

CANADA / JUDGMENT

Maurer Estate (Re)

2025 BCSC 1539

COURT

Supreme Court of British Columbia

DECIDED

11 August 2025

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2025 BCSC 1539 Maurer Estate (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Maurer Estate (Re),

2025 BCSC 1539

Date: 20250811

Docket: S251709

Registry: Vancouver

In the Matter of the Estate of Erna Wine Maurer, Deceased

Before: The Honourable Madam Justice Forth

Reasons for Judgment

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Place and Dates of Hearing:

Vancouver, B.C.

June 25-26, 2025

Place and Date of Judgment:

Vancouver, B.C.

August 11, 2025

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Introduction

[1] The petitioner, Solus Trust Company Limited, ("Solus"), in its capacity as the trustee of the estate of Erna Wine Maurer ("Erna"), deceased, seeks the opinion, advice or direction of the Court pursuant to s. 86 of the Trustee Act, R.S.B.C. 1996, c. 464.

[2] Erna died on August 23, 2020, leaving a will dated June 21, 2019 ("Will"). The Will instructed Solus to distribute the residue of the estate according to a letter of wishes.

- [3] A letter of wishes was signed on June 21, 2019 (the "Letter of Wishes"). It stated that Erna's wish was to divide the residue of the estate into 12 equal shares and gift to the 15 listed charities either a share, a half share, or a quarter share. The Will provides that if the Letter of Wishes cannot be found among Erna's personal papers after her death, her trustee (Solus) shall distribute the remainder of her estate among the charitable and non-charitable organizations to which she donated more than \$500 in the five years immediately preceding her death.
- [4] The respondent, Heart and Stroke Foundation ("Heart and Stroke"), is one of the charities listed in the Letter of Wishes.
- [5] The respondents, Paula Maurer Jacobs ("Paula") and Paul B. Maurer ("Paul"), are Erna's adult children who would inherit on an intestacy or partial intestacy. I will refer to them collectively as "the respondents" in these reasons.
- [6] The Attorney General of British Columbia (the "Attorney General") appears in their *parens patriae* role, to be a party to any matter concerning the administration of, or variation of, a charitable purpose trust.
- [7] Solus served the petition on all of the charities listed in the Letter of Wishes. By order of Justice Majawa dated May 28, 2025, Solus also served the petition on the Attorney General and CanadaHelps (a charity to which Erna donated more than \$500 in the five years before her death, and which was not expressly named in the Letter of Wishes).
- [8] I will provide some relevant background facts and then address each of the orders sought by Solus.

Relevant Background Facts

Prior to the Execution of the Will

- [9] On February 8, 2010, Erna made a will that left her residual estate to her husband, Jacob Kenneth Maurer.
- [10] On January 22, 2015, Erna made another will in which she stated that she is not married. She made some specific bequests and provided for the sum of US\$1,000,000 to be gifted to charitable organizations as determined by her executor. She left the remainder of her property to be held in trust for her two children.
- [11] On March 19, 2018, Erna made another will in which she gifted US\$2,000,000 to charitable and non-charitable organizations and individuals to be determined by her executor. At clause 2.3, she stated: "I plan on describing to my Executor the charitable and non-charitable organizations, types of charitable organizations and individuals, or the purposes for which I want to benefit". She left the remainder of her property to be held in trust for her children. I will refer to this will as the "2018 Will".

Execution of the Will and the Letter of Wishes

[12] On January 22, 2019, Daniel Gumprich, Vice-President of Solus, emailed Erna to confirm the points to be included in her new will. One of the points to be included in the will was that the trustee have discretion to distribute funds to charitable and non-charitable organizations and individuals as determined by the Trustee, in the Trustee's sole discretion. Mr. Gumprich then wrote:

The following points need not be incorporated into your new Will, however, [they] should form part of the guidance you provide the Trustee separately:

- Erna to provide Solus Trust Corporation with a "Letter of Wishes" outlining the types of organizations (charitable and non-charitable) and individuals, or purposes which she wants to benefit from the Trust assets.
- Letter of Wishes to be created outside of the Will document and can be updated by Erna at any time in the future.
- Updated Letter of Wishes to be delivered directly to Trustee.

[13] On February 21, 2019, John Blackmer, the President and CEO of Solus, contacted Erna's lawyer, Shaun Cathcart, seeking her assistance in helping Erna prepare a new will.

[14] Ms. Cathcart states that she acted for Erna from late February 2019 through to July 7, 2019. She estimated that she met with Erna at least 11 times, over a total of more than 20 hours, to discuss her wishes. She also communicated with Mr. Blackmer and Mr. Gumprich of Solus, who had been assisting Erna with estate planning.

[15] On April 3, 2019, a copy of Mr. Gumprich's January 22, 2019 email to Erna was forwarded to Ms. Cathcart. In this email, Mr. Gumprich noted that "[t]he issue of Erna's charitable and non-charitable giving following her death has been one which she has been wrestling with for some time."

[16] On April 12, 2019, Ms. Cathcart advised Erna that she was able to obtain from Erna's U.S. lawyer a copy of the 2018 Will and would incorporate the revisions and then discuss the draft will with her. Ms. Cathcart noted that there was a meeting scheduled for April 26, 2019 to review the draft will.

[17] After the April 26, 2019 meeting, Ms. Cathcart prepared a draft of the will and a draft letter of wishes, incorporating the "endowment fund concept". However, Ms. Cathcart deposed that Erna decided against using an endowment fund. Instead, Erna preferred for the residue of her estate to be distributed outright among charitable objects using an arrangement by which her will, having provided that the residue would go to charitable objects, made reference to a letter of wishes to the executor which provided guidance about the objects of her charitable giving.

- [18] Ms. Cathcart asked Erna to identify the charitable and non-charitable people and organizations that she wished to benefit in the letter of wishes. Erna researched which charities she wished to list, and Ms. Cathcart researched the correct names, addresses, and Canada Revenue Agency numbers (where applicable) of those she identified. Erna reviewed and commented on the drafts several times until she found the right mix of charities and correct proportions to each, the result being the Letter of Wishes.
- [19] Ms. Cathcart stated in her affidavit as follows:
11. Erna expressed to me great confidence in the executor, Solus, as an organization and in the individual staff members she had dealt with at Solus. Erna told me that she believed the executor knew and understood her charitable intentions and would carry them out. Erna told me that she was confident that the Letter of Wishes was clear and, as such, felt the executor would have no trouble following it. To my knowledge, Erna worked very hard on the Letter of Wishes so that the executor would have a complete list of those to which she wished to charitably benefit.
- [20] Prior to signing the Will, Erna signed two other wills and letters of wishes drafted by Ms. Cathcart: one on May 17, 2019 and another on June 14, 2019. In both of these wills, the residue of Erna's estate went to charitable organizations as set out in a letter of wishes.
- [21] Ms. Cathcart met with Erna on June 21, 2019 to sign the Letter of Wishes and the Will. She explained:
13. It is my invariable practice to have my clients sign documents such as letters of wishes before I have them sign their wills. In this case, based upon my invariable practice, I am certain that, on June 21, 2019, I had Erna sign the Letter of Wishes, which I signed as a witness, before she signed the Will, which was witnessed by me and Hilary Dempsey. I do not have a contemporaneous note on that point. I have asked Hilary Dempsey - the person who was the second witness for Erna's Will - if she remembers whether Erna signed the Letter of Wishes first and then signed Erna's Will, but she does not remember that detail. Ms. Dempsey has advised me she has no specific recollection of the order in which the documents were signed.
- [22] The original signed copies of the Will and the Letter of Wishes were delivered to Solus for safekeeping by letter dated June 28, 2019.

Excerpts from the Will

- [23] The Will provides that all previous wills and codicils are revoked. The Will is intended to distribute all of Erna's assets wherever they may be located.
- [24] Article 1 identifies her two adult children and states:

Except as provided below, I make no provision in this Will for any of my children who survive me, nor for the descendants of any child who does not survive me.

[25] Article 2 of the Will provides specific bequests to Paul, Paula, her grandson, friends, cousin, and employees. In Article 2.3, Paula is given a bequest of US\$1,000,000.

[26] Article 2.9 refers to the Erna Wine Maurer Washington Living Trust (the "Washington Trust"). In his affidavit, Mr. Blackmer described the Washington Trust as follows:

The [Washington Trust] originally settled January 22, 2015 held, inter alia, a property in Blaine Washington. The trust benefited Erna during her lifetime. Upon her death the trust property was to be held in trust by Erna's son Paul for his benefit during his lifetime and upon his death the remainder was to be distributed to his descendants subject to certain trust terms of which Solus was named the successor trustee.

