened his situation to that of a person who "expects" to receive an inheritance.

The Court ruled that a person's "interest" in a trust cannot be measured by simply analysing the trust document. The full circumstances of the case and its practical realities must be considered. On the facts, the husband always occupied the property. The trustees were his friends. It would be likely that they would honour his wishes. At any point the trustees could deliver the property to any beneficiary — including the father.

Indeed, if it were found to be a family asset, it would be likely that the Trustees would co-operate with the father to refinance the property. Thus, his "interest" exceeded a "mere expectation."

2. The Grandfather's Trust

The Court applied the same reasoning to the "grandfather's trust." While the capital was not substantially depleted, the borrowings were used for family purposes. The borrowings were mainly used for income-splitting purposes to preserve the trust's status as a separate taxpayer.

3. Valuation and Re-Apportionment

The trusts were valued at the trial date, so the home trust had a value of $3.75 million. The Court did, however, reapportion both assets based on the equitable considerations set out in s. 65(1) of the *Family Relations Act*. The result of that re-apportionment was that the husband received 70% of the home trust and 100% of the grandfather's trust.

L.M.J. v. R.G.J., 2015 SKQB 136

The parties were married to each other for 29 years prior to their separation. They had 4 children.

- J. who was 28 years old, was a hairdresser and who lived with her partner
- D. who was 26 years old and studied optometry in a college in another province
- K who was 18. She had serious substance abuse problems and was in an addiction program. The parties had agreed to set aside $75,000 from a trust fund to provide for her care
- B. L. who was 16. She lived with each parent on an alternating weekly schedule.

The husband was an investment advisor. He worked long hours. The wife had little employment outside the home. She assisted the husband in his business activities, planning client dinners, accompanying him on corporate functions and keeping track of his business expenses by data entry.

The parties resolved most issues. The major ones outstanding were:

1. who was entitled to a fountain situated at the matrimonial home (which would vest in the husband);
2. the husband's book of business;
3. the incomes of the parties and, attendant thereto, child and spousal support.

1. The Fountain

The agreed value of the fountain was $2,400. The wife alleged it had tremendous sentimental value to her, was a gift to her by the husband and that 4 cherubs on the fountain represented each of their 4 children. The husband alleged that its removal could be costly, was a fixture and would alter the value of the home.
The Court ruled in the husband's favour.

2. The Husband's Book of Business

i) The Parties' Positions

The wife took the position that the book of business was a family asset. She relied on cases from other provinces, namely, *Mavis* v. *Mavis* (2005), 15 R.F.L. (6th) 369 (Ont. S.C.J.); *Lightle* v. *Kotar*, 2014 BCCA 69.

The husband alleged that the book was the sole property of his employer, RBC. It was not his asset. Thus, it was not a family asset and it had no value.

ii) The Ruling

The book of business was a family asset. It was, in effect, goodwill—its components being the husband's contacts, his knowledge of their investment objectives, his familiarity with their historic investments and the other information accumulated during the course of his career.

The Court found factually that:

- there was no evidence that RBC actually owned the client list;
- there was no evidence that RBC had the sole and exclusive control, use and management of the client list;
- there was no documentary evidence that prohibited the husband from dealing with the client list;
- the husband dealt with the potential sale proceeds of the book in his will;
- the husband had a contractual right to participate in the business succession plan on retirement;
- the wife made contributions to the development of the book by hosting events and tracking the husband's expenses.

iii) The Value of the Book

The book was valued on the three year average of the husband's gross production as an investment adviser (the Court substituting 2009 for 2012 as 2011 was the valuation date). It's value was rounded off at $1.6 million.

No tax discount was applied as no evidence had been tendered as to the potential tax consequences.

3. Income Determination and Support

i) Income Determination

The husband's income was $865,126 (based on his 2013 line 150 income (less carrying costs of $95,001 and employment expenses of $99,637).

