

CANADA / JUDGMENT

Kellogg Estate (Re)

2013 BCSC 2292

COURT

Supreme Court of British Columbia

DECIDED

12 December 2013

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2013 BCSC 2292 Kellogg Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kellogg Estate (Re),

2013 BCSC 2292

Date: 20131212

Docket: 13-1491

Registry: Victoria

Re The Estate of Robert Payne Kellogg, also known as

Robert P. Kellogg, Deceased

Between:

Inga Kellogg Rouches, Executrix of the Will of Robert Payne Kellogg,

also known as Robert P. Kellogg, and Inga Kellogg Rouches,

Successor Trustee of the Kellogg Family Trust

Petitioner

And

Vivian Payne Kellogg, Susanna Mitchell Kellogg and

Inga Kellogg Rouches, both in her personal capacity and in her capacity as

Executrix of the Will of Lisa E. Kellogg

Respondents

Further Corrected Judgment: Subsequent to the corrected judgment on

August 14, 2014, the text of the judgment was further corrected at paragraph 7(b)

on August 19, 2014

Corrected Judgment: The text of the judgment was corrected on the cover page and paragraphs 4, 7, 79, 83, 84 and 89(b) on August 14, 2014. Also see supplementary reasons to these reasons for judgment dated August 14, 2014 (2014 BCSC 1541)

Before: The Honourable Madam Justice Gray

Reasons for Judgment

Counsel for the Petitioner:

H. D. Fisher

The Respondent, Susanna Kellogg:

In Person

The Respondent, Vivian Kellogg:

In Person

The Respondent, Inga Rouches, both

in her personal capacity and in her capacity as Executrix of the Will of Lisa E. Kellogg:

No Submissions

Place and Date of Trial/Hearing:

Victoria, B.C.

August 21, 2013

Place and Date of Judgment:

Victoria, B.C.

December 12, 2013

INTRODUCTION

- [1] The Petitioner is one of three children, all daughters, of Robert Payne Kellogg ("RPK"). RPK's Will dated March 23, 1994 ("Will") named her as his sole personal representative. A grant of Probate of the Will issued to the Petitioner on November 28, 2012.

- [2] I refer to RPK's three daughters by their first names, because two of them have the same last name. The three daughters are the Petitioner, Inga, and her two younger sisters, Vivian and Susanna. In some documentation, Inga's name is spelled "Inge" and Susanna's name is "Susan", but the references are to the same people.
- [3] Inga has applied for orders in two capacities. In her capacity as Executrix of RPK's Will, she has applied for orders construing the Will. In her capacity as trustee of "The Kellogg Family Trust, dated March 23, 1994, Robert P. Kellogg and Lisa E. Kellogg, Trustors and/or Trustees" ("KF Trust"), she has applied for orders relating to her ability to deal with a partial interest in property on Saltspring Island, B.C., known as "Musgrave Farm". I refer to RPK's interest as the "Musgrave Farm Interest". RPK was domiciled in Washington State, U.S.A., at the time of his death, so this proceeding relates only to real property in B.C., being the Musgrave Farm Interest.
- [4] The Petition proceeded to a one-day hearing on affidavits. Inga in her capacity as Executrix of RPK's Will and Trustee of the KF Trust was represented by counsel, Ms. Fisher. I refer to Inga in those two capacities as the "Petitioner". Vivian and Susanna acted in person. Inga did not make submissions in her personal capacity, as beneficiary in RPK's Will and under the KF Trust, or in her capacity as Executrix of the Will of Lisa E. Kellogg.
- [5] This case raises a question of how the court should deal with a clause in a will sometimes termed a "pour-over" clause, purporting to make a gift to an existing trust. Neither Ms. Fisher nor I nor my law clerk were able to find a British Columbia case dealing with such a clause, although there are English and Canadian cases of some relevance and American cases on point. In this case, the pour-over clause refers to the KF Trust as amended. The KF Trust existed on the date of the Will, and was amended later.
- [6] If the pour-over clause is not effective, there is a second question of whether the Will incorporates by reference the terms of the KF Trust, and if so, whether it incorporates the KF Trust on the terms in existence at the time the Will was executed, or on the terms as subsequently amended. If the gift in the Will is invalid, Inga seeks an order that the Musgrave Farm Interest should be distributed as on an intestacy.
- [7] If I have understood Vivian's submissions correctly, the parties to this Petition do not agree on how the Musgrave Farm Interest will be distributed under the three possible different interpretations of the Will. The Petition seeks interpretation of the Will, but does not seek to resolve what is the proper distribution under the three possible interpretations of the Will.
- a) The position of the Petitioner is that, if the Will is construed to provide that the gift passes on the terms of the KF Trust which applied on the day of the Will, the Musgrave Farm Interest will be distributed in equal shares to Inga, Vivian, and Susanna upon the death of both RPK and LEK. If I have understood her submissions correctly, in contrast, Vivian's position is that if the gift passes on the terms of the KF Trust which applied on the day of the Will, Inga, Vivian, and Susanna will have an interest, and so too will Inga's two children.

- b) The position of the Petitioner is that, if the Will is construed to provide that the gift passes to the KF Trust on the terms which applied on the date that RPK died, the Musgrave Farm Interest will be distributed equally to Inga and Susanna upon the death of both RPK and LEK, and Vivian will not receive any part of it. If I have understood her position correctly, Vivian's position is that if the gift passes on the terms of the KF Trust which applied on the date that RPK died, she will not have an interest, but Inga's two children will have an interest in addition to Inga and Susanna.
- c) If I have understood Vivian's submissions correctly, the parties on this Petition agree that if the gift passes as though there is an intestacy, the estate of RPK's wife, LEK, would be entitled to \$65,000 plus 1/3 of the estate, and the balance would be shared equally by Inga, Vivian, and Susanna.
- [8] Vivian's position is that the gift should pass as though there were an intestacy. Neither Inga nor Susanna took a position on how the gift should pass.
- [9] Vivian's position is that it is premature for the court to make an order regarding Inga's ability to deal with the Musgrave Farm Interest. Inga offered to agree to an order that any sale or partition of the Musgrave Farm Interest would be subject to either a) court approval on notice to Susanna, and, if the Will were construed so that Vivian is entitled to a share in the Musgrave Farm Interest, also on notice to Vivian; or b) written agreement by Susanna, and, if the Will were construed so that Vivian is entitled to a share in the Musgrave Farm Interest, written agreement by Vivian as well. That term was acceptable to Susanna, but Vivian's position remained that any order concerning dealing with the Musgrave Farm Interest is unnecessary at this time.

