IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sevy v. Sevy,*
2013 BCSC 2255

Date: 20131209
Docket: S131641
Registry: Vancouver

Between:

Alberta Upton Sevy

Petitioner

And

Jonathan Bowditch Sevy,
in his capacity as Co-Trustee of the Alberta Upton Sevy Trust
Albert Cameron Sevy, Maryjoy Susan Harris, Donnalyn Gallinger, and
Meredith Angelica Rose Glenn

Respondents

Before: The Honourable Mr. Justice Sewell

Reasons for Judgment

Counsel for the Petitioner:	H.H. Low
Counsel for the Respondent, Jonathan Bowditch Sevy:	D.P. Davison
Counsel for the Respondent, Donnalyn Gallinger:	C. Cho
No other appearances	
Place and Date of Trial:	Vancouver, B.C. September 23-27, 2013
Place and Date of Judgment:	Vancouver, B.C. December 9, 2013

[1] This unfortunate litigation arises out of a family dispute over the manner in which the trustees have administered a trust and dealt with its assets.

[2] The petitioner Alberta Upton Sevy, whom I will refer to as Alberta, is the sole income beneficiary of the Alberta Upton Sevy Trust (the "Trust"). The Trust was created by Article VI of the Albert Ezra Upton Trust which was settled by Albert Ezra Upton in 1956. The Trust came into existence on Mr. Upton's death in 1963. Alberta is co-trustee of the Trust with her son, the respondent Jonathon Sevy, whom I will refer to as Jon.

[3] Alberta is 87 years old, widowed, retired and has lived in Osoyoos, British Columbia since 1962. Jon is 63 years old and has lived in Penticton, British Columbia since 1998.

[4] Alberta is the income beneficiary of the Trust during her lifetime. The residual beneficiaries of any remaining Trust property after Alberta's death are Alberta's descendants, per stirpes, which at present are her four children: the respondent Jon, Albert Cameron Sevy ("Cam"), Maryjoy Susan Harris ("Maryjoy") and Donnalyn Gallinger ("Donnalyn"). Meredith Glenn is Cam's daughter and trustee of the CVRD Irrevocable Trust (the "CVRD Trust"). Jon is the co-trustee of the CVRD Trust.

[5] In the petition Alberta sought wide ranging relief against Jon. In the course of the hearing, Alberta's counsel informed me that she acknowledged that many of the claims against Jon could not be decided on a summary petition hearing. Alberta continues to seek the following relief:

1. an order that Jon be removed as co-trustee of the Trust;
2. an order that Mr. James Carphin be appointed as co-trustee of the Trust in Jon's place;
3. a declaration that the transfers from the Trust to the CVRD Trust of two properties which formed part of the capital of the Trust, known as the Provo House and the Lincoln Lot, are null and void and of no force and effect as against the Trust;

4. An order that Jon, at his own expense, effect a re-conveyance of the Provo House and the Lincoln Lot back to the Trust; and

5. an order that Alberta be at liberty to make application that Jon personally pay the costs of this proceeding as special costs

[6] Donnalyn supports the relief claimed by Alberta but also seeks an order that Alberta be removed as co-trustee and that James Carphin be appointed as sole trustee of the Trust. In addition, she seeks an order requiring Jon and Meredith Glenn, as trustees of the CVRD Trust to re-convey the Provo House and the Lincoln Lot to the Trust.

Trust Provisions

[7] Section 3 of Article VI of Trust provides that during her lifetime Alberta is to receive the net income earned by the Trust:

> Commencing with the date of the death of the settlor, the trustee shall pay to, or apply for the benefit of, the settlor's daughter, Alberta Upton Sevy, during her lifetime, all of the net income of this trust, at quarter-annual or more frequent intervals.

[8] Section 4 of Article VI provides in part that the trustee may distribute capital to Alberta for her health, comfort, support and maintenance, and to her children for their education:

> In addition to said payment of net income, the trustee shall pay to, or apply for the benefit of, said daughter, so much of the principal of this trust, at any time and from time to time, as the trustee (other than the settlor's said daughter) may, in its sole and uncontrolled discretion, deem necessary or advisable for her health, welfare, comfort, support and maintenance.
>
> Further, such trustee shall pay to, or apply for the benefit of, any one or more, or all, of said daughter's children who are living from time to time, so much of the principal of this trust as the trustee (other than the settlor's daughter) may deem necessary or advisable for the education of such children, without equalization or proration among them. It is the settlor's intention that the education of said daughter's children be provided by this trust and, therefore, that such trustee shall be liberal in using trust principal for the purpose of providing an excellent education for all of his said daughter's children.