[27] Article 2.10 refers to the Erna Wine Maurer California Living Trust (the "California Trust"). Mr. Blackmer described the California Trust as follows:

The [California Trust] originally settled January 23, 2013 and amended and restated by deed dated September 10, 2015 held, inter alia, the shares of Erna Wine A.I.D. Inc. (the "Shares") and a warehouse property in Burbank California (the "Warehouse Property"). The California Trust benefited Erna Maurer for her lifetime. Upon her death the trust property was to be distributed such that the Warehouse Property was to be sold and the proceeds of the Property and 50% of the remainder trust assets (other than the Shares) were to be distributed to the children of Erna Maurer's daughter Paula subject to certain trust terms of which Solus was named the trustee. Also on Erna Maurer's death the Shares and the other 50% of the remainder were to be held in trust by Erna Maurer's son Paul for his benefit during his lifetime and on his death to his descendants under similar trust terms as were applied to the trust for Paula's children

[Bold in original.]

[28] Article 2.10 sets up trusts for Erna's grandchildren.

[29] Article 4, titled "Provision For Remainder", is the key issue in this petition ("Article 4"). It provides, in its entirety, the following:

ARTICLE 4

PROVISION FOR REMAINDER

4.1 The remainder of my property shall be distributed as follows:

- a. The Trustee shall be SOLUS TRUST.
- b. The Trustee shall distribute the remainder of my property among those charitable and non-charitable organizations and individuals identified by me in the most recent letter of wishes to the Trustee signed by me at such time after my death, in the amounts and for the charitable purposes which I have stated in the letter of wishes to the Trustee.

- c. If, at the time of distribution, any of the charitable and non-charitable organizations and individuals identified by me in the letter of wishes to the Trustee has amalgamated with another organization, or has changed its name or location of its work, the Trustee shall, in the Trustee's sole discretion, pay such share of my estate to the organization which the Trustee decides is the successor organization at the time of distribution.
- d. If, at the time of distribution, in the sole discretion of the Trustee, any of the charitable and non-charitable organizations and individuals identified by me in the letter of wishes to the Trustee has ceased to operate or exist or has never operated or been in existence (as opposed to having amalgamated, changed its name or location of its work), the Trustee shall pay the share of my estate to the organization or individual which, in the Trustee's sole discretion, most closely resembles the organization or individual undertaking particular charitable work which I originally intended to benefit and which is in keeping with my charitable intentions and the spirit of the original charitable gift as it is my intention to distribute the remainder of my property among charitable and non-charitable organizations and individuals undertaking particular charitable work for general charitable purposes.
- e. The letter of wishes to the Trustee shall be found among my personal papers. If no letter of wishes to the Trustee can be found, I direct the Trustee to distribute the remainder of my property in such amounts as the Trustee decides are appropriate among those charitable and non-charitable organizations and individuals undertaking particular charitable work to which I have made charitable donations of more than Five Hundred Dollars (\$500.00 CDN Funds) as documented on my tax returns filed in Canada and the United States for the five (5) years immediately prior to my death.

Contents of the Letter of Wishes

[30] The Letter of Wishes provides in its entirety:

Letter of Wishes to the Trustee of my Estate

I have signed a Will dated June 21, 2019 ("my Will") which requires that the residue of my estate be distributed among the charitable and non-charitable organizations and individuals which I have identified to the Trustee in my latest letter of wishes as of my death. I have signed this letter of wishes dated June 21, 2019 to identify my current chosen charitable beneficiaries which I want to receive a portion of the residue of my estate according to my Will. I may update this letter of wishes from time to time.

It is my wish that the residue of my estate be divided into TWELVE (12) equal shares and that the following beneficiaries will receive the shares or fractions of shares listed below for each of them:

1. give ONE (1) share to GLAUCOMA RESEARCH FOUNDATION, located at 251 Post Street #600, San Francisco, California, 94108, U.S.A., in support of its research [("Glaucoma Research)];

2. give ONE-HALF (1/2) of a share to LINUS PAULING INSTITUTE OF OREGON STATE UNIVERSITY, located at 307 Linus Pauling Science Center, 2900 SW Campus Way, Corvallis, Oregon, 97331, U.S.A., in support of its research [("Linus Pauling")];
3. give ONE (1) share to CANADIAN NATIONAL INSTITUTE FOR THE BLIND, CRA# 11921 9459 RR0003, to be used by the B.C. - Yukon Division, in support of its research and patient care [("CNIB")];
4. give ONE-HALF (1/2) of a share to KNOWLEDGE NETWORK CORPORATION, CRA# 12153 2816 RR0001, in support of its programming [("Knowledge Network")];
5. give ONE (1) to ALYN HOSPITAL, in Jerusalem, Israel, in honor of my uncle, Henry Keller, and in support of its general charitable purposes;
6. give ONE (1) share to AMYOTROPHIC LATERAL SCLEROSIS SOCIETY OF CANADA, CRA# 10670 8977 RR0002, in support of its research [("ALSS")];
7. give ONE (1) share to DYING WITH DIGNITY CANADA, CRA# 11889 0086 RR0001 [("Dying with Dignity")];
8. give ONE (1) share to VGH AND UBC HOSPITAL FOUNDATION, CRA# 13217 3063 RR0001, to be used in support of patient care at Vancouver General Hospital [("VGH")];
9. give ONE (1) share to VGH & UBC HOSPITAL FOUNDATION, CRA# 13217 3063 RR0001, to be used in support of the Djaved Mowafaghian Centre for Brain Health [("VGH/UBC for Brain Health")];
10. give ONE (1) share to THE KIDNEY FOUNDATION OF CANADA, CRA# 10756 7398 RR0001, in support of its research and patient care [("Kidney Foundation")];
11. give ONE-QUARTER (1/4) of a share to the VANCOUVER ART GALLERY ASSOCIATION, CRA# 11926 0958 RR0001, in support of its programming [("Vancouver Art Gallery")];
12. give ONE-QUARTER (1/4) of a share to the CITY OF VANCOUVER to support improvements for the audience experience of persons attending events at the ORPHEUM THEATRE, located at 888 Granville Street in Vancouver, British Columbia, according to the priorities existing at the time this gift is made by my estate as decided by the Community Services Group, Cultural Services Department of Vancouver Civic Theatres, or such other successor department having authority over the ORPHEUM THEATRE [("City of Vancouver")];
13. give ONE (1) share to the PARKINSON SOCIETY BRITISH COLUMBIA, CRA# 11880 1240 RR0001, in support of its research and patient care [("Parkinson Society")];
14. give ONE (1) share to the HEART AND STROKE FOUNDATION, CRA# 10684 6942 RR0001, in support of the programs of the B.C. AND YUKON CHAPTER [("Heart and Stroke")];
15. give ONE-HALF (1/2) of a share to FOOTSTEPS, of 114 John Street, New York, N.Y., 10272 USA, in support of its general programming.

The Trustee may decide that one or more of the charitable and non-charitable organizations listed above is no longer appropriate to receive a share (or fraction of a share) of my residuary estate because such organization has changed its name, ceased to operate, ceased to exist or, for any other reason the Trustee decides is relevant, is no longer an appropriate beneficiary of a share (or fraction of a share) of my residuary estate. In that case, it is my wish that the Trustee will choose a substitute for the organization which has ceased to exist that, as nearly as possible, resembles that failed organization and is in keeping with [the] spirit and intent of my original gift, and that the Trustee will distribute the failed share of my estate to such substitute....

[31] I will refer to the last paragraph excerpted above as the "Limited Discretion Clause".

Post-Execution Events

[32] On June 29, 2019, Ms. Cathcart emailed Mr. Blackmer to explain why there would be a delay in the delivery of Erna's original documents. She wrote that since it was Saturday morning and Monday was a statutory holiday, the documents will not be received until July 2.

[33] On July 2, 2019, Solus acknowledged receipt of the courier package with the Will, Letter of Wishes, and Representation Agreement.

[34] On July 8, 2019, Ms. Cathcart wrote to Erna to report that the original Will and Letter of Wishes had been sent to Solus for safekeeping. She further stated:

I understand that you are still considering some planning issues. I also intend to have Will Johnson review your Will to confirm that it is appropriate for your purposes and conforms with Washington State law and practice. It is possible, therefore, that we may revisit your Will planning in September if you have any new instructions, or if Will Johnston has any suggestions for edits.

If you wish to revisit any of your planning documents after you have had time to consider them, please let me know and I will carry on working for you pursuant to my retainer letter dated March 22, 2019.

I look forward to hearing from you at the end of the summer about how you wish to proceed.

[35] On instructions from Erna, Ms. Cathcart divided her accounts for legal fees into two separate accounts: one for fees owed by Erna personally and one for those owed by her company. The total amount owing for legal fees was \$14,760.19. The time summary indicated that Ms. Cathcart had spent just over 40 hours on the retainer.