CHRONOLOGY OF FACTS

- [10] At some point before January 13, 1994, Mr. Eck, an attorney in the private practice of law in Bellevue, Washington, in the United States of America, received a document entitled "The Estate Plan Client Workbook" ("Workbook") for RPK and his wife Lisa E. Kellog ("LEK"), probably from Don Bucher, a representative of Heritage Benefits Inc. ("Heritage"). Heritage is an estate preservation and wealth management company located in Bellevue, Washington, U.S.A.
- [11] Mr. Eck met with RPK and LEK on January 13, 1994, to discuss their estate planning needs, and reviewed the contents of the Workbook with them. Mr. Eck had previously used a document production company called "The Estate Plan" to prepare estate planning documents for his clients. Mr. Eck ordered documents from The Estate Plan and asked that they be sent to RPK and LEK for their inspection.

- [12] The KF Trust was created by an Estate Plan form document ("KF Trust Indenture"). It does not appear to have been signed before a witness, although RPK and LEK made a voluntary declaration dated March 23, 1994 to a notary public named Stacy Jones that they executed the KF Trust Indenture. Both RPK and LEK signed as both Trustors and Trustees. The declaration was apparently made in King County, Washington, U.S.A.
- [13] The KF Trust Indenture is 54 pages long and includes the following provisions:
- a) The name of the KF Trust is "The Kellogg Family Trust, dated March 23, 1994, Robert P. Kellogg and Lisa E. Kellogg, Trustors and/or Trustees" (p. 1);
 - b) RPK and LEK are "Settlors" or "Trustors" or, separately, "Husband" or "Wife", and "Trustees" or "Trustee" and "Beneficiaries" or "Beneficiary" while living (p. 1);
 - c) "The children who are named as Primary Beneficiaries" are Inge, Vivian, and Susanna (p. 1);
 - d) "[T]he Trustors have the right to amend this Trust in whole or in part and, therefore, while the Trustors are alive, for income tax purposes, the Trust shall be treated as a revocable 'Grantor Trust' pursuant to" a section of the Internal Revenue Code (p. 2);
 - e) On the death of a Trustee, the next acting Trustee will immediately assume the duties of Trustee and manage the Trust according to its terms; and in the event of the death of an original Trustee, the remaining Trustee will continue to serve as Trustee over all assets held according to the terms of the Trust Agreement with respect to Trust A (p. 7);
 - f) In the event of the death of the surviving original Trustee who is a Trustor, Inga will serve as Successor Trustee (p. 7);
 - g) "The Trustors may, during the joint lives of the Trustors, by signed instruments delivered to the Trustee: change the beneficiaries, their respective shares and the plan of distribution; amend this Trust in any other respect; or, revoke this Trust in its entirety or any provision therein, except as to any share or Trust created herein which has become irrevocable by the terms hereof or by operation of law" (p. 12);
 - h) "Both Trustors acting as Trustees may, during the joint lives of the Trustors: change the beneficiaries, their respective shares and the plan of distribution; amend this Trust in any other respect; or revoke this Trust in its entirety or any provision therein; provided, however, the duties or responsibilities of the Trustee shall not be enlarged without the Trustee's consent nor without satisfactory adjustment of the Trustee's compensation" (p. 12);
 - i) The Trustee shall hold, administer and distribute the Trust Estate as follows:
 - i. In exercising discretion, the Trustee is to consider the needs of the Surviving Trustor, during his or her lifetime, as the primary purpose of the Trust, even if the satisfaction of such needs requires invasion of the entire Trust Estate (p. 14);

ii. After the death of the Surviving Trustor, the needs of the children shall be paramount to the conservation of the Trust Estate for the benefit of those who will be entitled to the Trust Estate at its termination. The Trustee shall, in exercising the discretion given to him or her for the benefit of the children or their issue, do so in such a manner as will encourage thrift, industry, and self-reliance to the maximum extent practicable by the respective Beneficiaries, and discourage extravagance or indolence on the part of any such Beneficiary (p. 14);

iii. "By way of illustration and not of limitation and in addition to any inherent, implied or statutory powers granted to trustees generally, the Trustee is specifically authorized and empowered with respect to any property, real or personal, at any time held under any provision of this Trust: to convey, convert, deal with, dispose of manage, mortgage, . sell, and in general, exercise all of the powers in the management of the Trust Estate which any individual could exercise in the management of similar property owned in his/her own right, upon such terms and conditions as to the Trustee may seem best without the necessity of a court order" (pp. 16-17);

iv. Upon the death of either Trustor, the Trustee shall divide and allocate the Trust Estate into two (2) separate shares. This division shall include any property which may be added from the deceased Trustor's general estate. One share shall be designated as Survivor's Trust A and the other share shall be designated as Decedent's Marital Share, Trust B and Trust C (p. 27);

j. Survivor's Trust A shall consist of the Survivor's one-half ($\frac{1}{2}$) interest in all other property included in the Trust Estate as the separate property of the Surviving Trustor. Upon division into shares at the death of a Trustor, Survivor's Trust A shall remain revocable by the Surviving Trustor during the life of the Surviving Trustor. Upon the death of the Surviving Trustor, this share shall become irrevocable (p. 27);

k. Survivor's Trust A shall be held, administered, and distributed as follows:

Right to Income

a. Commencing with the date of the first Trustor's death, the Trustee shall pay to or apply for the benefit of the Surviving Trustor during her lifetime all the net income from Trust A in convenient installments but no less frequently than quarterly (p. 31);

Right to Principal

b. In addition, the Trustee may pay to or apply for the benefit of the Surviving Trustor such sums from the principal of Trust A as in the Trustee's sole discretion shall be necessary or advisable from time to time for the medical care, maintenance, and welfare of the Surviving Trustor, taking into consideration to the extent the Trustees deem advisable, any other income or resources of the Surviving Trustor known to the Trustees (p. 31);

Distribution of Residual of Trust A

- c. The balance of the principal of Trust A shall be distributed in accordance with the provisions specified in the section of the Trust titled "ALLOCATION AND DISTRIBUTION OF TRUST ASSETS," which is a reference to pp. 40-47, the relevant portions of which are set out in m. and n. below (pp. 31-32);
- l. Decedent's Trust B and C shall be irrevocable and otherwise held and distributed on terms similar to Trust A (pp. 33-39);
- m. Upon or after the death of the Surviving Trustor, the Primary beneficiaries of the KF Trust are Inge, Vivan, and Susanna, and upon the death of the Surviving Trustor, the Trustee shall allocate the balance of the Trust Estate as then constituted into equal separate shares to provide one (1) share each for Inge, Vivian, and Susanna, the Primary Beneficiaries of the Trust Estate (p. 43); and,
- n. the distributions were to be made half on the Trustor's death and the other half 5 years later (p. 45).

[Underlining Added].

[14] RPK's Will is also dated March 23, 1994. RPK executed it before two witnesses, and made a declaration before the notary public, Stacy Jones, that he executed it voluntarily. The two witnesses made a declaration before the notary public that they witnessed the Will and that, to the best of their knowledge, RPK signed it under no constraint or undue influence. It appears that the declarations were made in King County, Washington, U.S.A.

[15] The Will includes the following on pp. 1-3:

Residue of Estate

[a] I give, devise and bequeath all the rest, residue and remainder of my property of every kind and description (including lapsed legacies and devises), wherever situated and whether acquired before or after the execution of this Will, to the Trustee under that certain Trust executed by me, which is known as [the KF Trust]. The Trustee shall add the property bequeathed and devised by this Item to the corpus of the above described Trust and shall hold, administer and distribute said property in accordance with the provisions of the said Trust, including any amendments thereto made before my death.

[b] If for any reason the said Trust shall not be in existence at the time of my death, or if for any reason a court of competent jurisdiction shall declare the foregoing testamentary disposition to the Trustee under said Trust as it exists at the time of my death to be invalid, then I give all of my estate including the residue and remainder thereof to that person who would have been the Trustee under said Trust, as Trustee, and to their substitutes and successors under the Trust, as such trust is described hereinabove. Property held by the designated Trustees shall be held, managed, invested, reinvested and distributed by the Trustees upon the terms, trusts and

conditions contained in said Trust pertaining to the period beginning with the date of my death. The terms, trust and conditions shall be those as were constituted in said Trust (giving effect to amendments, if any, hereafter made) immediately prior to its state of non-existence or determination of invalidity, and for that purpose I do hereby incorporate such Trust by reference into this my Will.

Personal Representative Powers

[c] By way of illustration and not of limitation and in addition to any inherent, implied or statutory powers granted to Personal Representatives generally, my Personal Representative is specifically authorized and empowered with respect to any property, real or personal, at any time held under any provision of this my Will: to allot, allocate between principal and income, assign, borrow, buy, care for, collect, compromise claims, contract with respect to, continue any business of mine, convey, convert, deal with, dispose of, enter into, exchange, hold, improve, incorporate any business of mine, invest, lease, manage, mortgage, grant and exercise options with respect to, take possession of, pledge, receive, release, repair, sell, sue for, make distributions in cash or in kind or partly in each without regard to the income tax basis of such asset and in general, exercise all of the powers in the management of my Estate which any individual could exercise in the management of similar property owned in its own right upon such terms and conditions as to my Personal Representative may seem best, and execute and deliver any and all instruments and do all acts which my Personal Representative may deem proper or necessary to carry out the purposes of this my Will, without being limited in any way by the specific grants of power made, and without the necessity of a court order.

[d] My Personal Representative shall have absolute discretion, but shall not be required, to make adjustments in the rights of any beneficiaries, or among the principal and income accounts to compensate for the consequences of any tax decision or election, or of any investments or administrative decision, that my Personal Representative believes has had the effect, directly or indirectly, of preferring one beneficiary or group of beneficiaries over others. In determining the federal estate and income tax liabilities of my estate, my Personal Representative shall have discretion to select the valuation date and to determine whether any or all of the allowable administration expenses in my estate shall be used as federal estate tax deductions or as federal income tax deductions and shall have the discretion to file a joint income tax return with my spouse.

[Paragraph Lettering Added].

[16] RPK's Will also provided that Inga would be the sole personal representative of his estate, should LEK predecease him or be unable or unwilling to act.

[17] LEK signed a will on the same day which is essentially identical to RPK's Will.

[18] RPK and LEK signed a written "Amendment to [KF Trust]" at Bellevue, Washington, on December 2, 1998. It does not appear to have been signed before a witness, although RPK and LEK made a declaration to Mr. Eck that they signed the Amendment to KF Trust as their voluntary act.

[19] The Amendment to KF Trust included the following:

- a) it changed the name of the second successor trustee from Susan M. Kellogg to Susanna Eriksen Kellogg, and deleted the provision that Vivian would be a third successor trustee (p. 1);
- b) it altered the Primary Beneficiaries to remove Vivian as a beneficiary and leave Inge and Susanna as the only beneficiaries, and included the following term (p. 2):

The Trustors specifically exclude [Vivian] from participating in the benefits of the Trust Estate. Except as specifically stated in this Trust Agreement the Trustors have intentionally omitted the previously named persons as well as any other person not named as a beneficiary of this Trust Agreement. Notwithstanding the fact that such omitted persons may include a child of the Trustor's who is not named or referred to in this Trust Agreement but who is living at the Trustor's death.

and,

- c) it replaced the term that the property would be distributed as to half immediately and as to the other half in five years with a term that it would be allocated on the death of the Surviving Trustor and distributed as soon as reasonably practicable (p. 4).

