

CANADA / JUDGMENT

Quinn Estate

2018 BCSC 365

COURT

Supreme Court of British Columbia

DECIDED

9 March 2018

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2018 BCSC 365 Quinn Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Quinn Estate,

2018 BCSC 365

Date: 20180309

Docket: S179378

Registry: Vancouver

Re: The Estate of John Brian Patrick Quinn, Deceased

Before: The Honourable Mr. Justice Funt

Reasons for Judgment

Counsel for the Petitioner, Sandra Quinn, the Executor of the Estate of John Brian Patrick Quinn:

J. Rost

A. Girou

Counsel for Sandra Quinn in her personal capacity:

A.D. Francis

Counsel for the Bank of Nova Scotia Trust Company, Trustee of the Quinn Family Trust:

H. McLellan

Counsel for Kathleen Quinn:

K.A. Kuntz

Counsel for Valerie Quinn Rydland:

M.S. Kerwin

Place and Dates of Hearing:

Vancouver, B.C.

January 23-24, 2018

Place and Date of Judgment:

Vancouver, B.C.

March 9, 2018

1. introduction

- [1] The petitioner seeks the Court's determination as to whether a pour-over clause in the deceased's will of April 1, 1996 for his Canadian assets (the "Will") is invalid, and, if so, whether it is cured by recent legislation, namely, s. 58 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 ("WESA").
- [2] Under the questioned clause in the Will, the residue of the deceased's Canadian estate was to "pour-over" to a revocable, amendable, inter vivos family trust ("Quinn Family Trust") which was settled by the deceased and his spouse approximately one month before the execution of the Will.
- [3] The deceased and his spouse were the trustees of the Quinn Family Trust.
- [4] About a year after the deceased executed his Will, the Quinn Family Trust was amended to include some bonding and similar requirements in order to ensure compliance with certain Treasury Regulations made under the laws of the United States of America, so that the Quinn Family Trust would be viewed as a Qualified Domestic Trust ("QDOT") under that country's tax laws.
- [5] For the reasons that follow, the Court will declare that the pour-over clause is invalid and that it is not cured by s. 58 of WESA. The result is that the residue of the deceased's estate will be distributed on intestacy in accordance with Part 3 of WESA.

2. facts

- [6] The deceased was a well-known head coach of several National Hockey League teams from 1979 through to 2006. He was also a businessperson and had obtained a law degree from a school in the United States.
- [7] The deceased was survived by his spouse of over 50 years, Sandra Quinn, and two adult daughters, Valerie Rydland and Kathleen Quinn. Valerie Rydland is married with three children.

- [8] At the time of his death, the deceased was a citizen of Canada and the United States. He was a Canadian resident residing in West Vancouver with Sandra Quinn, a Canadian citizen with a "U.S. green card".
- [9] The deceased died on November 23, 2014. Although he was in hospital at the time where he was being treated for a particular disease, his sudden death was unexpected.
- [10] As noted, on April 1, 1996, the deceased executed his Will in respect of his Canadian assets situated in Canada. At the time of his death, his Canadian assets consisted primarily of shares in the capital of several private corporations. Subject to the resolution of a particular liability, the value of the deceased's estate is either near nil or approximately \$750,000.
- [11] The Will was prepared by a U.S. attorney, and was executed in British Columbia with all requirements for proper execution for a will observed.
- [12] The questioned clause of the Will reads:

SIXTH: Residue. I give, devise and bequeath the residue of my estate to the Trust known as the QUINN FAMILY TRUST dated March 4, 1996, between J.B. PATRICK QUINN and SANDRA QUINN, as Settlers and J.B. PATRICK QUINN and SANDRA QUINN, as Trustees, to be added to principal and thereafter to be held, administered and distributed under the terms of such agreement.