[36] On November 26, 2019, Mr. Gumprich emailed Erna noting that the structure of her will had been changed from a US\$2,000,000 bequest to establish a testamentary trust, to a structure that would make the philanthropic amounts residual to her specific bequests. He listed the organizations and purposes set out in the Will and then asked Erna to edit them to reflect her current wishes.

[37] On November 30, 2019, Erna explained the reason for the structural change as follows:

the reason we changed the concept was when we roughly calculated the tax consequences there was just not enough left to set up what you had suggested. There still may not be

Meanwhile the list was done too quickly I want to change it.

[38] On December 4, 2019, Mr. Gumprich emailed Erna confirming that she wished the remainder of her property (under Article 4 of the Will) to be distributed to the organizations listed below:

Please confirm to me, by way of return email, the list and if possible, a percentage weighting for each of the charitable and non-charitable organizations identified.

- Vancouver General Hospital Foundation (855 West 12th Avenue, Vancouver, BC V5Z 1M9)
- Footsteps (114 John Street, #930, New York, NY 10272)
- Linus Pauling Institute (Oregon State University, 307 Linus Pauling Science Center, 2900 SW Campus Way, Corvallis, Oregon, 97331)
- Glaucoma Research Foundation - (251 Post St, #600, San Francisco, 94108)
- ALS Society of Canada (393 University Avenue, Suite 1701, Toronto ON M5G 1E6)
- Dying with Dignity Canada (55 Eglinton Ave E, Toronto, ON, M4P 1G8)
- Canadian National Institute for the Blind (5055 Joyce Street, Vancouver, BC V5R 6B2)

[39] On December 4, 2019, Erna responded to Mr. Gumprich's email to suggest that her "BhP stock" could be sold and added to charity funds, as it was "worth quite a bit".

[40] There was no new will or letter of wishes prepared by Ms. Cathcart after June 21, 2019, nor was Solus aware of Erna executing a subsequent will or letter of wishes.

[41] On August 23, 2020, Erna died.

[42] On March 24, 2021, Solus obtained a grant of administration of the Estate. A copy of the Letter of Wishes is attached to the grant along with a copy of the Will.

[43] On December 12, 2022, counsel for Solus wrote a letter to Paula and Paul raising potential legal issues with the "technical functioning" of Article 4 of the Will. At the conclusion of the letter, counsel asked whether they would agree that the Letter of Wishes be given effect. If not, then counsel advised that Solus would have to proceed with appropriate court proceedings.

- [44] On February 9, 2023, counsel for Paul and Paula responded to the letter, taking the position that the Will did not include the Letter of Wishes and that Paul and Paula should each receive an equal share of the residue of Erna's estate. If the charities did not agree with Paul and Paula's position, then counsel advised that Solus would have to bring an application to determine the issue prior to the expiry of three years from the date of death, in order to obtain useful tax donation receipts.
- [45] Solus filed the petition on March 5, 2025.
- [46] On May 7, 2025, Heart and Stroke filed a response to petition consenting to the orders sought.
- [47] On May 23, 2025, the respondents filed a response to petition opposing the granting of the relief sought in the petition and seeking that the residue of Erna's estate be distributed to them as intestate successors.
- [48] On May 28, 2025, the parties attended in chambers to speak to the matter. Justice Majawa adjourned the hearing to June 25, 2025, so that the petition could be served on CanadaHelps and the Attorney General.
- [49] On June 20, 2025, the Attorney General filed a response taking no position on the orders sought in the petition. However, it provided information to assist the Court respecting the administration of, or variation of, a charitable purpose trust.
- [50] On August 23, 2025, the 60-month period to claim a donation credit will expire.

Issues

[51] The issues for determination are:

1. Is the Letter of Wishes "precatory"?
2. Is Article 4 of the Will a pour-over clause?
3. Is the Letter of Wishes incorporated by reference into the Will such that it is fully effective as though it had been made as part of the Will?
4. Should an order be granted pursuant to s. 58 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA], that the Will be rectified to provide that the residue of Erna's estate be distributed to the beneficiaries set out in the Letter of Wishes?
5. Should an order be granted pursuant to s. 46 of WESA that if the Letter of Wishes is not valid and enforceable, then the residue of the estate is to be distributed pursuant to s. 4.1(e) of the Will?
6. Should an order be made to rectify the Will to include the Letter of Wishes pursuant to s. 59 of WESA?

7. Should an order be granted that Solus holds the residue of Erna's estate subject to a half-secret trust for the benefit of the beneficiaries identified in the Letter of Wishes?
8. Should an order be made that Solus holds the residue of Erna's estate subject to a charitable trust for the benefit of the beneficiaries identified in the Letter of Wishes?

Position of Parties

[52] I will provide a summary of the positions taken by the parties and the Attorney General in respect to the various issues listed.

Position of Solus

[53] Solus submits that Erna had a charitable intention, and that she intended to distribute the residue of her estate in accordance with this charitable intention. It argues that Article 4 of the Will does not contain a pour-over clause and is valid because it does not purport to dispose any part of the estate according to an existing, inter vivos trust.

[54] Alternatively, it submits that:

- a) the Letter of Wishes should be incorporated into the Will by reference as the required conditions are satisfied;
- b) ss. 58, 46, and 59 of WESA can be used to uphold Erna's charitable intentions;
- c) the Court could find the existence of a half-secret trust in which the Letter of Wishes communicates the further trust objects to Solus; or
- d) the Court ought to find and enforce the existence of a charitable trust and direct that to maintain Erna's charitable intention, the residue should be distributed as set out in the Letter of Wishes.

Position of the Respondents

[55] The respondents submit that the Letter of Wishes is "precatory" because (a) it only expresses a wish, (b) allows the trustee to exercise discretion to not make a gift to a beneficiary, and (c) allows Erna to make new wishes known to the trustee at a later date. As such, it does not impose a binding trust obligation.

[56] The respondents say that Article 4 is a pour-over clause and is invalid. The Letter of Wishes cannot be incorporated into the Will since the required conditions are not met. The respondents argue that ss. 58, 46, and 59 of WESA do not apply. The concept of a half-secret trust does not apply since the Letter of Wishes was not provided to Solus before or contemporaneously with the execution of the Will, nor does it contain Erna's most recent wishes.

[57] Finally, the respondents submit that a charitable trust cannot be created by

Article 4.1 of the Will and the Letter of Wishes. In addition, some of the beneficiaries are not charitable and some do not receive their shares for stated charitable purposes. The respondents seek an order that the Letter of Wishes is not enforceable, and Article 4.1(e) should not apply such that the residue of the estate should be distributed to these respondents.

Position of the Attorney General

[58] The Attorney General submits that all of the objects in the Letter of Wishes are charitable. Alternatively, if any of the objects are not charitable, then they may operate for the benefit or a charitable purpose or be otherwise severable.

Position of Heart and Stroke

[59] Heart and Stroke did not make individual submissions on each of the issues but adopted the submissions made by Solus and the Attorney General.

Issue 1: Is the Letter of Wishes "precatory"?

[60] The respondents submit that the Letter of Wishes is precatory and therefore invalid. They say that a document is "precatory" where a person expressed a recommendation or a desire for action in a nonbinding way.

Legal Principles

[61] The respondents rely primarily on *Keyes v. Grant*, [1928] 3 D.L.R. 558, 1928 CanLII 320 (B.C.C.A.) at 560-561, for the proposition that a clause expressing a wish and which includes a provision that a person is "free to use their own judgment" is not enforceable. In *Keyes*, a testator bequeathed to his wife all his personal properties and stated, "this is my wish (her being free to use her own judgment) for her Sadie Keyes to will at her death" certain amounts of money to named purposes and persons. The testator and his wife both executed wills on the same day containing the same provisions and a similar wish. The wife predeceased her husband. The Court of Appeal held that this language did not create a precatory trust. As Justice Macdonald wrote at 561:

There is, therefore, no trust enforceable by the beneficiaries mentioned. The cases show that the doctrine of precatory trusts is not given as wide an application as formerly, *Re Atkinson*, *supra*. To create it the words used by the testator must be in the nature of a direction. Here it is not only a mere wish, quite different from a direction, but further, it is subject to the judgment of the devisee. Her option or discretion is not excluded. When, therefore, she may interpose her own will to defeat the "wish" or desire it cannot be held that a trust is created. *Musoorie Bk. v. Raynor* (1882), 7 App. Cas. 321, at pp. 330-1.

[62] The respondents point to the words "It is my wish" in the Letter of Wishes, as well as the Limited Discretion Clause, as analogous to the elements of the testator's will in *Keyes* and thus unenforceable.