[Underlining Added].

[20] RPK passed away on April 15, 1999, when he was living in Lakewood, Washington, U.S.A. He was survived by his wife and his three children, being his daughters Inga, Susanna, and Vivian. A document from the Heritage files entitled "[RPK], Inventory at Time of Death, 15-Apr-99" appears to set out assets in the name of the KF Trust and in the name of RPK personally as at RPK's death on April 15, 1999. The document shows about \$1.5 million in assets in the name of the KF Trust, and about \$788,000 in the name of RPK himself. The assets described as being in RPK's name consist primarily of "Saltspring Island Property" shown as having a value of \$772,000, which is apparently the Musgrave Farm Interest.

[21] The Musgrave Farm consists of six separate legal parcels of land on Saltspring Island, B.C. Since March 2, 2000, the registered owners have been RPK as to an undivided 40/128 interest, and six others as to the remaining 88/128 interest. The six others are three nephews and a niece of RPK as to 18/128 each, and a former sister-in-law of RPK and her husband as to 8/128 each.

- [22] LEK did not obtain a grant of probate of RPK's Will and did not take any steps regarding the Musgrave Farm Interest. RPK was a resident of U.S.A. and did not file any Canadian income tax returns. LEK did not report the deemed disposition on RPK's death of the Musgrave Farm Interest for Canadian tax purposes.
- [23] LEK passed away on October 24, 2010, and like her husband, she was survived by her three daughters Inga, Susanna, and Vivian. A document entitled "KF Trust Balance sheet as of October 24, 2010" shows total net assets of about \$54,000 (being about \$1.45 million less than in the inventory document dated April 15, 1999). The most significant assets are described as securities, an art print, and a vehicle, and the most significant debts as credit card debts.
- [24] Inga applied for probate of RPK's Will. In her Statement of Assets, Liabilities and Distribution, she estimated the value of the Musgrave Farm Interest to be \$1.16 million as at his death on April 15, 1999. The only other assets she reported were items of personal property, which she estimated were worth about \$14,000.
- [25] On March 30, 2012, after Inga applied for probate of RPK's Will, Vivian filed a Caveat. Inga commenced proceedings for proof of the Will in solemn form. Vivian opposed it and filed a counterclaim.
- [26] On October 30, 2012, after a summary trial hearing, Russell J. pronounced for RPK's Will in solemn form, dismissed Vivian's counterclaim, and ordered Vivian to pay costs. The parties did not agree on the amount of costs, and they were determined by Master Bouck to be about \$7,150.
- [27] By order pronounced November 23, 2012, by a Master of the Court, Inga was appointed Executrix of RPK's Will. As stated above, Letters Probate were issued on November 28, 2012.
- [28] Also on November 28, 2012, Vivian filed an appeal of the order of Russell J.
- [29] Vivian commenced a separate lawsuit on March 12, 2013, seeking to set aside the grant of probate.
- [30] On June 24, 2013, Vivian's appeal of the order of Russell J. was dismissed by Prowse J.A. in chambers as abandoned. Vivian sought a review of that decision by a full panel of the Court of Appeal.
- [31] Vivian's separate lawsuit seeking to set aside the grant of probate was dismissed by Abrioux J. in the spring of 2013. Vivian has filed an appeal of that order.
- [32] A full panel of the Court of Appeal heard the review that Vivian sought of the decision of Prowse J.A. and dismissed the review on October 23, 2013. The result is that the order of Russell J. pronouncing for the Will remains in effect.

- [33] Inga retained a tax lawyer to assist her with the tax issues related to RPK's estate, and made a voluntary disclosure to the Canada Revenue Agency. Inga understands that the taxable capital gain relating to the Musgrave Farm Interest is about \$365,000. She understands that the tax owing would be about half of that, approximately \$180,000, together with any interest and penalties payable to the CRA.
- [34] Inga has personally advanced about \$69,000 to cover expenses relating to RPK's estate, including probate fees, accounting fees, and legal fees.
- [35] Inga believes that it will be necessary to sell some or all of the Musgrave Farm Interest to pay the estate's outstanding income taxes and debts. Inga deposed that, based on Vivian's actions to date, she believes that Vivian will oppose any steps Inga may wish to take to partition and/or sell the Musgrave Farm Interest. Inga wishes to have an order of the court confirming her authority to partition or sell the Musgrave Farm Interest before she enters into negotiations with third parties for the sale of some or all of it.

ANALYSIS

- [36] I deal first with the Pour-Over Clause, next with the Incorporation by Reference Clause, and finally with authority to sell or agree to partition the Musgrave Farm Interest.

(a) Pour-Over Clause

- [37] The clause in RPK's Will which I term the "Pour-Over Clause" is the following (which is also set out in paragraph 15(a) above):

I give, devise and bequeath all the rest, residue and remainder of my property of every kind and description (including lapsed legacies and devises), wherever situated and whether acquired before or after the execution of this Will, to the Trustee under that certain Trust executed by me, which is known as [the KF Trust]. The Trustee shall add the property bequeathed and devised by this Item to the corpus of the above described Trust and shall hold, administer and distribute said property in accordance with the provisions of the said Trust, including any amendments thereto made before my death.

[Underlining Added].

- [38] The concept of a pour-over clause is that the gift will simply "pour over" into an inter vivos trust. Here, the trust is the KF Trust. It is an inter vivos trust, meaning one created during a settlor's lifetime, rather than in a will like a testamentary trust. The KF Trust was already in existence at the time of RPK's execution of the Will.
- [39] A trust is not a separate legal entity but a "relationship" (see e.g. *Bronson v. Hewitt*, 2013 BCCA 367, at para. 70).