- [13] The Quinn Family Trust was settled on March 4, 1996, prior to the execution of the Will. The deceased executed the trust declaration contemporaneously with the execution of his Will. Sandra Quinn executed a "mirror will" contemporaneously with the settlement of the Quinn Family Trust.
- [14] Under the Quinn Family Trust, the settlors, namely, the deceased and Sandra Quinn, were the first beneficiaries. Following the death of the surviving settlor, the beneficiaries are Valerie Rydland and Kathleen Quinn (or if either daughter has predeceased both settlors, that daughter's issue, and if that daughter has no issue, to her surviving sister).
- [15] Under a June 5, 2017 order granted by Justice Kent, among other matters, The Bank of Nova Scotia Trust Company became the trustee of the Quinn Family Trust (replacing Sandra Quinn, Valerie Rydland, and Kathleen Quinn).
- [16] The Quinn Family Trust was part of the estate plan of the deceased and Sandra Quinn. Section 6.04 of the Quinn Family Trust reads (in part):

6.04 Interference with Testamentary Plan

The Settlers have adopted this Declaration of Trust after full and careful consideration of the nature and extent of their properties and with full knowledge of their heirs and the natural objects of their bounty and, except as specifically provided in this Declaration of Trust or in the Last Will and Testament of the Settlers, has intentionally omitted to make provision herein for any other heir or claimant. If any beneficiary under this Trust, under the Last Will and Testament of either Settlor, or any intestate beneficiary of either Settlor, should in any manner, directly or

indirectly, contest or attack this Trust or any of its provisions or the Last Will and Testament of either Settlor, then any share or interest provided to such beneficiary by this Trust or by such Wills which would otherwise be distributed to or held for the benefit of such attacking or contesting beneficiary, is and shall be revoked and disposed of in the same manner provided herein as if such contesting or attacking beneficiary had predeceased both Settlers.

[17] As noted, the Quinn Family Trust could be amended and was revocable. The relevant section reads:

1.02 Right to Amend or Revoke Trust

While both Settlers are alive, the community property included in the Trust Estate may be withdrawn in whole or in part by an instrument in writing signed by either of the Settlers and delivered to the Trustees, and such withdrawal shall act as a revocation of the Trust as to any property so withdrawn. Any separate property included in the Trust Estate may similarly be withdrawn by the Settlor who contributed it to the trust. In the event of any such revocation, the property shall revert as if this trust had not been created.

In addition, during this period, the Settlers, acting together, shall have the full and unrestricted power to alter or amend this Agreement. Alteration or amendment of any terms of this Agreement shall be by an instrument in writing signed by both of the Settlers. If any alteration or amendment has the effect of removing any property from the Trust Estate, the Trustees shall cause such property to be transferred to the person or persons in the manner provided hereinabove, as if the Trust Estate had been revoked.

[18] On March 17, 1997, the Quinn Family Trust was amended to require the trustees to comply with certain U.S. bank, bond, and letter of credit requirements as set forth in specified U.S. Treasury Regulations for QDOTs.

[19] Mr. R. Bourbonnais is a lawyer and was a long-time friend of the deceased. The deceased telephoned Mr. Bourbonnais while Mr. Bourbonnais was on holiday in September and October 2014 and asked to meet upon his return to discuss the deceased's affairs.

[20] Upon Mr. Bourbonnais's return to Vancouver, in or around the second week of October 2014, he spoke with Sandra Quinn who told him that the deceased had been hospitalized. She also told Mr. Bourbonnais that she only had certain of the deceased's and her estate planning documents and asked that he contact their U.S. attorney to obtain all of the original documents signed by the deceased and her. Mr. Bourbonnais did so and started to review the documents Sandra Quinn had. He had some concerns.

[21] Mr. Bourbonnais states that estate planning is not one of his primary areas of practice. On or about November 6, 2014, he contacted a lawyer at another firm that had expertise in estate planning, trusts, and tax law.

[22] On November 6, 2014, Mr. Bourbonnais sent the lawyer copies of the two documents he had, and on November 12, 2014, a further set of eighteen documents he had obtained.

- [23] In or around the third week of November 2014, Mr. Bourbonnais saw the deceased at the hospital. He told the deceased that he had reviewed the documents received from Sandra Quinn, had identified some potential issues, and that the other lawyer was currently reviewing his (and Sandra Quinn's) estate planning documents. He said that the lawyer would be contacting him shortly to discuss recommendations. Mr. Bourbonnais also told the deceased that he was soon to leave for a Mexican vacation. The deceased stated that he wished to meet with him upon his return. While on holidays, Mr. Bourbonnais received the unexpected news that the deceased had died.
- [24] Prior to the deceased's death, the law firm to which Mr. Bourbonnais had referred the deceased and Sandra Quinn had reviewed the documents received, collected further information, and had prepared a November 21, 2014 letter addressed to the deceased and Sandra Quinn with considerable detail and various recommendations. Some of the recommendations depended upon decisions to be made by either the deceased or Sandra Quinn, such as whether Sandra Quinn's U.S. green card was to be retained.
- [25] With respect to the Quinn Family Trust, subject to discussion, estate planning counsel stated (in part):

Schedule F - Issues with respect to the existing Trust

You created the Trust on March 4, 1996 and amended it March 17, 1997. In the U.S., it is very common for individuals to create revocable trusts. They generally have a primary purpose of avoiding probate fees, which vary widely from State to State, California being among the most onerous.