The wife's imputed income was $100,035. The Court did not articulate how the imputed income was derived.

ii) Child Support

D was considered by the Court to be independent.

K was provided for by the trust in her favour. She was not a member of either spouse's household.

B.L. was in a shared custody arrangement. The set off amount under s. 9 of the *Child Support Guidelines* was $5,694.93 monthly. There were no budgetary expenses to establish that this amount was inappropriate under the *Child Support Guidelines*.

iii) Spousal Support

The wife was entitled to spousal support on both a non-compensatory basis and a compensatory basis.

Dealing with non-compensatory support, the Court noted that her need would equate

to the lifestyle adopted by the parties during cohabitation and thereafter. Their respective means would take into account all of their pecuniary resources including capital and the income derived therefrom.

As the husband's income exceeded $350,000, the *Spousal Support Advisory Guidelines* had no significant application. The wife's total assets were $4.6 million. She could earn an investment return, but there was no clear evidence of what that return would be.

Deducting the child support from the wife's budget, the Court assessed her needs at a further $9,000 monthly.

D.M.B. v. D.B.B., 2015 SKQB 65

1. Introduction

The husband and wife separated after a 20-year marriage. The Court dealt with multiple issues including the division of their properties, spousal and child support, and court costs. The judgment was 121 pages long. Only the issue of valuing the husband's minority interest in a private company is dealt with here.

Saskatchewan is a community of property province. It calls for an equal division of family property or its value between the spouses. The Court has a choice of valuation dates:

- the date the application is made (in this case December 16, 2010);
- the date of adjudication; or
- if value is elusive, the date that the court thinks is reasonable.

Both parties called CBVs to testify. Neither CBV valued the shares as of the date of the commencement of the action. Each used, as his starting point, a sale of shares that occurred on October 4, 2010.

2. The Corporate Transactions

The husband had a minority interest in a company known as C. Inc. Between the date of separation and the date of trial, C. Inc. went through two different transactions which, in the end, resulted in the husband liquidating all of his interests in C. Inc.

The first transaction occurred about 4 months before the wife commenced her action. Under that transaction, the husband disposed of his shares to F. Inc. The transaction was partially a cash transaction and partially a share take-back. The husband was paid $397,000 cash and took back 60,450 shares in F. Inc. Those shares represented 2.85% of the capital value of F. Inc. and, had a nominal value of $13.20 per share. The shares were subject to restrictions imposed on the shareholders relating to the disposition of those shares and an earn-out based on corporate profitability. The earn-out required F. Inc. to hold back $10,000,000 for each of the next 3 years.

In fact, in 2012, the corporate earn-out targets were met and the first of the $10,000,000 was distributed to the shareholders of F. Inc.

A second transaction occurred in 2012. F. Inc. was sold to U Corporation. In that transaction, the husband disposed of his 60,450 shares in F. Inc. for $25.00 per share.

3. The Competing Positions of the CBVs

i) The Wife's CBV
Simply put, the wife's CBV took the position that the shares should be valued based on the two transactions. Thus, the husband's consideration (subject to adjustments and tax considerations not dealt with) was $397,000 representing the cash that he received in the first transaction, $1.5 million that he received on the sale of the shares, plus the earn-out (and subject to taxation and adjustments).

ii) The Husband's CBV
He would value the shares based on the following:
a) the $397,000 received by the husband in the first transaction;
b) plus the husband's share of the earn-out discounted by a factor of 50% or more (representing the contingency that the earn-out would not be met) and a 13% industry standard discount (subject to taxation and adjustments); and
c) plus the final payout on the ultimate liquidation of his shares.

4. The Outcome

i) Introduction
Normally, when valuing share interests, it is done on a notional situation where there is no live transaction or sale in the market place to consider. In that instance, a valuator would examine the business entity that is being valued and determine the appropriate approach to employ.