[9] Section 6 of Article VI states that the Trust will terminate when the principal is all paid out or, if not paid out, as follows:

> (a) upon the death of the settlor's daughter, Alberta Upton Sevy, provided all of said daughter's children then living shall have attained the age of twenty-five (25) years;

[10] Section 7 of Article VI directs the distribution of all remaining trust property and undistributed income at termination as follows:

> Upon termination as provided in Section 6, the trustee shall forthwith distribute, free of all trust restrictions, the then remaining principal and undistributed income to the then living descendants of the settlor's daughter, Alberta Upton Sevy, such descendants to take per stirpes.

[11] Section 17 of Article IX provides that the Trustee has the power:

> To make payments to or for minors or other beneficiaries under legal disability, in the exercise of the trustee's sole discretion, in any one or more of the following ways:
>
> (1) Directly to such beneficiary;
>
> (2) Directly in payment of the expense of support, maintenance, schooling, and medical, surgical, hospital or other institutional care of such beneficiary;
>
> (3) To the legal or natural guardian or conservator or committee of such minor or person under legal disability;
>
> (4) To any other person, whether or not appointed guardian of the person or conservator or committee of the incompetent, who shall have the care and trust of the person of such minor or such beneficiary under legal disability;
>
> The trustee shall not be under any duty to see to the application of funds so paid, provided it exercises due care in the selection of the person to whom such funds were paid, and the receipt of such person shall be full acquittance to the trustee.

[12] Section 1 of Article X provides for Alberta to be a co-trustee of the Trust:

> Immediately upon the death of the settlor, the settlor's daughter, Alberta Upton Sevy, shall become a co trustee hereunder, acting with the International Trust Company or any successor corporate trustee thereto.

[13] Section 3 of Article X deals with how disagreement amongst the trustees is to be revolved:

> In the event of a disagreement among the trustees as to any matter concerning the administration of the trust estate, the decision of the then acting corporate trustee shall control. In such event, the dissenting trustee shall be relieved of any responsibility or liability for actions taken by the corporate trustee, as to which such trustee has dissented.

[14] Section 3 of Article X also permits Alberta as the income beneficiary to remove the corporate trustee:

> The Settlor shall have no power to remove any trustee hereunder. However, after the settlor's death, any corporate trustee or successor corporate trustee may be removed by all of the adult beneficiaries (other than the settlor's said wife) not under any legal disability then eligible to receive the income of the trust estate, by giving thirty (30) days' notice in writing to such trustee signed by such beneficiaries and delivered in person or mailed to the last known address of such trustee, such removal to become effective at the end of the thirty (30) days from the time the notice was so delivered in person or mailed to such trustee. No such notice of removal hereunder need assign or give to the corporate trustee being removed any reason, cause or ground for such removal.

[15] Section 3 of Article X also sets out the requirements of a corporate trustee and how a corporate trustee can be replaced:

> … a successor corporate trustee, which shall be a bank or trust company having trust powers and a capital and surplus of at least Two Million Dollars ($2,000,000.00) shall be forthwith appointed by the settlor if he is then living, and if not, by the individual co trustee, or , if there be no individual co trustee, then by all of the adult beneficiaries (other than the settlor's said wife) not under legal disability then eligible to receive the income of the trust estate, by an instrument in writing signed by such person or persons and filed with the successor corporate trustee so appointed.

[16] Section 6 of Article XII sets Colorado law as the proper law of the Trust:

> This is a Colorado trust made and executed in that state, and is to be governed and construed according to its laws and shall continue to be so though conducted or administered in another state.

Background

[17] At the inception of the Trust upon Mr. Upton's death, the trustees were Alberta and the International Trust Company of Denver. They jointly administered

the Trust until 1994. In 1994 the International Trust Company resigned as trustee. It appears that no suitable corporate trustee could be found to replace it as corporate trustee. At Alberta's request, Jon agreed to act as co-trustee. He was appointed as co-trustee by an order of the Denver Probate Court dated January 20, 1994. Alberta and Jon continued to act as co-trustees without apparent difficulty until approximately 2010. During that time Jon had primary responsibility for managing the assets of the Trust.

[18] In 2010, Alberta's husband Joy was killed in an automobile accident in which Alberta was also seriously injured. In the period following the accident, Alberta was not able to attend to her duties as trustee. She gradually recovered from her injuries and by 2012 appears to have recovered to the point that she was able to carry out her duties as trustee and participate in trust decisions.

[19] The difficulties that have given rise to this litigation began in late 2011. Alberta and Jon gave conflicting evidence as to the origin of those difficulties.