We note that if you were Canadian tax residents at the time of creating the Trust, that would have given rise to a taxable disposition of assets transferred to the Trust. We assume you received advice at the time and that if you were Canadian residents at the time that this was properly reported.

The following are the reasons we recommend you wind up the Trust now:

1. If you do not, there will be a deemed disposition of the Trust's property on March 4, 2017 and if there has been any unrealized gain in the Trust's assets since the Trust's creation (or your re-establishment of residency in Canada if that was later), that gain will be subject to Canadian tax. This is as a result of the Canadian "21 year rule". There will be no U.S. capital gains tax at the same time, so double tax would arise if the assets were later sold. If the Trust continues, there will be this deemed disposition on March 4, 2017, and each subsequent 21 years.
2. The Trust is a resident of Canada for tax purposes because you are the Trustees and manage and control the Trust. The Trust is also a U.S. resident trust because it is governed by the law of California and Pat is a U.S. citizen and Sandra is a green card holder. Thus, technically the Trust should file an annual tax return in Canada, although you are taxed personally on the

income and gains of the Trust in both countries. Depending on how the Trust has been reporting in the past, you may wish to make a Voluntary Disclosure to the Canada Revenue Agency to file the Trust returns.

3. It is possible to roll the assets of the Trust out to the contributors (you) prior to the 21 year anniversary without triggering tax if the contributors are resident in Canada, as you both are. For U.S. purposes a distribution to you would be tax-free as well.
4. One additional problem that can arise in using a revocable trust to hold U.S. assets is the potential for mismatching of foreign tax credits on death. For U.S. tax purposes the trust will be looked through and U.S. estate tax will be levied on the value of your assets as though you owned those assets at death. For Canadian tax purposes, the Trust is recognized and it will not have a deemed disposition until an asset is actually disposed of or on a 21st anniversary. As the timing of the tax and taxpayers (estate vs. trust) are different, foreign tax credits will not be available and double tax can result. There are draft legislative amendments which might correct this.
5. The Trust creates a QDOT for Sandra if she survives Pat. As outlined above, this is administratively burdensome and the Marital Credit would be much more tax effective.

We recommend that the assets of the Trust be distributed out to you now to forego the complexity of having a revocable trust while resident in Canada and to avoid the creation of the QDOT. We could create a Titleholder Agreement allowing the Trust to remain on title to attempt to avoid probate on Pat's death although there is no certainty this would be successful.

We understand that the funds contributed to the primary account held by the Trust were funds belonging to Pat. Thus, for Canadian purposes, the income and gain from this account should be taxed on in Pat's hands, rather than 50/50, but we assume you have been taking the position that the funds were contributed by both of you. At this point, it would be best for the account to be in Pat's name alone, in order to grant a bump on the cost base in case Sandra loses her green card status after Pat's death or to pass into a U.S. estate tax protected trust if Sandra intends to keep the account in the U.S. and primarily invested in U.S. securities.

[Bold in original.]

[26] There is no evidence that before the deceased's death on November 23, 2014, the November 21, 2014 letter prepared by estate planning counsel was discussed with the deceased or that instructions were received. In light of the need for certain decisions to be first made by the deceased and Sandra Quinn, draft wills were not prepared.

3. statutory provisions

[27] The key statutory provisions are in WESA and they read:

1 (1) In this Act:

"will" means

- (a) a will,
- (b) a testament,
- (c) a codicil,
- (d) an appointment by will or by writing in the nature of a will in exercise of a power,
- (e) anything ordered to be effective as a will under section 58 [court order curing deficiencies],
or
- (f) any other testamentary disposition except the following:
 - (i) a designation under Part 5 [Benefit Plans];
 - (ii) a designation of a beneficiary under Part 3 [Life Insurance] or Part 4 [Accident and Sickness Insurance] of the Insurance Act;
 - (iii) a testamentary disposition governed specifically by another enactment or law of British Columbia or of another jurisdiction in or outside Canada;

37 (1) To be valid, a will must be

- (a) in writing,
 - (b) signed at its end by the will-maker, or the signature at the end must be acknowledged by the will-maker as his or hers, in the presence of 2 or more witnesses present at the same time,
and
 - (c) signed by 2 or more of the witnesses in the presence of the will-maker.
- (2) A will that does not comply with subsection (1) is invalid unless
- (a) the court orders it to be effective as a will under section 58 [court order curing deficiencies],
 - (b) it is a will recognized as valid under section 80 [validity of wills made in accordance with other laws], or
 - (c) it is valid under another provision of this Act.