When, however, there has been a sale of shares in a company, unless there was evidence to the contrary, the actual sale proceeds may be used as an indicator of fair market value if the sale occurred in an open market context. Evidence to the contrary might entail, for example, where minority shareholders buy and sell shares amongst themselves in a privately-held company and not in an active market.

In this particular case, the only way that the husband could capture the value in shares was to sell the shares. Consequently, he did not realize on the value of the shares until they were sold in the second transaction.

Between the first and the second transactions, because the husband was only a minority shareholder, it was unlikely that he did anything to affect the price of his shares in F. Inc.

ii) Valuation Date
The Court chose, as the valuation date, the amount that the husband received when he disposed, on a final basis, of all of his shares in C. Inc. It was reasonable, when valuing the husband's share interests, to have a live transaction or a sale in the market place to consider: *Thompson* v. *Thompson*, 2004 SKQB 100 (aff'd 2004 SKCA 169 (C.A.)). This was consistent with the principles of equity and fairness which entitles each spouse to an equal distribution of family property. Moreover, it was unlikely that the husband had done anything to materially affect the value of the shares due to his minority interest.

5. Costs

The Court required the husband to pay 75% of the costs of the wife's valuator for services required prior to trial. Effectively, in the Court's opinion, the husband had

stone-walled the valuator in not disclosing reconciliations until the very eve of trial. The reconciliations were dated two years prior to the trial. Indeed, in cross-examination, the husband's valuator admitted that the reconciliation documents were very helpful to him.

McKenzie v. McKenzie, 2015 BCSC 241

The parties had engaged in litigation in the trial courts and the British Columbia Court of Appeal. Ultimately, the major rulings of the courts were that:

a) The wife was entitled to a 10% interest in a corporation controlled by the husband; and

b) The wife was entitled to a 50% interest in the value of certain recreational property owned by a trust controlled by the husband.

The parties agreed that the wife's 10% interest in the corporation had a "gross" value of $607,000. The husband argued that this amount should be reduced by the "distributive" taxes exigible to realize the $607,000. The wife, by contrast, argued that the husband had sufficient funds from other resources to pay the amount in full.

1. The Considerations

The Court listed five appropriate factors to take into consideration in determining whether a tax discount would be appropriate. They include:

a) whether there is sufficient evidence to satisfy the court of the tax consequences or other costs inherent in raising the funds to satisfy a compensation order;

b) the onus would be on the payor to provide the trial judge with the necessary evidence of the tax consequences;

c) there is no absolute rule as to how the compensation order might be calculated depending, as it does, on the type of assets to be divided, their timing, the parties involved, and other orders in the action;

d) the matter should be considered as of the date of trial, not as of the date the order comes back before the court; and

e) the overriding principle is fairness.

2. The Tax Consequences

If the underlying assets of the corporation were sold "en bloc," the capital gains taxation exigible by the wife would amount to $67,600. On the other hand, if the husband were to refinance the properties in an amount sufficient to raise $607,000 after tax, the dividend taxes would amount to $200,000.

Applying the principle of fairness, it would be unfair to the husband to require him to make a compensation payment relating to a closely-held corporation wholly from after-tax dollars. It would be equally unfair to the wife, however, to enable the husband to select a more expensive method of satisfying his obligation to her.

In the end, the Court allowed a discount of $67,600 which, in the Court's opinion, visited the income tax consequences on each party fairly.

Bortnikov v. Rakitova, 2015 ONSC 1163

At a case conference, the husband agreed to produce an appraisal of certain real estate. The consent order provided that the property would be appraised by W.C., a qualified land appraiser. W.C. did, in fact, conduct the appraisal. The husband disagreed

with its contents. As a result, an issue arose as to whether the wife would be entitled to call W.C. as her witness at the trial.

The husband raised three arguments as to why W.C. should not be permitted to give evidence. They were:

a) litigation privilege;
b) contract; and
c) relevancy/reliability.

All three objections were dismissed by the judge.