[63] The issue of precatory language goes to the question of certainty of intention in the formation of a trust, a requirement for the formation of a trust: *Consumers' Association of Canada et al v. Coca-Cola Bottling Company et al*, 2006 BCSC 863 at para. 39, *aff'd* 2007 BCCA 356, leave to appeal *ref'd* [2007] S.C.C.A. No. 464. In Dennis Pavlich, *Trusts in Common-Law Canada*, 4th ed. (Toronto: LexisNexis, 2024), at §4.01, the author explains:

Words like "I wish ", "I hope ", "I request " -- generically called "precatory words" -- cause courts to look at the ordinary meaning of those utterances and give effect to an out-and-out gift (and not a trust). However, a trust may be found by examining how the words are actually operating in the context of the whole document. Though the words used may ordinarily connote permissive (i.e., need not be mandatory) signification, in the circumstances of the document read as a whole, they may actually reveal an intention to operate as imperatives. They may function as politely couched directives and not a request, although at first blush the words articulating the gift appear to express a wish. The polite language may actually convey a charge or demand to the trustee to take title and control of the property, and operate it for the benefit of the beneficiary (see *Hayman v. Nicoll* below). In short, courts look to see whether the substantive effect of the language in the document signifies one of two alternatives:

- whether the expressions reflect an intent to form a trust with obligations and a charge imposed on the transferee to act only to benefit another (i.e., a trust); or
- whether title transfer is motivated by an out-and-out gift combined with words that, despite tone, in actuality intimate a mere hope or exhortation to the transferee, as full owner, that use the gifted property in some way to help another (named) individual. (In these cases the strength of the request may also be reviewed in terms of the rules governing repugnancies.) Note, there is a presumption in favour of a gift, especially in family-type trusts.

So an intention to simply benefit someone other than the transferee receiving title is too general for a trust to be created. To create a trust, there must be an intention -- usually gauged by the intent to impose an obligation on the transferee to hold the property for the benefit of the third-party beneficiary. The inquiry is fact based though the evidence may involve difficult constructions as inferences drawn from the facts.

In any event, the rule is that the settlor's words and conduct must evince a clear intention to establish a trust. There is a need for some clear signal that the property given to the transferee must be used for a beneficiary and not personally. The onus of proof rests with the party alleging the transfer is a trust and not a gift.

[Footnotes omitted.]

[64] The question I must determine here is not merely whether the language in the Letter of Wishes is precatory, but whether it evinces an intention to form a trust or merely expresses a hope for an out-and-out gift.

- [65] This issue was raised in *Hayman v. Nicoll*, [1944] S.C.J. No. 24, 1944 CanLII 70, which the respondents also rely on. In that case, the testatrix left money to her daughter "in full confidence [that] she will dispose [of] it in accordance with the wishes expressed to her". Since the testatrix's wishes were expressed only to her daughter, it was impossible to know what her actual wishes were. The issue for the court was whether the words "in accordance with the wishes I have expressed" imposed a trust on the daughter over the money she had received.
- [66] The Supreme Court of Canada noted that the phrase "in full confidence" no longer signalled a trust, as it previously had. Rather, the phrase pointed to the transferor's moral expectation or hope of compliance with their wishes. The Court held that no trust was created because the words indicated a desire and not an obligation or imperative as required for an intended trust.
- [67] I do not understand *Hayman* to stand for the proposition that precatory words can never form the basis of a trust. In my view, it stands for the proposition that there must be certainty of intention for a trust to be created: see e.g. *Bergler v. Odenthal*, 2020 BCCA 175 at para. 28. As Justice Satanove explained in *Glasspool v. Glasspool Estate*, [1998] B.C.J. No. 693, *aff'd* 1999 BCCA 30:
- [23] As in the creation of any trust, intention of the settlor is key. Professor Waters, in his learned text *Law of Trusts in Canada*, 2d ed. (Carswell, 1984) discusses this issue in length in Chapter 5. He explains that in England prior to the passing of the Executors Act of 1830 the executor of an estate took the residue of the estate beneficially if it was not otherwise disposed of. Therefore the courts went to extremes to find that testamentary language of a precatory kind revealed the intention to transfer on trust. By the time *Lambe v. Eames* (1871), 6 Ch. App. 597, was decided the courts had noticeably turned away from this approach.
- [24] In *Re Atkinson* (1911), 103 L.T. 860 at 862 (C.A.) Cozens-Hardy, M.R. stated:
- And I think I may go further and say that the leaning of the courts is now not to construe words used in a will, not being words of a strictly definite legal character beyond all doubt - equivalent words, in short - as creating a trust.
- [25] *Re Atkinson*, *supra*, is cited by Waters, D.W.M. as authority for the proposition that:
- Every care has to be taken not to make mandatory words from those which are the mere indication of a wish or request and that to construe the true intention of the testator, the courts must examine the will as a whole and not be mesmerised by particular words. (*The Law of Trusts*, p. 110)
- [26] While I do not disagree with the learned author's statement I think one should pay heed also to the words of Fletcher Moulton, L.J. in *Re Atkinson*. He said this:

I can see that there has been a very great change of opinion in later years, if one regards the words which are considered to create a precatory trust now and what words were so considered in olden times. But I do not think that the principle on which the courts have acted can have changed. The principle is that you have to find from the words of the will the intention of the testator. The doctrine of precatory trusts does not mean that the courts may create an intention which they do not think from the words of the will was in the mind of the testator. It means that they may come to the assistance of weak or even inapt words and recognise his intention to create a trust in spite of the language being such that lawyers would not have used it for that purpose. It only meets the case of recognition of the intention of the testator and is not a doctrine by which an intention that did not exist is read into the will.

[27] Therefore it is not correct to say that precatory words can only create a moral obligation and never form the basis of a trust, if it can be established on the evidence that the testator clearly intended to create a trust.

[Emphasis added.]

Analysis

[68] When deciding whether the document is "precatory", one should not isolate some words in the Letter of Wishes and ignore the content of Article 4 of the Will. The Letter of Wishes sets out in its opening words that she has signed a will which requires that the residue of her estate be divided amongst charitable and non-charitable organizations and individuals. Erna's wishes were clear. She was not giving to Solus freedom to "use their own judgment" in distributing the remainder of her estate, but rather, specifying which charitable and non-charitable organizations she wanted to receive a share and in what proportion. It is clear what Erna's testamentary intentions were as can be gathered by the words of Article 4 and the Letter of Wishes. I see no basis to conclude that the Letter of Wishes is precatory.

Issue 2: Is Article 4 of the Will a pour-over clause?

[69] The respondents assert that Article 4 of the Will is a "pour-over" clause and is invalid. Solus disagrees.

Legal Principles

[70] A "pour-over" clause is generally viewed as "a dispositive provision directing that all or part of the estate should be added to the corpus of an existing trust, the terms of which were not reiterated in the will itself": *Quinn Estate*, 2018 BCSC 365 at para. 29, *aff'd* 2019 BCCA 91. In *Quinn Estate*, a testator left the residue of his estate to a trust that was established prior to the execution of his will. Stripped to its essentials, the clause in issue read: "I give, devise and bequeath the residue of my estate to the [Quinn Family Trust] to be added to principal and thereafter to be held, administered and distributed under the terms of such agreement": at para. 33. The court held that the clause was invalid as a pour-over clause under the common law: *Quinn Estate* at paras. 35-43.

- [71] In *Waslenchuk Estate*, 2020 BCSC 1929 at para. 69, Justice Walker found that the wording of the provision in question was substantially the same as the pour-over clause in *Quinn Estate*. He wrote:
- [71] Ms. Waslenchuk intended to make a gift to an inter vivos trust, whose purpose was part of but not limited to her estate planning and whose corpus she could also add to or withdraw at any time, to take immediate effect and performed during her lifetime, and one that she could amend or revoke at any time.
- [83] Other authorities also establish that the Trust is not, as the opposing respondents contend, a referential testamentary trust incorporated into the Will because the Trust is not dependent upon the death of the testator to come into effect. The Trust was settled and came into force during the life of Ms. Waslenchuk. She had the ability to add or distribute assets to or from the corpus of the Trust during her lifetime. An instrument that creates a trust which takes immediate effect, even where performance occurs after the death of the settlor, is an inter vivos trust and not a testamentary document, even where it contains a right of revocation. The fact that Ms. Waslenchuk chose not to utilize all of the Trust's provisions during her lifetime does not change the nature or character of the Trust. See: *Wonnacott v. Loewen*, 1990 CarswellBC 46 (C.A.) at paras. 16-23; *Norman Estate v. Watch Tower Bible and Tract Society of Canada*, 2014 BCCA 277 at paras. 18-22; *Mordo v. Nitting et al*, 2006 BCSC 1761 at paras. 321-322, 331-336.