[40] The fact that a trust is not a separate legal entity, like an individual or a corporation, affects the legal analysis. The treatment of trust property as separate for Canadian income tax purposes is specific to taxation, and does not create a trust entity from the trust relationship.

[41] The concerns about a pour-over clause relate primarily to the formalities for creating a will as set out in the Wills Act, R.S.B.C. 1996, c. 489. Sections 3 and 4 are as follows:

3 A will is valid only if it is in writing.

4 a will is not valid unless

- (a) at its end it is signed by the testator or signed in the testator's name by some other person in the testator's presence and by the testator's direction,
- (b) the testator makes or acknowledges the signature in the presence of 2 or more attesting witnesses present at the same time, and
- (c) 2 or more of the attesting witnesses subscribe the will in the presence of the testator.

[42] The Wills Act requirements must be satisfied for a will to be valid in B.C. In *Ellis v. Turner*, [1997] B.C.J. No. 2768 (C.A.), two witnesses had signed the will in the presence of the testatrix, but the testatrix herself had not signed the will at the end, had not signed the will in the presence of the witnesses, and had not acknowledged to the witnesses that her signature was on the will. The appellants argued that the court should accept the will despite the technical defects, arguing that there was reliable evidence that the will represented the testatrix's testamentary intentions and was not the result of duress, fraud, or subsequent alteration. Ryan J.A., speaking for the court, said as follows at para. 9:

The Wills Act creates a scheme designed to insure that a document purporting to be a testamentary disposition is in fact the will of the testator. A strong indicia of authenticity is proof that the will was signed at its end in the presence of witnesses. This Court must interpret, apply and respect the law as passed by the legislature. To declare the will in this case to be valid would be to by-pass the clear provisions of the Wills Act and to create a discretion in this Court which is not found in the Act. This is something which we cannot do.

[43] One problem with pour-over clauses is that if the relevant trust is amended following the date of the will, the amendment will usually fail to comply with the Wills Act. That is the case here, because the Amendment to KF Trust does not include the signature of any witnesses.

[44] I will first discuss the relevant English and Canadian cases and then refer to American law and articles by commentators. I refer to the relevant English and Canadian cases in chronological order.

- i) English and Canadian Cases

[45] *Blackwell v. Blackwell*, [1929] A.C. 318 (H.L.), is a case in which a codicil sought to make a gift to be held in trust by trustees. The intended trustees knew and accepted the object and outline of the trust before the codicil was executed. The court gave effect to the codicil.

[46] In distinguishing the case from one in which the intended trustees did not accept the terms of the trust before execution of the codicil, Lord Sumner said as follows (at p. 339):

A testator cannot reserve to himself a power of making future unwitnessed dispositions by merely naming a trustee and leaving the purposes of the trust to be supplied afterwards. To hold otherwise would indeed be to enable the testator to 'give the go-by' to the requirements of the Wills Act, because he did not choose to comply with them.

[47] In explaining why the gift was upheld, His Lordship went on to state at pp. 339-40:

It is communication of the purpose to the legatee, coupled with acquiescence or promise on his part, that removes the matter from the provision of the Wills Act and brings it within the law of trusts, as applied in this instance to trustees, who happen also to be legatees.

[48] In *Re Keen* [1937] 1 Ch. 236 (C.A.), the court held that a gift in a will to trustees failed for two reasons.

[49] First, the relevant clause attempted to reserve to the testator the power of making future dispositions without a duly attested codicil. Lord Wright M.R. noted that such a clause was contrary to the principles set out by Lord Sumner in *Blackwell*, stating at p. 247:

The trusts referred to but undefined in the will must be described in the will as established prior to or at least contemporaneously with its execution.

[50] Second, the sealed letter which notified the trustees about the trust terms was dated before the date of the will, while the language of the will contemplated a future definition of the trust. Thus, the letter setting out the trust terms was inconsistent with what the will prescribed.

[51] In *Re Jones*, [1942] 1 Ch. 328, Simonds J. held that a bequest failed for uncertainty. The term in the will was as follows (p. 328):

[to the] Tettenhall College Investment Trustees appointed or to be appointed under special declaration of trust for the benefit of Tettenhall College or otherwise as therein contained executed by me bearing even date with this my last will and testament or any substitution therefor or modification thereof or addition thereto which I may hereafter execute.

[Underlining Added].

Simonds J. wrote as follows in his analysis (pp. 334-35):

[T]he testator's intention was that subsequent declarations should have testamentary validity, though they might not satisfy the formal requirements of the Wills Act. That intention must, however, fail. It appears to me that this is, in effect, another way of stating the conclusion to

which I have come. A bequest in the terms of that before me is invalid, as evidence cannot be admitted to establish the first but not the second of two alternatives which together are the expression of the testamentary intention, because, if evidence is admitted to establish the first but not the second alternative, the testator's intention as a whole cannot be ascertained. The gift must then fail for uncertainty, because it is not permissible to make a gift in a form which involves power to change a testamentary disposition by an unexecuted codicil.

[52] In *Re Schintz' Will Trusts*, [1951] 1 Ch. 870, Wynn-Parry J. of the English Chancery Division upheld a gift to a trust but without including the changes made to the trust after the execution of the will. The term in the will was as follows (p. 871):

[I declare that] the share in my residuary estate which my daughter Julia Lucy Moreton shall take if she shall survive me shall not vest absolutely in her but shall be transferred to [the trustees of the voluntary settlement of 1906, to be held by them] upon the trusts and subject to the powers and provisions upon and subject to which the share in the said settlement [that was, the settled share of Julia Lucy Moreton, referred to as 'Lucy's share'] shall be held under or by virtue of the said settlement and the deed or deeds (if any) which may hereafter be executed by me under the power of revocation and declaration of new trusts thereby reserved to me or as near thereto as circumstances will admit.