1. Litigation Privilege
There was no litigation privilege in this particular case. W.C. did not participate in any litigation planning or strategy. He was, rather, merely a witness of fact. It matters not that the witness of fact is testifying as to facts observed by his own senses or may be called upon to give expert testimony.

Finally, there was no evidence to indicate that W.C. was privy to any confidential communications.

2. Contract
The contract between the husband and W.C. provided certain limiting conditions. One such limiting condition was that only the other party to the contract (unless it was a contract prepared for a lending agency) could rely on its conclusions. This was in accordance with the rules of the Canadian Uniform Standards of Professional Appraisal Practice which provided that a party receive a copy of an appraisal report unless he or she was clearly identified as the intended user.

The Court disagreed with this interpretation. It ruled that the purpose of these limited conditions was to protect the appraiser from damage claims from strangers to the appraiser/client relationship who may have seen or been given the appraisal information. It was simply a means of dealing with the "indeterminate liability to an indeterminate class for an indeterminate amount"—a problem frequently encountered in tort law.

3. Relevance/Reliability
If W.C. is called as a witness, the husband will have ample opportunity to challenge W.C.'s qualifications and to cross-examine him on all aspects of his report. Whether or not W.C. has done a good job or whether his opinions are reasonable or well-founded is not a matter of capacity to testify at the behest of the respondent. Rather, this is a matter going to either the admissibility of his report or the weight to be attached to it.

Mowers v. Acland, 2015 ONSC 1313
The parties jointly retained S.P. in his capacity as a Chartered Business Valuator. He was engaged to perform two functions:

a) a report valuing the shares in two corporations; and
b) an income determination setting out the income available to the respondent for support purposes for the years 2009–2012, inclusive.

S.P. delivered his report on February 25, 2015.

Dissatisfied with the report, the husband's lawyer brought a motion before the court requesting that S.P. do three things:

a) calculate the notional additional tax that would be payable by each party and corporation A as if they had liquidated their ownership on July 31, 2012;

b) to advise whether the sum of $739,464 classified as a redundant asset of corporation B and to advise as to his conclusion of the value of Corporation B if the asset was classified as working capital; and

c) to calculate the notional tax inherent in respect of his personal real estate holdings and his registered retirement savings accounts.

The trial decision in *Moore* v. *Getahun* caused quite a stir in Ontario. The case which was appealed to the Ontario Court of Appeal did not change the role of expert witnesses. Rather, the rules were merely a restatement of the common law duties of expert witnesses intended to clarify and emphasize those existing duties. Following *Moore* v. *Getahun*, 2015 ONCA 55, the court ruled that the motion brought by the husband was ill-founded in many respects including:

- The husband was asking the expert to prepare an income determination based on the hypothetical situation already rejected by S.P. (the redundant asset issue);
- It was the husband's obligation to prove any deductions that he claimed to reduce his net family property.

Hsieh v. Lui, 2015 BCSC 1438

The parties were married to each other on June 30, 1996. They separated 12 years later. They had one child—a daughter—who was currently 12 years of age.

Mr. Hsieh was a partner in a national accounting firm. His wife, although a college graduate, had left the labour force about 2 years after the marriage. Removing herself from the labour force did not place any strains on the marriage as Mrs. Lui came from a family of significant wealth.

The parties settled many major issues out of court. However, left outstanding were:

a) whether Mr. Hsieh had an outstanding interest in certain trusts;

b) whether the parties' former matrimonial home was subject to a mortgage;

c) whether a fund, which exceeded $1 million, was a family asset or whether it was a trust fund established for their daughter's education.

Sections 58(3)(a) and (e) were relevant to the court's consideration. Section 58(3)(a)(ii) sweeps into the family asset regime, trust interests, that would otherwise be family assets if individually owned. Section 58(3)(e) sweeps into the family asset regime "ventures" in which an individual has an ownership interest into which he or she contributed money or monies worth.