Analysis

- [72] I am not persuaded that Article 4 is a pour-over clause as it does not purport to add any property to an existing amendable or revocable trust. There was no pouring over that occurred by virtue of Article 4 into a trust that existed at the time the Will was executed.
- [73] In *Kellogg Estate (Re)*, 2013 BCSC 2292, aff'd 2015 BCCA 203, *Quinn Estate*, and *Waslenchuck Estate*, an inter vivos trust was created during the testator's lifetime and the wills purported to gift property to these trusts. This is different from a situation where a testator left specific instructions to her trustee on the distribution of her estate for charitable purposes.
- [74] The Letter of Wishes only applied upon the death of Erna and was not documented to take effect during her lifetime.

Issue 3: Incorporation by Reference

Legal Principles

- [75] In *Quinn Estate v. Rydland*, 2019 BCCA 91 at para. 19 [Quinn Estate CA], the Court set out five prerequisites that must be met for a separate document to be deemed to be incorporated into a will:

- 1) the reference in the will must show that the testator intended to incorporate the extrinsic document into the will;
- 2) the language of the will must be such that it refers to the extrinsic document as one already in existence at the time of the execution of the will;
- 3) the reference in the will must be sufficiently specific that it identifies the extrinsic document with reasonable certainty;
- 4) the document offered must be proven satisfactory to be the one referred to in the will; and
- 5) there must be satisfactory proof that the document was actually in existence at the time of the execution of the will.

Analysis

- [76] I must not lose sight of the strong presumption against intestacy and Erna's clear wish for the residue of her estate to be gifted to various charities. I will address each of the prerequisites.

Intended Incorporation

- [77] Erna states at Article 4.1(b) of the Will that Solus is to distribute the residue of the property to those charitable and non-charitable organizations and individuals "identified by me in the most recent letter of wishes to the Trustee signed by me". She goes on to state that the amounts and the charitable purposes are those which "I have stated in the letter of wishes to the Trustee".
- [78] While it is clear that Erna intended for the Letter of Wishes to be read together with Article 4 to provide the trustee with a clear understanding of whom she wished to benefit, I am unable to conclude that Erna intended to incorporate the Letter of Wishes into her Will. Erna rejected an endowment structure in favor of the letter of wishes format so that she could update the list of charitable beneficiaries at any time without having to execute a new will. This structure was specifically chosen to provide Erna with more flexibility by intentionally excluding the contents of the Letter of Wishes from the Will.
- [79] The failure to meet this element of the test for incorporation by reference is sufficient to dispose of this argument. However, in the event that I am wrong and there was an intention for the Letter of Wishes to be incorporated into the Will, I will analyze the remaining elements.

Existence of the Letter of Wishes

- [80] It is clear from the circumstances surrounding the preparation of the Will that a Letter of Wishes existed on the date the Will was signed, though there remained the possibility of a new letter of wishes being prepared in the future.

- [81] I disagree with the respondents' submissions that Article 4.1(e) supports the proposition that a letter of wishes might not even exist at the time of death. That provision addresses what ought to happen if the letter of wishes could not be found, not what should happen if a letter of wishes was never made. In any event, the Letter of Wishes did exist and was found, so this point is moot.
- [82] It is unclear if the Letter of Wishes existed at the time of the execution of the Will or not. Ms. Carthcart deposed that while she had no specific recollection as to whether the Letter of Wishes was signed first, it was her invariable practice to have documents such as letters of wishes signed first. I am not persuaded that use of the past tense in the Letter of Wishes ("I have signed a Will dated June 21, 2019") is enough to undermine Ms. Cathcart's evidence, given the fact that both the Will and the Letter of Wishes were signed on the same day. The Letter of Wishes was in existence at the time of the execution of the Will and, as such, this prerequisite has been met.

Identified With Reasonable Certainty and Referenced in the Will

- [83] The existence of the drafted Letter of Wishes and its reference in the Will meets the requirement that the extrinsic document be specifically identified. At the time of the execution of the Will, only one letter of wishes had been drafted. It is clear that the Letter of Wishes was being referenced and its existence has been proven.
- [84] As I have found that the first prerequisite has not been met, the Letter of Wishes cannot be incorporated into the Will by reference.

Issue 4: Application of s. 58 of WESA

Legal Principles

- [85] Section 58 provides, in relevant part:

Court order curing deficiencies

58 (1) In this section, "record" includes data that

- (a) is recorded or stored electronically,
 - (b) can be read by a person, and
 - (c) is capable of reproduction in a visible form.
- (2) On application, the court may make an order under subsection (3) if the court determines that a record, document or writing or marking on a will or document represents
- (a) the testamentary intentions of a deceased person,
 - (b) the intention of a deceased person to revoke, alter or revive a will or testamentary disposition of the deceased person, or

- (c) the intention of a deceased person to revoke, alter or revive a testamentary disposition contained in a document other than a will.
 - (3) Even though the making, revocation, alteration or revival of a will does not comply with this Act, the court may, as the circumstances require, order that a record or document or writing or marking on a will or document be fully effective as though it had been made
 - (a) as the will or part of the will of the deceased person,
 - (b) as a revocation, alteration or revival of a will of the deceased person, or
 - (c) as the testamentary intention of the deceased person.
- [86] In *Quinn Estate*, Justice Funt explained the relationship between ss. 37, 58, and 59 of WESA as follows:
- [53] Section 58 of WESA must be read in context with ss. 37 and 59 of WESA. As noted, under s. 37, a will must meet particular execution requirements to be valid.
- [54] With respect to the making of a will, s. 58 provides curative relief where the s. 37 execution requirements are not met, but where the record, document, or writing is found by the Court to represent the "testamentary intentions" of the deceased.
- [55] Section 58 is not an independent provision. From its language, "[e]ven though the making, revocation, alteration, or revival of a will does not comply with this Act", s. 58 is tethered to s. 37, I agree with Ms. Francis, counsel for Sandra Quinn in her personal capacity, in her written submission:
44. The policy reason behind section 58 is to enable the Courts to step in where a person has taken real steps to make a will, but the formalities have fallen short. It does not exist to enable the court to bless structures that circumvent the formalities all together, which is what a pour over clause to an amendable trust does. If the policy behind section 58 were to do away with testamentary formalities, then our WESA would not contain testamentary formalities. Rather, what section 58 reflects is a policy to ensure that a document that reflects the deliberate, fixed and final intention of a Deceased person is not set aside on the basis of failure to comply with a formality.
- [56] Section 58's scope is reflected in s. 59(1). Section 59(1) enables a will to be rectified where the will "fails to carry-out a will-maker's intentions" in specified circumstances. Section 59 does not allow rectification under any circumstances. If s. 58 were to be given an overly broad interpretation, s. 59(1) would have no purpose. Rectification could occur under s. 58 based on a simple assertion of testamentary intentions. Section 58 is a curative provision and not an independent provision designed to change fundamental principles of the law of wills.
- [57] In short, the statutory context shows that the purpose of s. 58 of WESA is to permit the Court to address circumstances of "formal invalidity" where the will-maker's "deliberate or fixed and final intention" as to the disposal of his or her property on death is found.

[87] The Court must be satisfied that the document is authentic and that it records "a deliberate or fixed and final expression of intention" as to the disposal of the deceased's property on death: Estate of Young, 2015 BCSC 182 at paras. 34-35.

Analysis

- [88] Under s. 58(2)(a), the Letter of Wishes could be deemed incorporated into the Will if it represents Erna's testamentary intentions. However, these intentions must be "deliberate, fixed and final". Solus argues that the Letter of Wishes is "the deliberate or fixed and final expression of Erna's intention as to the disposal of the residue of her estate at the time that she signed it (and subsequently signed the Will which refers to it)". This may be true, but the relevant time is her fixed and final intentions on her death, not on the date the Will was signed. I am not satisfied that this is the case.
- [89] While the Letter of Wishes is clearly deliberate, it is not fixed and final because it specifically contemplates that it may be undated "from time to time" as Erna's wishes changed. This was the purpose of the Letter of Wishes structure: Erna wanted flexibility to change her mind without having to execute a new will each time. To find that the Letter of Wishes represented her fixed and final instructions would undermine the policy rationale of s. 58 as it would endorse a structure that was designed to circumvent the formalities of s. 37 of WESA.
- [90] Under s. 58(2)(b), the Letter of Wishes does not represent Erna's intention to alter her Will or testamentary disposition. Section 58(2)(c) does not apply since the testamentary disposition in issue is contained in the Will, not another document.
- [91] I find that the Letter of Wishes cannot be cured by s. 58 of WESA.