[Underlining Added].

Wynn-Parry J. concluded as follows at p. 878:

The point, as will be seen, comes down to a very short question of construction of the particular will, construed, of course, against the background created by s. 9 of the Wills Act, 1837, and the judgments in the cases to which I have referred. I do not find the point easy, but I have come to the conclusion that the submission put forward by Mr. Cross is to be preferred, and that, laying emphasis upon the fact that the direction is to transfer the share in question to the trustees of the voluntary settlement and that the offending clause in the voluntary settlement is a limited power of revocation and a limited power of appointment, I am justified in treating the latter part of cl. 17 containing the offending words as being merely descriptive of the powers contained in the settlement. Finally, I realize that, were those words not in cl. 17, exactly the same effect would have followed as regards the disposition of the share of Lucy when the settlement came to be considered.

[53] In *Re Mihalopoulos* (1956), 5 D.L.R. (2d) 628, Egbert J. of the Alberta Supreme Court declined to follow the terms set out in a document separate from the will. The will provided that the remainder of the testator's Canadian estate "shall be distributed by my said trustees to such charities as they will find designated by me to share in this bequest among my papers" (para. 2). The testator's papers included an unsigned document dated the same date as the will.

[54] Egbert J. wrote as follows at paras. 11 and 17:

- [11] In my view, the document fails to satisfy either of the requisite conditions above set forth - there is no evidence that it was in existence at the time of the execution of the will - in fact, the available evidence is to the contrary - and it cannot be said that the document is beyond doubt the document referred to in the will. There is no doubt in my mind that the testator attempted and intended to reserve to himself the right to make future unattested dispositions of trust property which, prior to the present provisions of the Wills Act as to holograph instruments, would have been impossible: *Blackwell v. Blackwell*, [1929] A.C. 318 at p. 330.
- [17] In this case, as in the *Keen* case, the will, in my opinion clearly contemplates a future notification of the trust. Reading the will as a whole, and reading it in the light of the evidence as to the non-existence of the designation of trust at the time of execution of the will, there seems no doubt that the will contemplated a future designation and so as in the *Keen* case, was an attempt to reserve to the testator a power to make future disposition of his property by unattested and unsigned instruments, contrary to the provisions of the Wills Act. Moreover since the will contemplates some future designation of the trust, and the parol evidence suggested would be of an anterior designation, as in the *Keen* case, such evidence must be excluded as being inconsistent with what the will provides.

[Underlining Added].

- [55] In *Re Currie* (1978), 21 O.R. (2d) 709, Cromarty J. was considering the effect of a codicil for the purposes of succession duty. The codicil in question stated that if at the time of the testatrix's death there was a trust in existence known as the Currie Trust, the will gave shares and other securities to the Currie Trust to be dealt with in accordance with the terms of that trust. The codicil was dated June 4, 1973, and the trust indenture which created the Currie Trust was dated the next day.
- [56] Cromarty J. concluded that the codicil could not effectively incorporate the trust indenture nor make an effective disposition to the trust. While he did not specifically explain the basis of that conclusion, Cromarty J. cited cases which suggest that he concluded as follows:
1. non-testamentary documents may only be incorporated into wills if it can be established that the documents were actually in existence at the time of the execution of the wills; and
 2. testators cannot reserve unto themselves the right to make future unattested dispositions of trust property.

ii) American Legislation and Cases

- [57] A number of states of the United States have enacted legislation expressly permitting pour-over wills. See, for example, the Revised Code of Washington 11.12.250, which provides in part as follows:

A gift may be made by a will to a trustee of a trust executed by any trustor or testator if (1) the trust is identified in the testator's will and (2) its terms are evidenced either (a) in a written instrument other than a will, executed by the trustor prior to or concurrently with the execution of the testator's will or (b) in the will of a person who has predeceased the testator, regardless of when executed. Such gift shall not be invalid because the trust is amendable or revocable, or both, or because the trust was amended after the execution of the testator's will or after the testator's death. Unless the will provides otherwise, the property so given shall not be deemed to be held under a testamentary trust of the testator but shall become a part of the trust to which it is given to be administered and disposed of in accordance with the terms of the instrument establishing the trust, including any amendments, made prior to the death of the testator, and regardless of whether made before or after the execution of the will.

[Underlining Added].

[58] British Columbia does not have similar legislation, and it appears no other Canadian province or territory does either.

[59] Pour-over clauses have been held to be valid in several American states even without legislation similar to the Washington state legislation: See e.g. *Matter of Ivie* (1958), 4 N.Y. 2d 178 (7 judges of the Court of Appeals of New York); *Second Bank-State Street Trust Company v. Pinion* (1960), 170 N.E.2d 350 (5 judges of the Supreme Judicial Court of Massachusetts); and *Canal National Bank v. Chapman* (1961), 171 A.2d 919 (6 judges of the Supreme Judicial Court of Maine).

[60] The analyses in *Canal* and *Second Bank-State Street Trust Company* depended on the doctrine of "facts of independent significance", being an equitable doctrine that subsequent acts of independent significance do not require attestation under the applicable wills legislation. Essentially, the courts concluded that the amendments to the trust were facts of independent significance.

[61] I was not able to find any Canadian cases considering the doctrine of "facts of independent significance".

iii) Commentary

[62] In M.M. Litman, "Pour-over Wills: Their Relationship to the Doctrine of 'Incorporation by Reference' and The Doctrine of 'Facts of Independent Significance'" (1979) 4 E.T.R. 48, Professor Litman argues that the doctrine of facts of independent significance is well rooted in nineteenth century English jurisprudence.