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.
- (4) If an alteration to a will makes a word or provision illegible and the court is satisfied that the alteration was not made in accordance with this Act, the court may reinstate the original word or provision if there is evidence to establish what the original word or provision was.

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.

[28] Section 58 of WESA is only required to be considered if the pour-over clause is invalid. The legal status of the pour-over clause is governed by established jurisprudence. As discussed below, s. 59(1) provides legislative context for the interpretation of s. 58.

4. The Pour-over clause

- [29] 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": Alan N. Polasky, "Pour-Over' Wills - and the Statutory Blessing" (1959) 98:10 Trusts and Est. 949.
- [30] Unlike an individual (or a corporation), a trust is not a legal person; it is a relationship. Accordingly, a devise or bequest to a trust is not like a devise or bequest to an individual.
- [31] Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith, eds., *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) at 3, describes the relationship as follows:

However, the relationship between the trustee, having duties and powers, and the beneficiary or purpose, having rights to compel performance of the trusts (or obligations upon which terms the trustee holds), is the traditional way in which the "trust" has been analyzed. And among lawyers of the common law tradition [the] following definition is generally regarded as being one of the best:

A trust is the relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one, and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust.

[Footnotes omitted.]

[32] Dean H. Allan Leal in his article, "The Revocable Trust and Pour Over Wills" (1966) 1:3 Real Prop. Prob. & Tr. J. 286, comments on the Anglo-Canadian jurisprudence. Although Dean Leal's article is from the 1960s, it provides a useful summary and analysis. He states, at 289:

The allied problem raised by the legitimate desire of a testator to pour assets from his will to a revocable inter vivos trust is a matter of serious difficulty under Anglo-Canadian jurisprudence, and the short answer is that under present decisions it probably cannot be done with safety and should not be attempted. The decisions in this area are most unsatisfactory since the reasoning proceeds almost entirely on the basis of incorporation by reference even in those cases where it is perfectly clear that the testator had no intention whatever of incorporating the trust or the trust instrument or anything else into the will but demonstrates the obvious intention of making a gift to the trust.

This has caused no difficulty with us if the trust is irrevocable; in that situation the court properly deals with the matter on the basis of an accretion to the trust [Re Playfair, [1951] ch. 4]. Given an amendable or revocable trust, and even though the trust has not been amended after the execution of the will (or at any time), the pour over is held to be invalid on the ground that the document is "future" and therefore does not satisfy the prime requisite of incorporation by reference, namely, a "presently existing document." The testator cannot, it is said, by his will create for himself a power to dispose of his property by an instrument not duly executed as a will or codicil.

[Footnotes omitted.]

[33] In the case at bar, the deceased had the "obvious intention of making a gift" to the Quinn Family Trust. Stripped to essentials, the Sixth clause of the Will reads:

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.

- [34] In light of the deceased's obvious intention, I will not attempt to find the Sixth clause valid on the basis of the doctrine of incorporation by reference.
- [35] As noted, a trust is not a legal person. The question becomes: In what circumstances, if any, does Anglo-Canadian jurisprudence recognize a trust as a fact of "independent significance"?
- [36] Albert H. Oosterhoff et al., *Oosterhoff on Wills*, 8th ed. (Toronto: Thomson Reuters Canada, 2016) at 140-141 notes:
6. Anglo-Canadian courts have not generally adopted the devise of the pour-over trust, under which a testator may give money or property by will to an existing trust created by herself or by another person. The advantage of this device is that if a beneficiary has a vested interest under the existing trust, but predeceases the testator, the beneficiary's estate will be entitled to the gift. If, however, the existing trust is incorporated into the will, so that it is not a pour-over, but a referential trust, the gift to such a beneficiary would lapse, since the trust (except to the extent that it previously existed) takes effect as of the date of the testator's death.