Issue 5: Application of s. 46 of WESA

Legal Principles

[92] Section 46 of WESA provides:

When gifts cannot take effect

46 (1) If a gift in a will cannot take effect for any reason, including because a beneficiary dies before the will-maker, the property that is the subject of the gift must, subject to a contrary intention appearing in the will, be distributed according to the following priorities:

- (a) to the alternative beneficiary of the gift, if any, named or described by the will-maker, whether the gift fails for a reason specifically contemplated by the will-maker or for any other reason;

[93] A "gift" is defined to include a beneficial devise or bequest, in s. 1 of the WESA. The difference between a beneficial devise and a bequest is not set out in the statute. Barron's Canadian Law Dictionary provides the following guidance:

BEQUEST

A gift or disposition of personalty contained in a will. A devise ordinary passes real property, and a bequest, personal property

DEVISE

A gift of land or an interest in land (real property) made by a will

[94] This distinction is generally consistent with the case law. In *Smith v. Chatham Home of the Friendless*, [1932] S.C.R. 713, 1932 CanLII 12 at 717, the Court acknowledged that while the words "legacies" and "bequests" are "indiscriminately used in testamentary dispositions to mean gifts of personal property", a testator "is entitled to use them to distinguish donations to different classes and his intention will be given effect to provided he has made it clear what his intention was". Similarly, in *Gunn Estate (Re)*, 2009 PESC 38 at para. 29, aff'd 2010 PECA 13, the court adopted the definitions in *Black's Law Dictionary* and held that "a bequest or 'legacy' is 'a gift by will of personal property', while a devise is 'a testamentary disposition of land or realty'".

Analysis

[95] The issue is whether Article 4.1(b) of the Will makes a gift or whether it is a direction to the trustee to distribute residue according to the most recent letter of wishes that the trustee locates in Erna's personal papers. I am persuaded that the Will does not make a gift, being a beneficial devise or bequest, but represents a direction to the trustee and, as such, s. 46 of WESA does not apply.

Issue 6: Application of s. 59 of WESA

Legal Principles

[96] Section 59 of WESA provides, in part, that:

Rectification of will

59 (1) On application for rectification of a will, the court, sitting as a court of construction or as a court of probate, may order that the will be rectified if the court determines that the will fails to carry out the will-maker's intentions because of

- (a) an error arising from an accidental slip or omission,
 - (b) a misunderstanding of the will-maker's instructions, or
 - (c) a failure to carry out the will-maker's instructions.
- (2) Extrinsic evidence, including evidence of the will-maker's intent, is admissible to prove the existence of a circumstance described in subsection (1).

- (3) An application for rectification of a will must be made no later than 180 days from the date the representation grant is issued unless the court grants leave to make an application after that date.
- [97] In determining whether to grant leave under s. 59(3), the ultimate question is whether it is in the interests of justice to grant an extension in all the circumstances: *Simpson v. Zaste*, 2022 BCCA 208 at para. 40. Relevant factors to consider include whether the rectification claim has merit, whether the intention to seek rectification and the length of delay in doing so support granting leave, and whether an extension would create any undue prejudice to the respondents: *Simpson* at paras. 32-40.
- [98] If leave is granted under s. 59(3), the test for rectification under s. 59(1) involves the following three questions:
1. What were the will-maker's intentions with regard to the issue for which rectification is sought?
 2. Does the will as written fail to carry out those intentions?
 3. Is that failure a consequence of one of the reasons specified in ss. 59(1)(a) through (c)?
- See *Simpson* at para. 78, citing with approval *Jamt Estate (Re)*, 2021 BCSC 788 at para. 45.

Analysis

- [99] The first issue is whether leave should be granted since the application for rectification was not made within the 180 days from the date of the grant of probate, being March 24, 2021.
- [100] Solus did not seek leave of the court to bring a s. 59 rectification application as part of the petition filed. At the hearing, Solus sought leave to bring the rectification and argued that leave should be granted.
- [101] I will first deal with the timing issue and the delay. Solus says that the Letter of Wishes was attached to the grant of administration and, as such, it currently forms part of the grant document. In my view, nothing turns on the fact that the Letter of Wishes was attached to the Will when the grant of administration was filed.
- [102] Solus provided no explanation as to why it has taken over four years for it to seek the rectification of the Will. It was clear in the letter of December 12, 2022, that Solus was aware of the issues with the Will and the Letter of Wishes and the potential need to bring a court application. In the absence of an explanation, the large delay supports a conclusion that no leave should be granted.

[103] On the issue of prejudice, the only specific prejudice raised is that the respondents have now lost their ability to seek a variation of the Will pursuant to s. 60 of WESA due to the expiry of the 180-day limitation period. I am not persuaded by this argument. The respondents were well aware of the Will and the Letter of Wishes and the potential for their mother's estate to pass in accordance with these documents. If either of them wanted to commence a proceeding seeking to vary the Will, they could have done so.

[104] The last factor is the issue of merit. In analyzing this factor, I will turn to the test for rectification under s. 59 of WESA. I adopt the same procedure followed by the chambers judge and the Court of Appeal in Simpson at para. 64, to defer the final determination of whether it is in the interests of justice to grant leave until I have considered the merits of the application.

What were the will-maker's intentions?

[105] There is no doubt, and the respondents concede, that Erna's intentions were to distribute the residue of her estate to various charities, according to a letter of wishes which could be updated at any time prior to her death.

Did the Will fail to carry out those intentions?

[106] The method employed by the Will does not carry out those intentions since I have found that the Letter of Wishes cannot be incorporated by reference into the Will and is not otherwise enforceable as a testamentary instrument.

Was that failure a consequence of one of the reasons specified in ss. 59(1)(a) through (c)?

[107] I am not persuaded that the error arises from an accidental slip or omission. The decision to use a Letter of Wishes was a deliberate one. It appears one recommended by Solus and adopted by Ms. Cathcart.

[108] Erna wanted to have the residue of her estate left to charities and both Ms. Cathcart and Solus were aware of her instructions. I can find no misunderstanding.

[109] On the evidentiary record before me, I cannot conclude that there was a failure to carry out Erna's instructions. Ms. Cathcart initially drafted a will that provide an endowment fund concept. Erna then indicated that she preferred to use the arrangement where the executor would receive a letter of wishes which would provide guidance about the objects of her charitable giving. Acting on those instructions, Ms. Cathcart redrafted the Will. I conclude that the merits of the application do not meet the required threshold.

[110] Returning to the leave application, in all the circumstances, I find that it would not be in the interests of justice to grant leave to bring a rectification application given the weak merits. In the alternative, if I am wrong on that determination, I am not persuaded that the circumstance of this case falls within the prescribed limitations for a rectification.

Issue 7: Is a half-secret trust created?

Legal Principles

- [111] A "secret trust" was historically recognized by equity when a testator or intestate person failed to comply with the Wills Act or the Statute of Frauds but imposed an obligation to hold property on trust for a third person: *Bergler v. Odenthal*, 2020 BCCA 175 at para. 1. In *Champoise v. Prost*, 2000 BCCA 426, the Court of Appeal described the requirements for a secret trust as follows:
- [15] A secret trust arises where a person gives property to another, communicating to that person an intention that the property be dealt with in a specific way upon the happening of an event, and the donee accepts the obligation. The essential elements are the intention of the donor, a communication of the intention to the donee and acceptance of the obligation by the donee: *Sutherland Estate v. Nicoll Estate*, [1944] S.C.R. 253 (sub nom. *Hayman v. Nicoll*), [1944] 3 D.L.R. 552; *Jankowski v. Pelek Estate*, (1995), 131 D.L.R. (4th) 717 (Man. C.A.); *Ottaway v. Norman*, [1971] 3 All E.R. 1325 (Ch.D.); D.W.M. Waters, *Law of Trusts in Canada*, 2d ed. (Toronto: Carswell, 1984) at 215-217.
- [16] In addition to these requirements for an enforceable secret trust, the three certainties necessary for any express trust must be exhibited; the words making the trust must be imperative, the subject of the trust must be certain, and the object or person intended to take the benefit of the trust must be certain. Further, those certainties must be exhibited at the time the trust is created: *Re Beardmore Trusts*, [1951] 1 D.L.R. 41; D.W.M. Waters, *Law of Trusts in Canada*, supra at 107.

[Bold in original.]