[20] Alberta's evidence is that in 2011 her accountant, Kathy Ost, informed her that on behalf of the Trust, Jon had issued income tax statements declaring that Alberta had received $196,993 of income from the Trust for the period from 2005-2011. This caused Alberta some concern because most of the income attributed to her was in respect of money that had been paid out of the Trust to her children. Kathy Ost was concerned about the attribution of income to Alberta because she believed it would be necessary for Alberta to refile her Canadian tax returns for the period and that she might have to pay penalties and interest to the Canada Revenue Agency.

[21] Jon's evidence is as follows. For a number of years prior to 2011, income from the Trust had been paid to Alberta's children rather than to her as stipulated in the Trust deed. Alberta was aware that this was being done and consented to it. Any children who received such payments were expected to pay any taxes attributable to them. For reasons that are not clearly set out, but appear to be related to a tax dispute Jon was having with the Internal Revenue Service in the United States, no

tax returns were filed for the Trust for a number of years prior to 2005. In 2005, a decision was made to resume filing returns for the Trust. In the course of reviewing how best to resume tax filings, Jon and Alberta became aware that the children who had been receiving payments from the Trust had not in fact declared them as income or paid tax on them. Jon did further research, obtained professional advice, and determined that the best way to deal with this issue was to declare that the funds that had been paid out to the children represented income Alberta had received from the Trust and in turn given to the children as gifts. Jon directed the Trust's accountants to file returns for the 2005 to 2011 tax years stating that Alberta had received $196,993 in income from the Trust. Jon ensured that any tax payable in respect of that income was paid by the Trust. Alberta was aware of and consented to this arrangement.

[22] There is no evidence that Alberta was required to pay any additional taxes or penalties either in Canada or the United States as a result of the manner in which the Trust's tax filings were made or as a result of the attribution of income to her for the years from 2005 to 2011. It is however clear that the tax issue caused considerable discord in the family. Kathy Ost expressed concern about the possible tax consequences of how the filings were made. In addition, Alberta sought the assistance of her son-in-law Gregory Harris, Maryjoy's husband, who is a lawyer, to obtain information about the tax position of the Trust and herself. Mr. Harris's intervention was not well received by Jon. There was an acrimonious exchange of correspondence on this and other issues.

[23] The discord over the tax issue set the stage for a further disagreement that led to this litigation. The disagreement concerned the transfer of the Provo House and the Lincoln Lot from the Trust to the CVRD Trust. The Provo House is a house in Utah in which Cam and his wife live. The Lincoln Lot is a lot in Denver.

[24] On December 27, 2012, Jon and Meredith Glenn created the CVRD Trust. The Trust deed states that Jon is the settlor of the CVRD Trust. On the same day, Jon executed quit claim deeds transferring the Provo House and the Lincoln Lot to

the CVRD Trust, subject to a reservation of the income from the Lincoln Lot during Alberta's lifetime. There is considerable conflict in the evidence about the origins and merits of these transfers. However it is clear that a transfer of at least the Provo House to or for the benefit of Cam was under active consideration by the family in 2012.

[25] Alberta's evidence is that although she agreed the Provo House should eventually go to Cam, she never agreed as to when and how it would it would be given to him. In July 2012, Jon sent her an email stating that he thought the Provo House and the Lincoln Lot should be transferred to Cam in December 2012 but Alberta did not agree. On December 15, 2012, Alberta sent Jon an email saying she had overheard Jon and Cam discussing the Provo House and the Lincoln Lot going into a trust for Cam. In the email, she told Jon he should not go ahead with the transfer and told him she had received advice that such a transfer was "against the rules of the AEU trust".

[26] Jon's evidence is that Alberta agreed to the transfer of the Provo House and the Lincoln Lot in 2012 and that he thereupon began to investigate how to accomplish the transfer. Alberta was at first supportive of the idea and was in fact independently investigating how the Provo House could be transferred to Cam. In late 2012 Alberta changed her mind about the transfer of the two properties to a trust for Cam and told Jon not to proceed with the transfer. Jon concluded that he had the authority to proceed with the transfer without Alberta's consent and he accordingly transferred the two properties to the CVRD Trust to hold the properties for the benefit of Cam on December 27, 2012. Jon's reasons for so acting are set out in his email to the Trust's lawyer, Mr. Garfield, of December 18, 2012 as follows:

> Having considered the various points that we have discussed over the past few days, I determine that my overriding obligation as trustee is to provide for the benefit of my mother and my disabled brother, that I have the authority and power to do so, and that I can accept the risks of personal liability for acting in a manner contrary to the current wishes of my mother, the co-trustee, who I believe is under duress and undue influence by my brother in law who my British Columbia lawyer advises is acting in clear defiance of his professional ethical guidelines. I believe my decision is in complete compliance with the terms and intents of the AE Upton Trust.