The pour-over trust doctrine is not a probate doctrine, but rather concerns the construction of wills. It is based upon the doctrine of independent significance. Under that doctrine, if a fact or an entity exists which has significance independent of the will, extrinsic evidence is admissible to identify the fact or entity. A properly established trust is such a fact of independent significance.

The disadvantage of the pour-over trust is similar to that which attends the doctrine of incorporation by reference, namely that a reference to a trust which is revocable or which may be replaced with another is not acceptable, since the trust does not then have independent significance and the testator is purporting to reserve the right to make a future unattested codicil to the will. To overcome this difficulty legislation was enacted in many of the United States which allows the doctrine to operate even though the trust is revocable. Similar legislation was recommended in Canada by the Uniform Law Conference of Canada.

Even though it is clear that the testator does not intend to incorporate the trust in these cases, the Anglo-Canadian courts treat pour-over trusts, with the sole exception of *Re Playfair*, as documents to be incorporated.

[Emphasis added, footnotes omitted.]

- [37] The recommendations of the Uniform Law Conference of Canada to facilitate a pour-over bequest or devise to an inter vivos trust have not been adopted in our Province.
- [38] For the matter at bar, the signal Canadian cases since Dean Leal's 1966 article are *Kellogg Estate (Re)*, 2013 BCSC 2292, and *Re Currie* (1978), 21 O.R. (2d) 709 (H.C.J.), which Justice Gray discusses in *Kellogg Estate*. *Re Playfair*, [1951] Ch. 4 is distinguishable from the case at bar, as the subject trust in that decision was irrevocable, with the beneficiary having an indefeasible interest.

- [39] In Kellogg Estate, Justice Gray held a pour-over clause to a revocable, amendable, inter vivos trust to be invalid. As in the case at bar, the inter vivos trust was amended after the execution of the deceased's will. In Kellogg Estate, the amendment served to remove one of the primary beneficiaries of the trust.
- [40] After a review of the relevant English and Canadian cases, American legislation and cases, and academic commentary, Justice Gray concluded:
- [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.
- [41] On appeal, the court found the issues to be moot, as the respondents agreed that the residue of the estate would be shared equally with the appellant: *Kellogg Estate v. Kellogg*, 2015 BCCA 203 at paras. 1, 12.
- [42] The Court of Appeal did not suggest or otherwise comment that Justice Gray's conclusion that the pour-over clause was not valid was incorrect. It did question the correctness of Justice Gray's conclusion regarding a clause in the subject will specifically incorporating the terms of a family trust by reference "given there had been in fact an amendment", though it did not decide the issue: para. 12.
- [43] As a matter of judicial comity and our Court of Appeal's apparent approval, I am properly bound to find that the pour-over clause, in the case at bar, is invalid (subject to the s. 58 of WESA curative provision): *Re Hansard Spruce Mills Ltd.*, [1954] 4. D.L.R. 590 (B.C.S.C.).
- [44] Mr. Kerwin, counsel for Valerie Rydland, urged on the Court the factual distinction that in *Kellogg Estate*, the amendment involved a change in beneficiaries as opposed to a change of an administrative nature. He referred the Court to *In Re Ivie's Will* (1958), 173 N.Y.S. 2d 293, 149 N.E. 2d 725, a decision of the New York Court of Appeals.