[63] Professor Litman refers at p. 55 to *Stubbs. v. Sargon* (1837), 2 Keen 255, 48 E.R. 626. In *Stubbs*, the testatrix directed that certain property be divided "amongst my partners who shall be in co-partnership with me at the time of my decease or to whom I may have disposed of my said business " Before she died, the testatrix disposed of her business to certain persons. The court upheld the gift, even though the testatrix had not named the beneficiaries in a will with the necessary formalities. The court concluded that it was

sufficient that she had done an act in the ordinary course of her affairs, being the disposition of her business, which sufficiently clarified the gift.

- [64] The rationale for the doctrine of facts of independent significance was described in Alan N. Polasky, "Pour-Over Wills - And The Statutory Blessing" (1959) 98 Trusts and Estates 949, as follows at p. 951:

the policy underlying the wills legislation is satisfied because the act or fact relied upon, having independent significance, is not essentially a disposition of a testamentary nature and therefore less subject to the dangers of undue influence, or fraud, for purposes of influencing the disposition.

- [65] As set out in Litman at pp. 56-57:

Numerous cases have allowed donees of testamentary gifts to be defined after the execution of a will by non-testamentary acts that depended at least in part on the volition of the testator. In *Re Howell's Trusts*, [1937] 3 All E.R. 647 a disposition to the "servants in my employ at my death" was upheld. In the American cases of *Metcalf v. Sweeney*, 21 A. 364 (1891) and *Lear v. Manser*, 196 A. 240 (1916) bequests to "such persons as may be in my employ at my death" and "such persons as shall care for me in my last illness" were upheld.

- [66] Professor Litman argues that pour-over clauses may provide substantial benefits to testators, including reduction of tax and minimization of administration expenses. However, Professor Litman did not argue that Canadian jurisprudence supported such clauses, instead arguing for judicial guidance and direction on the limitations of using pour-over wills.

iv) Discussion

- [67] The arguments in favour of considering the Pour-Over Clause to be effective are that RPK's intentions as set out in that clause were to make a gift to the KF Trust in whatever form it existed at the time of his death; that RPK may have thought that a trust was like a corporation, and that he could make a gift to the KF Trust as though it were a legal entity; that the Will was executed in Washington State, U.S.A., and there may have been legislation at the time in that state enabling pour-over clauses; that the KF Trust Indenture and the Amendment to KF Trust, while not witnessed, were acknowledged to a single notary public to have been executed, and therefore had some degree of formality; and that the Amendment to KF Trust affected the property already subject to the terms of the KF Trust, and therefore was a "fact of independent significance".
- [68] The arguments suggesting that the Pour-Over Clause is not effective are that, at least with respect to the Amendment to KF Trust, it would enable RPK to avoid the requirements of the Wills Act; that although the execution of the KF Trust Indenture and the Amendment to KF Trust were acknowledged to a single notary public, they did not have the degree of finality and solemnity which would arise from proper compliance with the Wills Act, including two witnesses; and that the doctrine of "facts of independent significance" is not recognized in B.C. law, and the old English cases in which the doctrine is rooted should not be extended to

apply in this situation.

- [69] In my view, the fact that the Pour-Over Clause refers to future amendments of the KF Trust and the fact that the KF Trust Indenture was amended by the Amendment to KF Trust following the execution of the Will is determinative.
- [70] The gift cannot "pour over" to be held by the trustee of the KF Trust on the terms which existed at the time the Will was executed, because that trustee is now obliged to follow the terms set out in the Amendment to KF Trust. The gift cannot "pour over" to be held by the trustee on the basis of the Amendment to KF Trust because the effect would be to permit RPK to have effectively amended his Will without complying with the Wills Act.
- [71] Even though there is some formality associated with acknowledging execution of a document before a single witness who is a notary public, the court does not have jurisdiction to weigh the degree of formality. The failure to comply with the Wills Act is fatal.
- [72] The doctrine of "facts of independent significance" has not been recognized in B.C., and applying such a doctrine here would require bypassing the Wills Act.
- [73] As a result, the Pour-Over Clause is invalid.

(b) Incorporation by Reference Clause

- [74] The clause in the Will which I refer to as the "Incorporation by Reference Clause" is the following (and is also set out in paragraph 15(b) above):

If for any reason the said Trust shall not be in existence at the time of my death, or if for any reason a court of competent jurisdiction shall declare the foregoing testamentary disposition to the Trustee under said Trust as it exists at the time of my death to be invalid, then I give all of my estate including the residue and remainder thereof to that person who would have been the Trustee under said Trust, as Trustee, and to their substitutes and successors under the Trust, as such trust is described hereinabove. Property held by the designated Trustees shall be held, managed, invested, reinvested and distributed by the Trustees upon the terms, trusts and conditions contained in said Trust pertaining to the period beginning with the date of my death. The terms, trust and conditions shall be those as were constituted in said Trust (giving effect to amendments, if any, hereafter made) immediately prior to its state of non-existence or determination of invalidity, and for that purpose I do hereby incorporate such Trust by reference into this my Will.

[Underlining Added]

- [75] The requirements for incorporating a document into a will were described in *Re Mihalopoulos* as follows at para. 9:

It seems clear from the authorities that if a document is to be deemed as having been incorporated into a will, two conditions must be satisfied. (1) It must be clear that the testator in the will referred to some document then in existence; and (2), the document in question must be

beyond doubt the document referred to: Jarman on Wills, 8th ed., p. 154; Re Watkins (1865), L. R. 1 P. & D. 19; Allen v. Maddock (1858), 11 Moo. P.C. 427, 14 E.R. 757; Singleton v. Tomlinson (1878), 3 App. Cas. 404; Re Smart, [1902] p. 238; University College of North Wales v. Taylor, [1908] P. 140; Smart v. Prujean (1801), 6 Ves. 560, 31 E.R. 1195.

[76] In Re Edwards' Will Trusts, [1948] 1 Ch. 440, the English Court of Appeal incorporated into a will some but not all terms of a written trust settlement. Lord Greene M.R. said as follows at p. 448:

It seems to me that the directions for incorporation are directions to read into the will the entirety of a document which the testator no doubt thought would be effective. But if, on writing them into the will, it turns out that part of them is invalid from some rule of law, as in the present case, I cannot read the testator's directions as meaning that, therefore, the whole process of incorporation must be abandoned. I think that the effect of it is that so much of the settlement as can validly have operation as part of a testamentary disposition is left to take effect according to its true construction.