Alleged Breaches of Trust

[27] Alberta submits that Jon has committed numerous breaches of trust that justify an order removing him as trustee. She also submits that Jon should be removed as trustee because there is such a level of discord and hostility between the trustees that they can no longer properly administer the Trust.

[28] Alberta alleges that Jon failed to pay the income of the Trust to Alberta, failed to provide a proper accounting of the Trust, failed to deal with the tax obligations of the Trust and failed to keep the Trust assets separate and apart from his personal assets.

[29] Jon's evidence is that Alberta and his siblings agreed to the manner in which the Trust was being administered and in particular with the manner in which income was paid out of the Trust. He denies that he failed to provide an adequate accounting of the Trust and deposes that Alberta was quite content with the manner in which the Trust was being administered until 2012. His evidence is that the tax issue raised by Alberta is without substance and Alberta has suffered no adverse tax consequences from the way tax filings were made for the Trust.

[30] Given the direct conflicts in the evidence on these issues and the nature of this summary petition hearing, I am unable to make the necessary findings of fact to resolve the allegations against Jon with respect to the administration of the Trust prior to 2012.

[31] I have reviewed the evidence with respect to the tax filings because it was a source of discord in the period leading up to the dispute over the transfer of the properties to the CVRD Trust but am equally unable to resolve the disputed evidence with respect to it.

[32] In *Douglas Lake Cattle Co. v. Smith* (1991), 54 B.C.L.R. (2d) 52 (BCCA), the court decided that the test for granting judgment on a summary petition hearing is the same as the test for granting judgment on an application for summary judgment under what was then Rule 18 of the *Supreme Court Rules*. Under R. 9-6(5)(c) of the

Supreme Court Civil Rules, B.C. Reg. 168/2009, the court may grant judgment if it is satisfied that the only genuine question before it is a question of law but cannot resolve disputed issues of fact.

[33] In this case there are disputed issues of fact that cannot be resolved on a summary petition hearing. The court is being asked to exercise its equitable jurisdiction to control trusts and protect the interests of beneficiaries. Jon's affidavit raises the equitable defences of laches, or unreasonable delay, acquiescence and informed consent to many of the complaints made against him. These defences require findings of fact that I am unable to make on the disputed evidence before me and therefore cannot be decided in this hearing.

[34] However, two grounds on which relief is sought do not raise any genuine issues of fact. They can be decided in this hearing because the material facts are not in dispute. The first is the allegation that Jon's transfers of the Provo House and the Lincoln Lot to the CVRD Trust were done without proper authority and are a breach of trust. The second is that there has been a fundamental breakdown in the relationship between the co-trustees and between the co-trustees and the beneficiaries.

[35] Jon acknowledges that by the time he executed the transfers of the Provo House and the Lincoln Lot to the CVRD Trust he knew that Alberta did not agree with or consent to those transfers. The question for determination is whether Jon had the sole authority to proceed with the transfers or whether he was in breach of trust in proceeding with them.

[36] There is also no question there has been a fundamental breakdown in the relationship between the trustees and between the trustees and the beneficiaries of the Trust. The issue is whether that break down justifies the removal of one or both trustees and the appointment of Mr. Carphin to replace them.

[37] To address these issues, I must first determine the proper law to be applied to the Trust.

Proper Law of the Trust

[38] Section 6 of Article XII of the Trust provides that it shall be administered and construed in accordance with Colorado law.

[39] Article 6 of chapter II of the *International Trusts Act*, R.S.B.C. 1996, c. 237, [*ITA*] provides that a trust shall be governed by the law chosen by the settlor.

[40] Article 8(a) of chapter II of the *ITA* directs that the law chosen by the settlor applies to the removal of trustees. It provides as follows:

> The law specified by Article 6 or 7 shall govern the validity of the trust, its construction, its effects, and the administration of the trust.
>
> In particular that law shall govern —
>
> (a) the appointment, resignation and removal of trustees, the capacity to act as a trustee, and the devolution of the office of trustee;
>
> (b) the rights and duties of trustees among themselves;
>
> (c) the right of trustees to delegate in whole or in part the discharge of their duties or the exercise of their powers;
>
> (d) the power of trustees to administer or to dispose of trust assets, to create security interests in the trust assets, or to acquire new assets;
>
> (e) the powers of investment of trustees;
>
> (f) restrictions on the duration of the trust, and on the power to accumulate the income of the trust;
>
> (g) the relationships between the trustees and the beneficiaries including the personal liability of the trustees to the beneficiaries;
>
> (h) the variation or termination of the trust;
>
> (i) the distribution of the trust assets;
>
> (j) the duty of trustees to account for their administration.