- [45] In *Re Ivie's Will*, the New York Court of Appeals held that a bequest to an inter vivos trust which had been settled before the deceased had made his will but which was amended subsequently and prior to the deceased's death for administrative purposes was valid. The bequest was to be administered under the terms of the trust and not by the executor of the deceased's will.
- [46] The New York Court of Appeals refers to the rule against incorporation by reference and held the rule should not apply where the trust has "undergone minor administrative changes subsequent to the execution of the will".
- [47] *Re Ivie's Will* may be explained under the doctrine of "facts of independent significance". As noted, such a doctrine with respect to revocable, amendable, inter vivos trusts is not recognized in our Province. In my view, even where the actual amendments may only be of an administrative nature, the doctrine of "facts of independent significance" will not save a purported gift, devise or bequest to a revocable, amendable, inter vivos trust. The Legislature's purpose, as reflected in WESA, must be considered.
- [48] The definition of "will" in s. 1 of WESA contemplates a "testamentary disposition". The solemnity of making one's will is reflected in s. 37(1) of WESA and its requirements for proper execution.
- [49] The Legislature's purpose in requiring particular formalities for the proper execution of a will is to ensure certainty as to the deceased's final wishes and to avoid controversy (and possible litigation). The possible use of a revocable, amendable, inter vivos trust as the recipient of a testamentary gift, bequest or devise creates that uncertainty the Legislature sought to avoid. Put bluntly, a person could one day execute his or her will, fully observing the execution strictures of s. 37(1) of WESA, leaving the residue of his or her estate to a revocable, amendable, inter vivos trust, which he or she could then revoke or amend the following day without regard to any execution strictures.
- [50] Having two witnesses present at the time of a will-maker's execution of his or her will or codicil serves to protect against fraud or undue influence, or the perception of such, thereby helping to ensure certainty of the will-maker's final wishes. A well-founded perception that there is the protection against fraud or undue influence often serves to maintain, give, or secure family harmony, especially as the will-maker approaches his or her later part of life.
- [51] Further, the Quinn Family Trust does not have "significance independent" of the Will. If a recipient trust is revocable or amendable by the will-maker, it cannot be said that the trust has significance independent of the will. In the case at bar, the deceased could withdraw all of the community property and all of the separate property he had contributed to the Quinn Family Trust. Acting in concert with Sandra Quinn, the deceased could revoke or amend the Quinn Family Trust. A sufficient quality of independence does not exist. In *Re Playfair*, the recipient trust was irrevocable with the beneficiary having an indefeasible interest, reflecting sufficient independence from the will-maker.

- [52] In sum, subject to the possible application of s. 58 of WESA, I find the pour-over clause of the deceased's will to be invalid.
5. the curative provision - s. 58 of wesa
- [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. Our Court of Appeal in *Hadley Estate (Re)*, 2017 BCCA 311 reviews and articulates these aspects:
- [33] British Columbia was a "strict compliance" jurisdiction prior to passage of the WESA. Under s. 4 of the Wills Act, R.S.B.C. 1996, c. 489, testators were obliged to comply strictly with execution and attestation formalities for creating a will for it to be valid. The same was true for revoking, altering or reviving a will: Wills Act, ss. 14, 17, 18. These formal requirements sometimes led to a will-maker's testamentary intentions being defeated for no good reason. As a result, the British Columbia Law Institute recommended the introduction of a dispensing power to relieve against the consequences of non-compliance with testamentary formalities as part of a general reform of wills and estate administration law: BCLI, Wills,

Estates and Succession: A Modern Legal Framework (BCLI Report No. 45, June 2006) at xiv.

- [34] Section 58 of the WESA is the legislative response to the BCLI recommendation. Remedial in nature, it confers a broad discretion on the court to order that a "record or document or writing or marking on a will or document" be fully effective, despite non-compliance with the statutory requirements. Although s. 58 cannot be used to uphold a will that is substantively invalid, it permits the court to cure issues of formal invalidity in prescribed circumstances: [s. 58 quoted in part.]
- [35] For an order to be granted under s. 58 of the WESA, the court must be satisfied that a document represents the testamentary intentions of the deceased person. However, unlike the curative provisions in some provinces, s. 58 does not require a minimum level of execution or other formality for a testamentary document to be found fully effective. Regardless of its form, if the court grants an order under s. 58(3), the document may be admitted to probate.
- [36] As discussed in *Estate of Young* [2015 BCSC 182], s. 58 is very similar to Manitoba's curative provision and thus the leading appellate authority on its meaning is *George v. Daily* [(1997), 143 D.L.R. (4th) 273 (Man. C.A.)]. *George* and several other Manitoba authorities are reviewed in *Estate of Young*, which review need not be repeated. Their import is summarized at paras. 34-37:
- [34] As is apparent from the foregoing, a determination of whether to exercise the court's curative power with respect to a non-compliant document is inevitably and intensely fact-sensitive. Two principal issues for consideration emerge from the post-1995 Manitoba authorities. The first is an obvious threshold issue: is the document authentic? The second, and core, issue is whether the non-compliant document represents the deceased's testamentary intentions, as that concept was explained in *George*.
- [35] In *George* the court confirmed that testamentary intention means much more than the expression of how a person would like his or her property to be disposed of after death. The key question is whether the document records a deliberate or fixed and final expression of intention as to the disposal of the deceased's property on death. A deliberate or fixed and final intention is not the equivalent of an irrevocable intention, given that a will, by its nature, is revocable until the death of its maker. Rather, the intention must be fixed and final at the material time, which will vary depending on the circumstances.
- [36] The burden of proof that a non-compliant document embodies the deceased's testamentary intentions is a balance of probabilities. A wide range of factors may be relevant to establishing their existence in a particular case. Although context specific, these factors may include the presence of the deceased's signature, the deceased's handwriting, witness signatures, revocation of previous wills, funeral arrangements, specific bequests and the title of the document: *Sawatzky* at para. 21; *Kuszek* at para. 7; *Martineau* at para. 21.