[Underlining Added].

[77] Here, the KF Trust Indenture and the Will were dated the same day. The Pour-Over Clause refers to the trust as being in existence. I conclude that at the time that RPK executed the Will, the KF Trust was in existence, and the trustee was bound by the terms of the KF Trust Indenture.

[78] The Incorporation by Reference Clause refers to the terms of the KF Trust "giving effect to amendments, if any, hereafter made". As discussed under the heading "Pour-Over Clause", it is contrary to the Wills Act for a testator to change a will by an instrument which does not comply with the requirements of the Wills Act.

[79] Should the Will be interpreted as incorporating the terms of the KF Trust as it existed at the time RPK signed the Will, or should the Incorporation by Reference Clause be held to be invalid because of the reference to subsequent amendments, with the result that the residue of the estate will pass under an intestacy?

[80] There is a strong presumption against intestacy: see e.g. Howell v. Howell Estate, 1999 BCCA 371. This presumption was discussed by Dorgan J. in Young v. Abercrombie, 2008 BCSC 389, at paras. 16, 18 and 19, as follows:

[16] Further, in the construction of wills, there is a strong presumption against intestacy. This often-cited principle was articulated by Lord Esher, M.R. in Re Harrison Estate (1885), 30 Ch.D. 290 at 393-4, as follows:

There is one rule of construction, which to my mind is a golden rule, viz., that when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce - that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy. This is a golden rule.

[181] In *Baldissera v. Baldassi* (1997), 18 E.T.R. (2d) 128 (B.C.S.C.) at para. 10, Edwards J., citing *The Canadian Law of Wills*, vol. 2, confirmed that:

There is a presumption against intestacy and the court will prefer an interpretation of the will which avoids an intestacy.

And further, at para. 11, Edwards J. held:

The court on reading the will as a whole may conclude that the testator clearly intended to dispose of his entire estate. Once such an intention is clear the court will construe the will so as to give effect to the will in preference to a construction which will result in a partial or total intestacy.

[191] A similar conclusion is found in *Jankowski v. Pelek Estate*, [1996] 2 W.W.R. 457, 131 D.L.R. (4th) 717 (Man. C.A.), where Helper J.A. at para. 76 stated, "[i]f the will is capable of two constructions, one which disposes of the whole estate and the other which leaves part of the estate undisposed of, the court will prefer the former."

[81] At the time he executed the Will, RPK intended that the residue would pass to the trustee of the KF Trust on the terms set out in the KF Trust Indenture. He also intended that any amendments to the KF Trust would effectively result in amendments to his Will, but he did not take steps in compliance with the Wills Act to make such amendments applicable to his Will.

[82] As a result, the Incorporation by Reference Clause incorporates the terms of the KF Trust Indenture, which governed the trustee on the date that RPK executed the Will. The gift of the Musgrave Farm Interest essentially passes to a testamentary trust which is on the terms of the KF Trust as at the date RPK signed the Will, being the terms set out in the KF Trust Indenture without amendment.

[83] As a result, RPK's three daughters have an equal interest in the Musgrave Farm Interest.

(c) Trustee Dealing with Musgrave Farm Interest

[84] As set out above, if the court concluded, as I have, that RPK's three daughters have an equal share in the Musgrave Farm Interest, Inga offered to agree to an order that any sale or partition of it would be subject to either a) court approval on notice to Susanna and Vivian; or b) written agreement by Susanna and Vivian. That term was acceptable to Susanna, but Vivian's position remained that any order about dealing with the Musgrave Farm Interest is unnecessary at this time.

- [85] I have concluded that the Pour-Over Clause is ineffective, but the Will incorporates by reference the terms of the KF Trust Indenture without the amendments made after the date of the Will. The trustee is as set out in the KF Trust Indenture. Inga is the trustee of the testamentary trust on those terms.
- [86] There has been a history of lawsuits regarding the Will. The disputes may have arisen at least in part from the uncertainty about interpretation of the Will, and it may be that matters can now proceed by agreement of the three sisters.
- [87] As trustee of the testamentary trust, Inga has the powers set out in the KF Trust Indenture and described above at paragraph 13(i)(iii), including the power to deal with the Musgrave Farm Interest. Inga's concern about problems is reasonable in light of the history of lawsuits including appeals. I cannot see any disadvantage to Vivian of an order in the terms to which Inga and Susanna are prepared to consent.
- [88] There will be an order that Inga, as trustee of the testamentary trust (which is on the terms of the KF Trust Indenture without amendment), is entitled to sell or mortgage or agree to the partition of the Musgrave Farm Interest, subject to either a) court approval on notice to Susanna and Vivian; or b) written agreement by Susanna and Vivian.

SUMMARY

[89] In summary:

- a) the Pour-Over Clause is invalid;
 - b) the effect of the Incorporation by Reference Clause is that the Musgrave Farm Interest is to be held on a testamentary trust which is on the same terms as set out in the KF Trust Indenture dated March 23, 1994, without amendment, and with the result that Inga, Vivian, and Susanna have an equal share in the Musgrave Farm Interest; and
 - c) Inga, as trustee of the testamentary trust, is entitled to sell or mortgage or agree to partition the Musgrave Farm Interest, subject to either a) court approval on notice to Susanna and Vivian; or b) written agreement by Susanna and Vivian.
- [90] If the parties do not agree on the issue of costs, they should provide written submissions to the Registry with the request that they be forwarded to my attention. Any party seeking costs must provide written submissions to the Registry and the other parties on or before January 15, 2014; any party responding to such an application must provide written submissions on or before January 29, 2014; and the first party or parties may provide written reply submissions on or before February 5, 2014.

"Gray J."

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