[41] Alberta relies on *Chellaram v. Chellaram*, [1985] Ch 409, in support of her submission that British Columbia law should govern in matters relating to the removal of trustees because an application to remove a trustee is of a special nature and is not a right conferred by the Trust deed. According to *Chellaram*, the removal of a trustee is an exercise of the inherent jurisdiction of the court to control trusts. However, the terms of the *ITA* are clear. Issues relating to the removal of trustees and the rights and duties of trustees are governed by the law chosen by the settlor. I therefore conclude that while I have the power to remove a trustee in this case, I

must exercise that power in accordance with Colorado law. However, unless a party proves otherwise, I can assume that Colorado law is the same as British Columbia law. Any party who seeks to assert Colorado law must establish what the relevant Colorado law is by admissible opinion evidence.

[42] The parties filed opinions on Colorado law from three lawyers practising law in Colorado. Alberta relies on the opinion of Theodore Atlass dated August 30, 2013. Donnalyn relies on the opinion of David Simmental, also dated August 30, 2013. Jon relies on the opinion of J. Brent Garfield, dated July 30, 2013, and on an affidavit sworn by him on June 3, 2013.

[43] I have read and considered all the opinion evidence with respect to Colorado law on the interpretation of trusts and the powers of trustees. The opinions agree that under Colorado law, a trust deed must be interpreted by considering its express terms in the context of the whole of the deed. There is also agreement that the powers granted to the trustees in a trust deed must be exercised solely for the purposes of carrying out the terms of the trust and the court has the power to remove trustees for misconduct.

[44] At page 9, Mr. Atlass' opinion cites the *Restatement of the Law of Trusts, Second,* at s. 186 as follows:

> Extent of Trustee's Powers. Except as stated in [sections]165-168, the trustee can properly exercise such powers and only such powers as (a) are conferred upon him in specific words by the terms of the trust or (b) are necessary or appropriate to carry out the purposes of the trust and are not forbidden by the terms of the trust. Sections 165-168 deal with situations involving impossibility, illegality, change of circumstances and the anticipation of income and principal.

[45] At page 10 of his opinion letter, Mr. Atlass states his opinion with respect to the scope of a trustee's authority to act under Colorado law as follows:

> Trustees are supposed to administer a trust in accordance with its terms and trustees are usually given broad power and discretion to carry out the terms and conditions of the trust agreement under which they are acting. A trustee commits a breach of trust where he interprets the trust instrument as authorizing him to do an act which the court determines he is not authorized by the instrument to do.

[46] At page 5 of Mr. Simmental's opinion, he states as follows:

> In Colorado trustees are given great latitude and only in the most egregious of circumstances, only where a Trustee acts in extraordinarily imprudent, extremely unreasonable manner, or substantially out of step with the settlor's intent, will the Court interfere with the discretionary powers of a Trustee. As suggested in *Denver Foundation v. Wells Fargo Bank, N. A., supra*, citing *Bogert on Trusts*, the actions of the Trustee almost need to be for the purpose of harming the beneficiary or out of ill will or prejudice against him, or an action contrary to the purposes of the trust before the Courts will step in.
>
> However, the Alberta Upton Sevy Trust provides that the trustee is specifically instructed to pay only for the education of Alberta's children and is not authorized to provide for their health, maintenance, and support. A transfer of principal, in the form of a transfer of title to trust real property, to benefit one of the children, without any connection to his or her education appears to violate the purpose of the trust, is contrary to the intent of the settlor and harms both the net income beneficiary (Alberta Upton Sevy) and the remainder beneficiaries (Alberta's children).

[47] The law as set out in these two opinions is the same as the law of British Columbia, that is, that a trustee may exercise only those powers granted to him or her in the trust deed and must exercise those powers only for the purpose of carrying out the terms of the trust.

[48] Mr. Garfield takes a more expansive view of the powers of a trustee. He refers to the same case authority as Mr. Simmental, the decision of the Colorado Supreme Court in *Denver Foundation v. Wells Fargo Bank, N.A.*, 163 P. 3d 1116 (2007), for the proposition that a Colorado court will review the exercise of a discretionary power given to a trustee on an abuse of discretion standard, and will only interfere when the discretion has been exercised arbitrarily or capriciously. However, Mr. Garfield neglected to refer to a later passage of that decision, referred to by Mr. Simmental, which provides that a court will interfere with an interpretation or action of a trustee that is substantially out of step with the settlor's intent.