- [112] A "half-secret" trust occurs where the will creates a trust by leaving property to a trustee but does not disclose the identity of the beneficiaries: *Gefen Estate v. Gefen*, 2022 ONCA 174 at para. 46.
- [113] The timing, form, and content of the communication of intention that must be made depend on the form of the bequest or devise. In *Hayman* at 262-263, the Court wrote:

There remains the contention that by a communication to the daughter a secret trust arose. The rules of law dealing with this class of transactions are clearly settled. If, on the face of the will, the legal interest is, simpliciter, in the legatee, it can be shown that an agreement outside of the will was made by which the legatee undertook as an absolute obligation the carrying out of wishes of the testator. If, on the other hand, the will expressly creates the fiduciary obligation, then the oral communication must be made either before or at the time of the making of the will. If it is not, the beneficial interest is deemed not to be distributed and a resulting trust at once arises. The present case is intermediate. Although the words are precatory, they look to an oral or a written communication to the legatee for their completion. Where a trust arises outside the will, the transaction may take place at any time during the life of the testator for the reason that the continuance of the legacy is on the footing of the legatee's undertaking. But the rule does not oblige us to say that the mere communication, in such a case as this, of the wishes of the

testatrix, would ipso facto create an obligatory trust. If the language of the will, following which the communication is made, is precatory, why should a communication be considered as going beyond its mere fulfilment, and as not being intended to have the same effect as if it had been set out in full in the testamentary document? It would be necessary to show clearly not only the communication but that it was made in circumstances in which such an obligation was imposed upon and accepted by the legatee: *In re Falkiner*; *Mead v. Smith*; *Sullivan v. Sullivan*; *Reid v. Atkinson*. That proof here, having as its object the establishment of a claim against an estate, would in addition require corroboration.

[114] I understand this excerpt from Hayman to mean the following:

- a) Where a will gives a gift (legal title simpliciter), it must be established that there was an agreement made outside of the will whereby the legatee undertook the absolute obligation of carrying out the testator's wishes.
- b) Where a will expressly creates a trust (fiduciary obligation), it must be established that the communication was made either before or at the time of the making of the will. If this is not established, then the beneficial interest is deemed not to be distributed, and a resulting trust arises. See also *Blackwell v. Blackwell*, [1929] UKHL 1, [1929] AC 318 at 339; *MacCallum Estate (Re)*, 2022 NSSC 34 at para. 22.
- c) Where the will states a wish (i.e., is precatory), it must be established that the testator communicated the wish in a way that shows that it was a mandatory obligation.

Analysis

[115] The respondents submit that Article 4.1 and the Letter of Wishes do not meet the requirements for a half-secret trust because the Letter of Wishes was not given to Solus before or contemporaneously with the execution of the Will. The evidence supports that it was delivered to Solus on July 2, 2019, about a week after the Will was executed.

[116] There is no evidence that Solus was advised that the documents were being sent to them in contemplation of a half-secret trust. Rather, as per Ms. Cathcart's reporting letter dated July 8, 2019, the original copies of the Will and the Letter of Wishes were delivered to Solus for "safekeeping".

[117] The evidence does support that Erna was still contemplating changing the list of charities; however, she never did.

[118] As set out above, the elements of a secret trust are:

- a) certainty of intention;
- b) certainty of subject matter;
- c) certainty of objects;

- d) communication of an intention to create a trust to the legatee that was communicated to the legatee before or at the time of the making of the will; and
- e) acceptance of the obligation by the legatee.

[119] With respect to the first requirement, Erna clearly intended to create a trust in Article 4 of the Will. Article 4.1(a) clearly provides legal title to Solus as trustee, while Article 4.2(b) instructs the trustee in mandatory language to distribute the property among the charitable and non-charitable organizations identified in the most recent letter of wishes.

[120] I am satisfied that the subject matter is certain: it is the remainder of Erna's estate.

[121] With respect to certainty of objects, while not contained in the Will, the objects were clearly identified (by name, address, and CRA number where available) in the Letter of Wishes. There is little doubt whom Erna wished to benefit by receipt of a share of the residue of her estate.

[122] With respect to communication, I am not persuaded by the respondents' argument that communication is only satisfied by delivery of the executed copy of the Letter of Wishes. According to the Concise Oxford English Dictionary, "communicate" means "to share or exchange information or ideas", while "communication" means "the action of communicating a letter or message containing information": see Angus Stevenson & Maurice Waite, eds., Concise Oxford English Dictionary, 12th ed. (New York: Oxford University Press, 1911).

[123] I am not aware of any authority that a specific form of communication, either oral or written, is required to satisfy this element of half-secret trust. All that matters is whether Solus, as trustee, was made aware that Erna intended to create a trust over the residue of her estate for the benefit of the charities identified. It is my view that when the extrinsic evidence is considered, this element has been satisfied.

[124] Since the trust established in Article 4 is a half-secret testamentary trust, the communication of Erna's intention to Solus must have occurred before or at the time the Will was made. I am unable to find that such a communication occurred. Although Solus was aware that Erna was instructing a lawyer on a new will, the terms of the will were unknown to Solus until they received a copy of it many days after the Will was executed.

[125] I conclude that Article 4 does not constitute a valid half-secret testamentary trust.

Issue 8: Does Solus hold the residue of Erna's estate subject to a charitable trust for the benefit of the beneficiaries identified in the Letter of Wishes?

Legal Principles

[126] A charitable trust never fails for uncertainty: *Johnston Estate (Re)*, 2008 BCSC 1185 at para. 21. As stated in Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, eds., *Waters' Law of Trusts in Canada*, 5th ed. (Toronto: Thomson Reuters, 2021) at ch 14.III(A)(1):

Charitable or public trusts are exempted from the requirement of that form of certainty of objects. As a concession to charity, and provided the settlor has wholly devoted the trust property to the furtherance of charitable objects, the law permits the settlor to describe the trust objects simply as for charitable purposes or for one type of charitable activity, without particularizing further as to the specific purposes which are to be pursued or the specific charitable institutions which are to receive benefit from the trust. The certainty required of the objects of a charitable trust is that the purpose or range of purposes or institutions contemplated by the settlor is within the legal concept of charity. Has the settlor enabled his or her trustees to do anything which would be non-charitable? -- that is the question.

[127] The trust objects must be sufficiently clearly defined such that the court can ascertain whether the scope of the activity envisaged by the objects coincides with or is included within the scope of charity: *Waters* at ch 14.III(A)(4).

[128] In order to determine whether the residuary gift is intended to create a valid charitable trust, the purpose must be recognized in law as charitable. Generally, a charitable activity is one that "seeks the welfare of the public and is not concerned with the conferment of private advantage": *Johnston* at para. 17. However, if an activity falls within one of the following four categories, it is presumptively considered charitable:

- a. relief of poverty;
- b. advancement of education;
- c. advancement of religion; and
- d. other purposes beneficial to the community (the "fourth category").

See *Johnston* at para. 17.

[129] Whether a charitable purpose falls within the fourth category and is of general public utility will depend on whether it is considered charitable in law. Purposes falling within the fourth category include:

- a. relief of distress and suffering;
- b. support and care of ex-service personnel;
- c. social and recreational purposes;
- d. promotion of sport; and
- e. benefit of the community at large.

See Waters at ch 14.IV(A)(4).

[130] Section 4 of WESA provides:

Construction of instruments

4 (1) If this Act provides that a provision of this Act is subject to a contrary intention appearing in an instrument, that contrary intention must appear in the instrument or arise from a necessary implication of the instrument.

- (2) Extrinsic evidence of testamentary intent, including a statement made by the will-maker, is not admissible to assist in the construction of a testamentary instrument unless
 - (a) a provision of the will is meaningless,
 - (b) a provision of the testamentary instrument is ambiguous
 - (i) on its face, or
 - (ii) in light of evidence, other than evidence of the will-maker's intention, demonstrating that the language used in the testamentary instrument is ambiguous having regard to surrounding circumstances, or
 - (c) extrinsic evidence is expressly permitted by this Act.

Analysis

[131] There is no doubt that Erna wanted to leave the residue of her estate for charitable purposes. The Will and all the extrinsic surrounding evidence support this. I disagree with the respondents' submissions that Erna "expressed a clearly non charitable intent also". This interpretation is obtained by segregating out the words "non-charitable organizations and individuals" in Article 4.1(b).

[132] When the entirety of Article 4 is read as a whole, it is clear that Erna's intention was to give testamentary gifts for charitable purposes. In Article 4.1(b), she refers to "charitable and non-charitable organizations and individuals" and then states; "in the amounts and for the charitable purposes which I have stated in the letter of wishes to the Trustee". There is no reference to non-charitable purposes in Article 4.1(b).

[133] In Article 4.1(c), Erna instructed that if a particular organization had ceased to operate or exist at the time of distribution, the Trustee shall pay its share to an organization or individual undertaking the particular charitable work and in keeping with her charitable intentions and the spirit of the original charitable gift. There is no reference to any non-charitable intentions in this clause.