1. The FRH Trust

i) Interest in a Trust

The Court acknowledged that the words "an interest in a trust" have not been clearly defined in British Columbia jurisprudence. The Court, however, made the following factual findings:

a) Mr. Hsieh was not a beneficiary of the trust;

b) He was not a sole trustee with authority to appoint himself a beneficiary;

c) He did not have a beneficial interest in the trust; and

d) He did not have an express contingent interest under the terms of the trust instrument.

Moreover, there was no evidence that Mr. Hsieh operated or managed the trust nor was there evidence that Mr. Hsieh had any degree of control over the trustees which would give him indirect control of the trust. In fact, under the terms of his engagement with the national accounting firm, he was prohibited from being a trustee or a beneficiary of the trust.

Therefore, having no interest in the trust directly or indirectly, the corpus of the trust could not be a family asset.

ii) Was the trust a "venture"

To establish a basis for section 58(3)(e), three elements must be proven:

a) the asset at issue must be a venture;

b) one spouse must have an interest in the venture; and

c) the other spouse must have contributed to the venture.

The first and third factors were fully met. A "venture" is described in broad terms which would include any undertaking attended with an element of risk which has the potential for profit.

The third factor was also likely satisfied. There is no doubt that Mrs. Lui provided both financial support and child care and household management. She had pledged her daughter's education fund as security for a loan (which was ultimately repaid). The direct financial contributions and her indirect financial contributions (through child care and household management) were both contributions.

However, as set out above, under the trust instrument, Mr. Hsieh had no express interest in the trust whether direct or contingent. It was intentionally structured so that Mr. Hsieh would have no beneficial interest. Moreover, there was no evidence that Mr. Hsieh had any control over the trustees (although they were family members).

2. The Mortgage

The mortgage originally encumbered the parties' matrimonial home on Hornby Street in Vancouver. At the time of its acquisition, it was subject to two mortgages, totalling just over $600,000.

Those mortgages were paid off and on June 25, 1996, Mrs. Lui signed a mortgage of $635,000 in favour of her father. Mr. Hsieh, however, maintained that he was entirely unaware of the existence of the mortgage. He alleged that there were no antecedent loans between the father and Ms. Lui. He pointed out that there was no marriage agreement between himself and his wife.

The Court disagreed. The initial payoff and the amount of the new mortgage were relatively similar. The mortgage was a "sealed document" which did not require proof of consideration (although the Court did find that there was consideration). The Court characterized the transaction as being "an encumbered gift."

3. The Trust in Favour of the Child

Mrs. Lui received funds totalling approximately $1.1 million from her father, with express instructions that the funds were to be ear-marked for the child's education and other expenses.

Simply put, Mrs. Lui was not the beneficial owner of these funds. Although no formal trust document existed, there was no dispute concerning the original intention relating to these funds.

As a result, the Court held that the funds were not the property of either parent and were not, therefore, family assets.

M. v. F., 2015 ONCA 277

The case involved an appeal from a judge's comprehensive parenting plan. The primary issue was whether the father should have overnight access to a child who, at the time of trial, was four years of age.

The parties had seen Dr. I. B. as a mediator when the child was only 9 months old. They continued in mediation for approximately five months. The mediation was terminated when the parties failed to reach agreement.

The parties then engaged in litigation. By agreement, they retained Dr. I. B. once again to complete a custody/access assessment. He completed his assessment in August of 2011 and updated it in September of 2012 just before the trial. His two reports were described as being "thoughtful and comprehensive."

Meanwhile, the wife hired Dr. P.J. to critique Dr. I. B.'s reports. Dr. P.J. did not see the child in a clinical setting (in fact, he was precluded from so doing without the consent of both parents). He defined his "limited role" as an expert to be raise concerns about Dr. I. B.'s assessment for the court's consideration.

One of the grounds of the appeal was that the trial judge placed insufficient weight on the evidence of Dr. P. J.