[49] The disagreement, if any, between the Atlass and Simmental opinions and the opinion of Mr. Garfield seems to be over the degree of deference the court should show to the trustee's interpretation of the Trust deed. In this regard, I conclude that under Colorado law the court should defer to the decisions of a trustee

but should intervene if it concludes that the interpretation of the Trust deed by the trustee is substantially out of step with the settlor's intent.

[50] I also think *Denver Foundation* needs to be understood in the context of the issue before the court and the terms of the Trust deed under consideration. The issue was whether the beneficiary of the trust, the Denver Foundation, had the power to direct the defendant, Wells Fargo Bank, to transfer the corpus of the trust to a non-profit corporation set up by the Denver Foundation to hold for management and investment.

[51] The trust deed gave the Denver Foundation, a charitable body, the power to conclusively construe in good faith any term or provision of the trust declaration. The following passage from Denver Foundation illustrates this:

> Instead, only in the most egregious of circumstances, in which an interpretation is extraordinarily imprudent, extremely unreasonable, or substantially out of step with the settlor's intent, we will interfere to impose our own reading of the document. *Bogert on Trusts* § 560 (rev.2d ed.1980) (suggesting courts upset the use of discretionary powers only to remedy improper actions such as "acting for the benefit of the [holder of the discretionary power] himself or some third person, or for the purpose of harming the beneficiary or out of ill will or prejudice against him, or an action contrary to the purposes of the trust"); Restatement (Second_ of Trusts § 187 cmt. e (determining courts will not intervene unless the discretionary power is wielded dishonestly, or with an improper even though not a dishonest motive, or effects a patently unreasonable judgment).
>
> In this case, while we may not have independently construed Article 3-1.1 in the same manner as has The Denver Foundation, we cannot conclude that The Denver Foundation has arbitrarily or capriciously arrived at its interpretation of that language. It is not outside the bounds of reason that Article 3-1.1, by its title, sanctions The Denver Foundation to direct the transfer of trust corpus to the Foundation's nonprofit corporation for the administration and investment but not for disbursement to outside end-user charities. So construed, the Foundation's exercise of power under Article 3-1.1 would not conflict with the 1976 Trust Agreement provision barring "inva[sion] of principal." Rather, it would simply reflect the drafters' intent that the Sterne-Elder Trust exist as a permanent endowment fund, the principal of which would never be distributed to end-user charities but instead would exist in perpetuity to benefit the Denver community.
>
> We are also reluctant to meddle with The Denver Foundation's right to construe in good faith the terms of its Declaration because the Sternes, by incorporating into their 1976 Trust Agreement the 1925 Declaration and any later amendments thereto, knowingly and intelligently conferred upon The Denver Foundation that precise power. We have not seen any evidence that

> would suggest The Denver Foundation seeks to construe its Declaration dishonestly or for improper motives, nor, it should be said, has Wells Fargo alleged any such intention. Indeed, we have no reason to question the good faith of The Denver Foundation. Ultimately, however, we endorse this interpretation of the 1976 Trust agreement because we conclude that transfer of the Sterne-Elder Trust principal to The Denver Foundation furthers the Sternes' overarching intent and essential purpose in creating their Trust.
>
> [Emphasis added.]

[52] I agree with the following summary of *Denver Foundation*, found at 2007 Colo. Lexis 582, page 1:

> OVERVIEW: The trust agreement bequeathed a portion of the settlors' estate for the use and purposes of the foundation, to be held in trust by the bank. The trust agreement, which incorporated by reference the foundation's amended declaration governing its activities, allowed the bank to transfer the trust principal to the foundation's nonprofit corporation to hold for management and investment. That interpretation was appropriate as the foundation was entitled to conclusively construe, in good faith, any provision of its declaration. Its interpretation allowing for the transfer of the trust corpus to the foundation's nonprofit corporation corresponded with the settlors' intent and essential purposes in executing the trust agreement.

[53] The essential finding in *Denver Foundation* is that the trust itself authorized the Denver Foundation to construe the terms of the trust and that the interpretation of the trust deed by the Foundation corresponded to the settlor's intent. There was no suggestion the trust funds were being diverted from the uses specified by the settlor.

[54] The Trust deed in this case does not give the trustee powers similar to those under consideration in *Denver Foundation*. Here, the manner in which Trust property is to be distributed is clearly set out in the Trust deed.

[55] Under Colorado law, a court would intervene if it concludes that a trustee's interpretation of a trust deed would be substantially inconsistent with the intent of the settlor as set out in the trust deed.