- [37] While imperfect or even non-compliance with formal testamentary requirements may be overcome by application of a sufficiently broad curative provision, the further a document departs from the formal requirements the harder it may be for the court to find it embodies the deceased's testamentary intention: George at para. 81.

The Material Time

- [37] In many cases, as here, the material time for determining testamentary intentions on a s. 58 application is the time when the document in question was created. However, as noted in Estate of Young, depending on the circumstances, the material time may vary on this key issue. For example, after creating a document, a will-maker may, by words or actions, manifest a fixed and final intention that it expresses how his or her property is to be disposed of on death and thus that it operates as a will. In other words, a document may acquire a testamentary character by subsequent and sufficient manifestation of the will-maker's intention: Bennett et al. v. Toronto General Trusts Corporation, [1958] S.C.R. 392 at 397. Nevertheless, in most cases, the focus of inquiry will be the will-maker's intention when the document was prepared and executed: see, for example, Sweeney Cunningham Estate v. Sweeney, 2013 NSSC 299 at para. 29; Komonen v. Fong, 2011 NSSC 315 at para. 23.
- [58] In the case at bar, the deficiency is not one of proper execution. All parties agree that the Will was properly executed.
- [59] The facts set forth above show that the steps taken prior to the deceased's death did not constitute a revocation of the Will.
- [60] The evidence shows that, prior to his death in 2014, the deceased wished to review his (and Sandra Quinn's) estate plan, and sought advice. As a result of the deceased's untimely death, he did not meet with estate planning counsel, did not give instructions, and no drafts of new wills were prepared. Matters were at a stage of contemplation leading to further investigation and consideration.
- [61] There is no evidence that the deceased intended the Quinn Family Trust to have testamentary character. It was executed contemporaneously with the Will, however, unlike the Will, the execution requirements for a testamentary document were not followed for the Quinn Family Trust.
- [62] The Quinn Family Trust was a revocable, amendable, inter vivos trust with the deceased being one of the two settlors and trustees. Although, as may be seen from clause 6.04, the Quinn Family Trust was part of an estate plan functioning during the deceased's life time, it was designed to be flexible, and left matters in flux. For example, shortly before the deceased's death, counsel had sent the November 21, 2014 letter addressed to the deceased and Sandra Quinn, which Sandra Quinn had the opportunity to read, and which recommended the assets be distributed "now". The distribution of all of the Quinn Family Trust assets would have had the effect of a revocation.

- [63] In *George v. Daily* (1997), 143 D.L.R. (4th) 273 (Man. C.A.), the Manitoba Court of Appeal addressed the importance of testamentary intention as follows:
- [60] It remains a fundamental and universal proposition "that nothing can receive probate which was not intended to be a testamentary act by the testator": per Lord Selborne L.C. in *White v. Pollock* (1882), 7 App. Cas. 400 (H.L.) at p. 405. In *Bailey's The Law of Wills*, 7th ed. (Pitman Publishing, 1973) the principle is stated (at pp. 65-6): "No will is entitled to probate unless the testator executed it with the intention that it should take effect as his will." (It is not necessary to review cases such as *Milnes v. Foden*, [1890] 15 P. 105, in which instruments have been admitted to probate even though the deceased was unaware that he/she had performed a testamentary act. The principle remains the same: the intention that the instrument record the final (but revocable) wishes of the deceased as to the disposal of his/her property after death.)
- [61] Section 23 can be invoked to give effect to the testamentary intentions of a deceased in the face of imperfect compliance, even noncompliance, with the formalities of the Act. Section 23 cannot, however, make a will out of a document which was never intended by the deceased to have testamentary effect. In *Re Balfour Estate* (1990), 85 Sask. R. 183 (Q.B.), Gerein J. explained the principle:

Yet, it must be kept in mind that the section's [s. 35.1 of the Saskatchewan Wills Act] purpose is to overcome non-compliance with formal requirements. It does not empower the Court to render a document testamentary in nature when it is otherwise not so. In the instant case, the document does not manifest a true testamentary intention and therefore does not meet the threshold requirement of the section.