The Court questioned, in a custody case, whether the evidence of Dr. P. J., who never met the child, would be admissible at all. The Court pointed out that several judges have admitted critique evidence and then discounted its weight. Other courts have determined that it is not admissible because it does not meet the criteria in the leading case of *R*. v. *Mohan*, [1994] 2 SCR 9. In that case, the appellate justice ordered that courts are called upon to engage in a "gate keeper" function to ensure that the "helpfulness" is not set at too low a standard. A trial judge may refuse to admit such evidence due to its frailties and the fact that its value—to impeach the role of the court-appointed expert—always remains available through cross-examination.

Indeed, the appellate justice in this particular case ruled that the critique report had little probative value, added expense, and risked elevating the animosity between the parties.

Lakhoo v. Lakhoo, 2015 ABQB 357

The parties separated after a 15 year marriage. The wife had been employed as a pharmacist prior to the marriage but had not worked outside the home for a number of years.

The husband was an exceedingly wealthy man. He took the position that he "…could pay enough support to more than meet Mrs. Lakhoo's needs and keep her in a lifestyle to which she became accustomed during [their] marriage."

In the course of the proceedings, the Court granted a bifurcation order directing the parties to litigate the question of the validity of a pre-nuptial agreement before

requiring the respondent to make full and complete financial disclosure. She also dismissed the wife's claim for advanced costs.

The wife successfully appealed the orders.
Upon the results of the successful appeal, the wife brought motions for:

a) interim spousal support;
b) retroactive support;
c) her claim for advanced payment of costs.

1. Interim Support
The Court made a number of observations regarding interim support.

First, the court is always at liberty to review or modify an interim support order which clearly contemplates variation following full financial disclosure.

Second, all of the considerations of s. 15(2) of the *Divorce Act* will be brought into play. They will be subject to modification, however, with a somewhat greater emphasis on the economic needs of the claimant and the ability of the respondent to meet those needs.

The Court ordered interim support in the amount of $25,000 monthly (on the assumption that the respondent's income was approximately $617,000 annually).

2. Retroactivity
The husband had been paying $17,000 monthly spousal support. Because of his underpayment, he was ordered to pay a lump sum of $376,000 (discounted for the absence of income tax relief) to $229,360.

3. Costs
The applicant also asked for $400,000 in advanced costs to help fund the matrimonial litigation.

The Court ruled that the assessment of advanced costs is a very fact-specific inquiry. It is based on necessity and not on the merits of the litigation. An order for advanced costs is made "for the purposes of levelling the playing field between the parties in matrimonial litigation." Finally, it is not limited to only one order. Advanced payments can be made, from time to time, as the motion is based on the legal landscape at the time that the motion is made.

Accordingly, the Court ordered the husband to pay $400,000 into the trust account of his own lawyer to stand to the applicant's benefit. The applicant, through her counsel, could submit a bill of costs every three months to the respondent and his lawyer. Those costs would be paid within 30 days unless the reasonableness of the bill was disputed. In such a case, a motion could be brought before the presiding justice who made the advanced payment award.

Grosse v. Grosse, 2015 SKCA 68
Mr. Grosse and his wife separated after a 28-year marriage.

During the marriage, Mr. Grosse had become a very wealthy man by accumulating large real estate holdings. Ultimately, he incorporated a company known as Suite 100 Investments Inc.

In 2006, upon the advice of his accountant, he created a trust known as the Grosse

Family Trust. He was its sole trustee. He, his two grown up sons, and any potential grandchildren would be beneficiaries of the trust. His wife was not a beneficiary. As sole trustee, Mr. Grosse had broad discretionary powers to administer the trust and to determine, if and when and to which beneficiaries any portion of the trust income or capital could be distributed to. In other words, Mr. Grosse had the ability to pay himself any income or the entirety of the capital if he so desired. He could wind up the trust (although this, of course, would defeat its entire purpose).