[56] I also accept the opinions of Mr. Atlass and Mr. Simmental that a trustee commits a breach of trust when he interprets the trust instrument as authorizing him to do an act that the court determines he is not authorized by the instrument to do. If

Mr. Garfield is of a contrary view I do not accept his opinion. However, as I read his opinion he does not disagree with the fundamental proposition that under Colorado law a trustee is bound to comply with the provisions of the trust deed and that failure to do so is a breach of trust.

Are the transfers of the Provo House and Lincoln Lot a breach of trust under Colorado Law?

[57] Jon says he had the power and authority to transfer the properties out of the Trust.

[58] The terms of the Trust relevant to this issue are those that direct how the income and capital of the Trust is to be distributed set out in paras. 7-10 of these reasons.

[59] Section 3 of Article VI of the Trust provides that after the death of the settlor, the trustee shall pay all of the income of the Trust to Alberta. Section 6 of Article VI provides that upon Alberta's death, if all of her children have during her lifetime attained the age of 25 years, the Trust shall terminate and all of the undistributed income and remaining capital of the Trust shall be distributed equally to each of them, per stirpes.

[60] All of Alberta's children are now living and are over 25 years of age. Therefore, on Alberta's death each will be entitled to an immediate distribution of 25% of the remaining assets in the Trust.

[61] Jon submits that Section 17 of Article X authorizes the transfer of Trust assets to Cam because Cam is under a legal disability. Jon submits that Cam is "legally disabled" because he suffers from post-traumatic spinogenic paraplegia with moderate to severe daily pain from the chest down caused by injuries Cam suffered in a motor vehicle accident. Jon further submits that the "beneficial interest" in the Lincoln Lot remained in the Trust and only the legal interest in the Lincoln Lot was transferred.

[62] The latter submission is wrong. The deed Jon executed conveys the legal and beneficial interest in the Lincoln Lot to Cam, subject only to a reservation of income and use during Alberta's life.

[63] In his written submissions, Jon's counsel stated that Jon had obtained a legal opinion with respect to the transfer of the properties.

[64] However, Jon has not produced any opinion predating the transfers supporting his assertion that he had the authority to carry them out. Jon's email to Mr. Garfield quoted at para. 26 does not suggest he was relying on Mr. Garfield's advice when he proceeded with the transfers.

[65] Jon's reliance on section 17 of Article X assumes the purpose of that section is to authorize distributions of Trust property to be made to beneficiaries because they are legally disabled. This assumption is not supported by the terms of the Trust deed.

[66] In my view, section 17 of Article IX does not modify or diminish the fundamental fiduciary duty of the trustee to administer the Trust in the best interests of the beneficiaries and in particular to ensure the assets of the Trust are distributed in accordance with the scheme of distribution set out in the Trust deed.

[67] I conclude that the purpose of section 17 of Article IX is to permit the trustee to make payments either directly to persons under disability or to their legal representatives, provided that those persons are otherwise entitled to receive income or capital from the Trust. Any such entitlement must however be found elsewhere in the Trust.

[68] In my view Article VI determines who the beneficiaries of the Trust are. The power to make payments under s. 17 of Article IX is restricted to payments to beneficiaries. If a person is not a beneficiary who is entitled to receive trust income on property pursuant to Article VI, s. 17 of Article IX does not apply to him or her.

[69] Article VI does set out certain specific circumstances in which the trustee may make discretionary distributions of capital prior to Alberta's death. The trustee, other than Alberta, has the discretion to make payments for Alberta's health, welfare, comfort, support and maintenance and the discretion to make payments for the education of Alberta's children. These payments may be made without equalization or proration among the children. Section 4 also permitted capital distributions to be made to Alberta on her 40th, 45th and 50th birthdays.

[70] The Trust deed does not authorize any other discretionary payments of income or capital. It is also to be noted that s. 17 of article IX, unlike the provisions authorizing payments from the Trust, does not specify whether the payments it refers to are to come from income or capital. This is consistent with the sole subject matter of s. 17 being the manner in which payments can be made to persons under legal disability rather than establishing that disability alone is a basis for being eligible to receive distributions of trust assets.

[71] I also find that Jon's conclusion that Cam is a person under legal disability cannot reasonably be supported. Cam's physical disabilities are not legal disabilities. The opening words of section 17 made this clear. They state that the trustee has the power to make payments to or for the benefit of "minors or other beneficiaries under legal disability".

[72] I agree with Mr. Atlass and Mr. Simmental that a legal disability must be a disability that impairs the ability of a person to make legally binding commitments. In the case of an adult, legal disability implies that some other person has been appointed to manage that person's affairs or person. It is clear from the evidence that Cam suffers from no such disability.