[134] Finally, in Article 4.1(e), she references supporting charitable and non-charitable organizations and individuals "undertaking particular charitable work".

- [135] The extrinsic surrounding evidence supports Erna's intention to donate for charitable purposes and, at no time did she express the intention that the residue of her estate should be left to her adult children during the preparation of the Will and the Letter of Wishes. As noted in the respondents' submissions at para. 65, "[t]he will-maker's intention was to distribute the residue of her estate to various charities, according to an extrinsic document that she could update from time to time."
- [136] The respondents submit that without the Letter of Wishes, Article 4 is meaningless because it does not name beneficiaries, nor does it specify any charitable purposes which the residue should be used. As such, extrinsic evidence may be admissible to construe Article 4.1, pursuant to s. 4 of WESA. I agree that this is the proper approach.
- [137] The Letter of Wishes includes 10 registered charities for Canadian income tax purposes. The Court will specifically deal with the various charities identified in the Letter of Wishes.
- [138] The bequests to the Glaucoma Research, CNIB, ALSS, VGH, VGH/UBC for brain health, Kidney Foundation, Parkinson Society, and Heart and Stroke are all for research purposes. Research has been found to be charitable as advancement of education or under the fourth category: Barnes (Re), [1976] 72 D.L.R. (3d) 651, 1976 CanLII 262 (Alta. Q.B.). The respondents do not challenge the charitable nature of these organizations.
- [139] The respondents argue that the bequest to Linus Pauling does not qualify as a charitable organization. However, research conducted in a university will be charitable, whatever its object, because the university itself is completely engaged, directly or indirectly, in the process of instruction: Waters at ch 14.IV(A)(2)(a)(ii).
- [140] The respondents also submit that there is no evidence that Linus Pauling is a part of the university, i.e., it is not enough that it is located on the campus of a university.
- [141] Attached as an exhibit to the affidavit of Heather Thomson, a legal assistant at Legacy Tax & Trust Lawyers, was a copy of the "About" page from the Linus Pauling official website. The page explains:

Dr. Linus Carl Pauling concluded that vitamins and other essential micronutrients play a significant role in enhancing health and preventing disease. More than 50 years ago, Dr. Pauling co-founded the Institute to carry out research in this field that he believed would be of enormous importance to public health

After Pauling's death, the Linus Pauling Institute was re-established on the campus of Oregon State University in Corvallis, Oregon.

For the past 25 years, the Institute has thrived as one of the University's Research Centers and Institutes .

Mission

Promote optimal health through cutting-edge research and trusted public out-reach

Research programs at the Linus Pauling Institute investigate the role that vitamins and essential minerals (micronutrients) and chemicals from plants (phytochemicals) play in human aging, immune function, and chronic disease.

[142] I am also satisfied that the Linus Pauling is involved in research for the advancement of the public health of the community falling within the fourth category.

[143] The respondents point out that Dying with Dignity has no stated charitable purpose and there is no evidence that the Alyn Hospital qualifies as a charitable organization.

[144] In respect to the Alyn Hospital, there is evidence that it is charitable. Attached as an exhibit to Ms. Thomson's affidavit was also a copy of a page from Alyn Hospital's official website, which provides the following information:

ALYN Hospital is the only rehabilitation center for children and adolescents in Israel and one of the leading facilities in the world. ALYN Hospital specializes in diagnosing and rehabilitating children coping with a wide variety of congenital and acquired physical disabilities.

[145] I am persuaded that, as a hospital, it assists in the relief of distress and suffering and related to patient care that falls under the fourth category: see *Re Ross Estates v. Town of St. Andrews* (1980), 28 N.B.R. (2d) 611, 1980 CanLII 3226 (Q.B.). The bequest to Alyn Hospital is a charitable bequest.

[146] No charitable purpose is identified for Dying with Dignity in the Letter of Wishes. However, Dying with Dignity is a registered Canadian charity, and the charity detail page on the official Government of Canada website describes its ongoing programs as follows:

Dying with Dignity Canada is the national human-rights charity committed to improving quality of dying, protecting end-of-life rights, and helping Canadians avoid unwanted suffering ..

[147] I find that Dying with Dignity is a charitable organization whose objects are to relieve pain and suffering for those in our community facing end-of-life decisions. The bequest to Dying with Dignity is a charitable bequest.

[148] The respondents challenged the charitable status of the Knowledge Network, Vancouver Art Gallery, City of Vancouver, and Footsteps.

[149] The provision of free access to information and to a means by which citizens can communicate with each other on whatever subject they please, the promotion of arts, and other community and cultural purposes have all been found to fall within the fourth category as charitable purposes: *Vancouver Regional FreeNet Assn. v. M.N.R.* (C.A.), [1996] 3 F.C. 880 at paras. 1-9, 17-18, 1996 CanLII 4076; *Senecal v. Canada*, [1984] 1 F.C. 169 at 175, 1983 CanLII 4972.

- [150] The bequest to the Knowledge Network was for its programming. The Knowledge Network is a registered charity and is described as BC's public broadcaster. I accept that in providing programming to the public, the Knowledge Network is involved in the provision of education which falls within one of the four principal categories of a "charity" at law.
- [151] The bequest to the Vancouver Art Gallery was for its programming. The Vancouver Art Gallery is a registered charity. It is described as a public art museum that provides exhibits, ongoing programs including those for young persons, spring and summer camps, school programs, lectures, performances and tours. I find that the bequest made to the Vancouver Art Gallery was for a charitable purpose.
- [152] The bequest to the City of Vancouver was specifically to support improvements for the audience experience of persons attending events at the Orpheum Theatre. I am satisfied that providing a venue to support the promotion of arts in our community falls under the fourth category.
- [153] The bequest for Footsteps was in support of its general programming. The Footsteps website describes its operations as follows:

Footsteps is the only organization in North America providing comprehensive services and programs to people who have chosen to leave their ultra-Orthodox communities and build self-determined lives. Based in New York with remote offerings nationally, Footsteps provides a range of services, including social and emotional support, educational and career guidance, workshops and social activities.

- [154] The services provided include educational scholarships, supporting parents during custody battles, and connecting members with career resources. In consideration of the various programs that Footsteps offers, I am persuaded that for those individuals trying to leave their ultra-orthodox communities, it provides relief from their pain and suffering. In addition, it offers programs to support educational goals, including scholarships and career guidance. In light of these objectives, I find that Footsteps possesses main objectives which are charitable.
- [155] Since I have concluded that the Letter of Wishes does not form part of the Will, I find that Erna expressed a general charitable intent in the Will and that Article 4 of the Will created a charitable trust for the benefit of the entities listed in the Letter of Wishes. I find that there was certainty of intention, being a charitable one, certainty of the subject matter, being the residue of Erna's estate, and certainty of objects, identified in the Letter of Wishes.

Conclusion

- [156] In conclusion, I will set out the answers to the issues addressed in these reasons:

1. Is the Letter of Wishes a precatory document? No.
2. Is Article 4 of the Will a pour-over clause? No.

3. Is the Letter of Wishes incorporated by reference into the Will such that it is fully effective as though it had been made as part of the Will? No.
4. Should an order be granted pursuant to s. 58 of WESA that the Will be rectified to provide that the residue of Erna's estate be distributed to the beneficiaries set out in the Letter of Wishes? No.
5. Should an order be granted pursuant to s. 46 of WESA that if the Letter of Wishes is not valid and enforceable, then the residue of the estate is to be distributed pursuant to Article 4.1(e) of the Will? No.
6. Should an order be made that to rectify the Will to include the Letter of Wishes pursuant to s. 59 of WESA? No.
7. Should an order be granted that Solus holds the residue of Erna's estate subject to a half-secret trust for the benefit of the beneficiaries identified in the Letter of Wishes? No.
8. Should an order be made that Solus holds the residue of Erna's estate subject to a charitable trust for the benefit of the beneficiaries identified in the Letter of Wishes? Yes.

[157] I order that:

1. Solus is directed to hold the residue of Erna's estate subject to a charitable trust for the benefit of the beneficiaries listed in the Letter of Wishes; and
2. the parties are at liberty to return before me to address any consequential accounts, directions, and inquires of and incidental to the petition and these reasons.

[158] The parties wishing to make costs submissions should exchange those submissions and provide them to the Court within 60 days after the pronouncement of these reasons. If any party wishes to make oral cost submissions, they should indicate that in their written submissions. If a request for oral submissions is made, Vancouver Civil Scheduling will contact counsel to arrange for a suitable time to appear before me. If there is no request for oral submissions, I will make my costs decision based on the written submissions provided.

"Forth J."

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Prepared on 29 October 2026 · Esheria