Upon the completion of the trust, he entered into an estate freeze. He converted his shares in Suite 100 to non-voting preferred shares with a value equal to the value of the frozen company. Suite 100 then issued new common shares which were, in turn, purchased by the trust. These shares were known as the "growth shares" because the increase in value of those shares would rise in tandem with the increase in value of the assets of Suite 100. Mr. Grosse continued to be the sole director of Suite 100 and, thereby, controlled all of its operations.

At trial, the trial judge ruled that the preferred shares owned by Mr. Grosse were family property and that the value of those shares should be divided equally between the spouses. However, the trial judge ruled that Mr. Grosse had only a contingent beneficial interest in the growth shares. The trial judge ruled that there was no assurance that Mr. Grosse would ever end up with any of the trust's income or assets. If he did, however, he would have to share them on an "if and when basis" with his wife. Specifically, the trial judge determined that "the court's task is to strike a balance between the preservation of the integrity of the trust and the parties' intentions, on the one hand, and guarding against mischief by [Mr. Grosse] and the inequitable treatment of [Ms. Grosse] on the other."

The wife appealed.

1. The Definition of "Family Property"

Saskatchewan's *Family Law Act* requires spouses to divide family property equally. The definition includes:

(a) an interest in a trust;

(b) property over which a spouse has a power of appointment; and

(c) property disposed of by a spouse where the disposing spouse has a power to consume, revoke, or dispose of the property.

The three extended definitions of property found in subparagraphs (a), (b) and (c) form a non-exhaustive list of interests to be included as family property. The clauses are not mutually exclusive. They may apply to the same property or the "interest" a spouse has in that property, the goal being to ensure property interests are identified and considered when making a division under the *Act*. In so doing, the court may "pierce the veil" of whatever legal entity or device is used to hold property, including a trust and power of appointment.

As its sole trustee, he had a power of appointment over the trust income and capital which, based on the terms of the trust agreement, was exercisable in his favour. Accordingly, all of the trust assets including the growth shares would be family property in accordance with sub-paragraph (b) of the *Act*. As the sole trustee of the trust and as the sole director of Suite 100, he had total control of all of the underlying assets of the corporation and the trust.

2. The Duty of a Trustee to Act Fairly

The trust created by Mr. Grosse was not a testamentary trust. It gave Mr. Grosse the power to transfer all of the trust's income and property to himself without consideration for the other beneficiaries. It contained such an "escape provision" to enable Mr. Grosse to deal with unforeseen contingencies. The fact remained that Mr. Grosse had sole and unfettered control over the property on the distribution date.

3. The Sons' Interest in the Trust

The sons only had a contingent beneficial interest in the trust. It was up to Mr. Grosse, as trustee, if, when and what the sons would receive. On the application date, the sons on their own had no legal or equivalent right to demand any of the trust's income or assets. On that date, Mr. Grosse, who was also an estate beneficiary, could then or at any date thereafter, take for his sole benefit whatever portion of the income and capital of the trust he desired.

4. The Appropriateness of the "If And When" Order in Dividing Pensions

The Court of Appeal considered the use of such orders in dividing trust property.
The principal advantage of an "if and when" order is that it avoids dissolving the trust or burdening the spouse who has an interest with a high equalization payment. It also has disadvantages which include:

- it forges an indefinite bond between individuals whose relationship is ending;
- the calculation, in the future, may prove problematic; and
- the amount paid under such order may vary from the value of the interest on the date for division.

In the instant case, an "if and when" order would be unfair to Ms. Grosse. It would allow Mr. Grosse to determine if and when or whether Ms. Grosse would receive any entitlement in respect of the growth shares. This would be inherently unfair and would defeat the equitable division of family property contemplated by the *Act*.

Secondly, the value of the growth shares could be easily ascertained. While the Court indicated that an "if and when" division may prove appropriate in other cases, it was not appropriate to the case at hand.