[73] I am also of the view that Jon did not have authority to transfer property out of the Trust without the consent of his co-trustee. I can see no merit in Jon's argument that he is to be regarded as a successor to the corporate trustee with the power granted to the corporate trustee to act unilaterally in the administration of the Trust estate.

[74] The provisions of the Trust dealing with the corporate trustee require a corporate trustee to be an institution with specific capital assets. A corporate trustee is independent, with no personal interest in the income or capital of the Trust.

[75] Finally, I can see nothing in the Trust to suggest that even if Jon is the successor to the corporate trustee with all its powers, he would have the power to distribute Trust property contrary to the scheme of distribution set out in Article VI of the Trust. The provisions of section 3 of Article X of the Trust, stating that the decision of the corporate trustee shall prevail in cases of disagreement, apply only to the administration of the Trust. They do not authorize the corporate trustee to act in a manner contrary to the mandatory provisions of Article VI dealing with the manner in which Trust income and capital must be distributed.

[76] I therefore conclude that the transfers of the Provo House and the Lincoln Lot were contrary to the terms of the Trust. On the termination of the Trust, Alberta's children are entitled to an equal distribution of the capital of the Trust. Prior to her death, the capital can be distributed to Alberta at the discretion of the trustee other than herself if that trustee deems it necessary for her health, welfare, comfort, support and maintenance. The transfer of the two properties to only one of the children is therefore contrary to the settlor's intended distribution of the Trust assets.

[77] Jon's counsel submits that even if I conclude that Jon's actions are a breach of trust I can excuse them under Colorado law pursuant to the doctrine of equitable deviation. However, as Mr. Garfield acknowledges in his opinion, the power to permit equitable deviation is not to be used to disregard the settlor's intent but to give effect to his probable intent had the circumstances in which the trustee acted been anticipated by the settlor. In addition, to act pursuant to this power I must be satisfied that the purpose of the Trust has been furthered by the deviation.

[78] As I have already explained, Jon's actions did not further the purpose of the Trust. They frustrated the settlor's stated scheme of distribution set out in the Trust. In addition, Jon proceeded with the transfers in the face of the express objections of his co-trustee. I therefore can see no basis to excuse Jon's breach of trust.

[79] Accordingly I find that the transfers executed by Jon were breaches of trust, are unauthorized and void and this court must intervene to remedy them.

Remedies

[80] The Provo House and the Lincoln Lot must be restored to the Trust. Title to the properties is vested in Jon and Meredith Glenn as trustees of the CVRD Trust. Both Jon and Meredith Glenn are subject to the jurisdiction of this court. I therefore order them to take all necessary steps to transfer title to the Provo House and the Lincoln Lot back to the Trust and in particular to execute all transfers necessary for that purpose.

[81] Alberta and Donnalyn seek an order removing Jon as trustee. I am satisfied that both under Colorado law and British Columbia law the court may remove a trustee if it finds that the trustee has acted in a manner inconsistent with the settlor's intentions as set out in the Trust deed. In this case I find that Jon has so acted. Jon's actions have contributed to the remarkable degree of discord that has resulted in an inability to administer the Trust in an effective manner.

[82] Accordingly I order that Jon be removed as a trustee of the Trust.

Should Alberta be removed as Trustee

[83] I have also come to the conclusion that Alberta should be removed as trustee. It is quite clear to me that there is a high level of conflict and discord in the Sevy family over the administration of the Trust. While I am reluctant to ignore the stated wishes of the settlor that Alberta be a trustee of the Trust, I am satisfied that the orderly administration of the Trust requires that she be removed as trustee as well.

[84] In this regard I accept the submission of counsel for Donnalyn that Alberta is estranged from all members of the family except Maryjoy. I also note that for some period of time Alberta seemed to have been prepared to facilitate transfer of Trust assets to Cam. In addition, this litigation has demonstrated the high degree of conflict in the family and in particular with regard to the proper administration of the Trust.

Appointment of James Carphin as Trustee

[85] I conclude that the appointment of a single independent trustee is in the interests of all beneficiaries.

[86] I am satisfied that under British Columbia law the court can appoint an independent trustee if there is a high degree of conflict among the existing trustees. There is no evidence before me that Colorado law differs from British Columbia law in this regard and I am therefore entitled to assume it is the same as British Columbia law.

[87] I find that James Carphin is an appropriate person to be appointed to act as an independent trustee in this matter. No one has raised any objection to his independence or ability to act as trustee in this matter. Accordingly I order that he be appointed as trustee of the Trust.

[88] Any relief sought in the petitions that I have not dealt with in these reasons is referred to the trial list for disposition.

[89] The parties will have liberty to make application with respect to costs.

"The Honourable Mr. Justice Sewell"