[64] Ms. Francis in her written submissions also stated:

41. Much is made by the respondent Valerie Rydland of the fact that the 1997 amendment to the Trust was an administrative amendment; it did not alter the disposition of the Deceased's assets on his death. But this argument misses the point. It is [the] amendable nature of the Trust itself, not the actual amendments made to it, that renders it ineligible to be saved under section 58.
42. In order for the gift to the Trust in this case to be curable under section 58, it would be necessary for the terms of the Trust to represent the deliberate or fixed and final intentions of the Deceased. By its very nature, the Trust could never express the fixed and final intention of the Deceased because it contemplated its own amendment. The Trust was a vehicle that enabled the Deceased to change his testamentary dispositions at any time. It was the very opposite of a fixed and final statement of the Deceased's intentions with respect to the disposition of his assets on his death.

[65] Again, I agree. The Quinn Family Trust, by providing for its own amendment or revocation by the deceased and Sandra Quinn, creates a mechanism to avoid the execution strictures of s. 37 of WESA. Such provisions for revocation or amendment also do not reflect the requisite "deliberate or fixed and final intention" for testamentary dispositions.

[66] As noted, in Kellogg Estate, the doctrine of "facts of independent significance" has not been recognized in our Province. I do not read s. 58 of WESA as allowing the court to bypass the execution requirements for a valid will, or to recognize, in the case at bar, a revocable, amendable, inter vivos trust as a fact of independent significance. As noted, the deceased was, during his lifetime, a settlor, a trustee, and a beneficiary of the Quinn Family Trust. The facts are readily distinguishable from that of the irrevocable trust in *Re Playfair*.

6. CONCLUSION

[67] The Court declares that the Sixth clause of the Will of J.B. Patrick Quinn dated April 1, 1996 is invalid and is not cured by s. 58 of WESA. The residue of his estate will be distributed on intestacy in accordance with Part 3 of WESA.

7. costs

[68] In *Vielbig v. Waterland Estate* (1995), 121 D.L.R. (4th) 485 (B.C.C.A.), our Court of Appeal cited with approval Master Horn's review of costs in connection with a wills variation matter in *Lee v. Lee Estate* (1993), 84 B.C.L.R. (2d) 341. Master Horn stated (in part) at 346:

An order for costs in favour of a completely unsuccessful party against a completely successful party is a most exceptional order. The general rule is that costs follow the event and while a court may depart from this rule, any departure is usually in the way of depriving a successful party of costs and not of awarding costs to an unsuccessful party. In either case, the usual rule should not be departed from simply because an unsuccessful party did not expect to lose. (*Baart v. Kumar* (1985), 21 D.L.R. (4th) 705 (B.C.C.A.) at 711; *Approving Officer (Burnaby) v. Mutual Development Corp.*, [1971] 5 W.W.R. 97 (B.C.C.A.) at 100 and 105; *Donald Campbell & Co. v. Pollak* (No. 2) [1927] A.C. 732 (H.L.) at 776.)

In probate or administration actions or in proceedings for the construction of wills, the rule may be more frequently departed from. In such cases where the validity of a will or the capacity of the testator to make a will or the meaning of a will is in issue, it is sometimes the case that the costs of all parties are ordered to be paid out of the estate. This is upon the principle that where such an issue must be litigated to remove all doubts, then all interested parties must be joined and are entitled to be heard and should not be out of pocket if in the result the litigation does not conclude in their favour. The estate must bear the cost of settling disputes as a cost of administration. This is the reasoning which underlies such cases as *Re Dingwall* (1967), 65 D.L.R. (2d) 43 (Ont. H.C.) and *McNamara v. Hyde*, [1943] 2 W.W.R. 344 (B.C.S.C.) and *Re Lotzkar Estate* (1965), 51 W.W.R. 99 (B.C.C.A.). The question to be asked in such case is whether the parties were forced into litigation by the conduct of the testator or the conduct of the main beneficiaries.

[69] In the case at bar, the questions involved the construction of the Will and whether the invalidity could be cured under s. 58 of WESA. It was the deceased who made the Will requiring the opinion of the Court. The parties will be entitled to their costs from the estate on a full indemnity basis.

"Funt J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/18/03/2018BCSC0365.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/quinn-estate-2018>

Prepared on 28 October 2026 · Esheria