

CANADA / JUDGMENT

Waslenchuk Estate

2020 BCSC 1929

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Supreme Court of British Columbia

DECIDED

8 December 2020

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2020 BCSC 1929 Waslenchuk Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Waslenchuk Estate,

2020 BCSC 1929

Date: 20201208

Docket: P190644

Registry: Vancouver

In the Matter of the Estate of Lorraine Rose Waslenchuk, Deceased

Before: The Honourable Mr. Justice Walker

Reasons for Judgment

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Place and Dates of Hearing:

Vancouver, B.C.

October 13-14 & 16, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 8, 2020

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Background

- [1] Janet Letourneau is the executor of the will of Lorraine Rose Waslenchuk and in that capacity has brought an application seeking directions. Ms. Letourneau is Ms. Waslenchuk's only surviving sibling and will inherit the residue of Ms. Waslenchuk's estate if it passes on an intestacy.

- [2] Ms. Waslenchuk executed her will in Connecticut on November 27, 2013 ("Will"). She passed away in Vancouver on August 2, 2016. She was predeceased by her husband, Dennis Waslenchuk, who died a year earlier, on May 9, 2015. They did not have children.
- [3] The Waslenchuks lived in the United States from 1975 until 2014. They initially moved to the United States so that Mr. Waslenchuk could obtain his Ph.D. He accepted a job teaching there and later started his own business. The Waslenchuks maintained their Canadian citizenship and their ties with Canada while living in the United States. Ms. Waslenchuk obtained American citizenship while they were living in the United States. In 2014, when Mr. Waslenchuk was suffering from cancer, the Waslenchuks sold their real estate holdings in the United States and moved back to British Columbia (where they were born and raised). They purchased real estate in the Lower Mainland before returning to the province, intending to make British Columbia their permanent residence.
- [4] The respondent, Paul Holland, Jr., who is an attorney practising law in Connecticut, prepared the Will and a will for Mr. Waslenchuk. The Waslenchuks executed their wills in Connecticut, where they lived at the time, in accordance with the formal requirements in force in that jurisdiction.
- [5] At the same time their wills were prepared, Mr. and Mrs. Waslenchuk settled separate revocable and amendable inter vivos trusts (also called "living trusts" in Connecticut). Their trust documents were also prepared by Mr. Holland in accordance with the laws of Connecticut.
- [6] An inter vivos trust is made by deed, oral declaration, or in writing, to take effect during the lifetime of the settlor.
- [7] In evidence is Mr. Holland's correspondence to Mr. and Mrs. Waslenchuk describing their trusts as "inter vivos" trusts.
- [8] One of the purposes of the Waslenchuks' trusts was to provide a vehicle to manage their assets in the event they became incapacitated. Another was to provide for the ultimate distribution of their assets upon their death. Another was to minimize the impact of probate.
- [9] Ms. Waslenchuk's trust is described in the trust documents as the Lorraine R. Waslenchuk Revocable Trust ("Trust").
- [10] Article II.C. of the Will purports to distribute the residue of Ms. Waslenchuk's estate to the trustees of the Trust on her death.
- [11] It is the interrelationship between the Will and the Trust that grounds the question posed by Ms. Letourneau and the dispute in this case.

- [12] Ms. Waslenchuk's estate is presently comprised of movables and real property in British Columbia and movables (funds) in Connecticut, worth approximately CAD \$4 million in total.
- [13] The Will was probated through the Prince Rupert probate registry. The grant of probate was issued on January 13, 2017. I was advised by counsel that the Prince Rupert registry was chosen as a matter of expediency due to its lighter case load and quicker processing capacity at that time.
- [14] A copy of the Trust document was provided with the application for probate. It was attached to the grant of probate but is not referred to in it. The grant states:

Whereas Lorraine Rose Waslenchuk a.k.a Lorraine R. Waslenchuk a.k.a. Loraaine Waslenchuk (the "deceased") whose last known address was #307-2788 Vine Street, Vancouver, BC died on 2 August, 2016 and left a will dated 27 November, 2013, a copy of which is attached.

Administration of the estate of the deceased is granted to Janet Katherine Letourneau.

- [15] As applicant, Ms. Letourneau seeks directions in her capacity as executor, concerning the construction of the Will and the administration of the residue of the estate.
- [16] Specifically, Ms. Letourneau asks whether Article II.C of the Will, which addresses the distribution of the estate's residue to the Trust, is valid. She framed the question this way in her notice of application filed May 2, 2019:

Is Article II.C of the Will (the "Residue Distribution Clause") invalid and of no force and effect in light of the Court's decision in *Re: Quinn Estate*, 2018 BCSC 365 and affirmed 2019 BCCA 91?

- [17] Determining that question involves construing the Will and in doing so, I exercise my jurisdiction as a court of construction to determine the meaning of the testamentary document approved in probate: *Ali Estate (Re)*, 2011 BCSC 537 at paras. 21-24. As Madam Justice Dardi pointed out in her reasons in *Ali* at para. 23, "It is axiomatic that court must interpret or construe a will in the form in which it has been admitted to probate."
- [18] Much depends on the answer to the question posed by Ms. Letourneau on this application.
- [19] As executor, Ms. Letourneau takes no position to the answer to that question.
- [20] As a potential beneficiary, however, where she is represented by separate counsel, Ms. Letourneau characterizes Article II.C as a "pour-over" clause which this Court and the Court of Appeal in *Quinn Estate (Re)*, 2018 BCSC 365 and 2019 BCCA 91 ("*Quinn Estate SC*" and "*Quinn Estate CA*", respectively) held is invalid.

- [21] In *Quinn Estate CA*, Chief Justice Bauman described a pour-over clause in this way:

2 The impugned provision is known as a "pour-over" clause as the residue figuratively "pours over" into the corpus of a non-testamentary inter vivos trust. It is not a clause finding much support in Anglo-Canadian law.

- [22] Another description is found in Quinn Estate SC:
- [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.
- [23] If Ms. Letourneau's position qua potential estate beneficiary is correct, and the provision in the Will is invalid, then the distribution of the residue of Ms. Waslenchuk's estate, will be by way of intestacy, wholly to Ms. Letourneau: Wills, Estates and Succession Act, S.B.C. 2009, c. 13, ss. 25, 44, 46 [WESA]; Quinn Estate SC at para. 67; Thulin v. Butler, 2003 BCCA 225 at para. 4. Ms. Letourneau would take the residue on an intestacy because Ms. Waslenchuk's father, Leo Letourneau, the sole intestate heir of Ms. Waslenchuk's estate, died on June 7, 2018, and Ms. Letourneau is the sole beneficiary of his estate.
- [24] The other respondents contend that Article II.C is a valid testamentary clause in British Columbia. They assert it is not a pour-over clause, but part of a composite testamentary document that includes the Trust, or alternatively, a valid referential trust.
- [25] The opposing respondents advance other alternative positions.
- [26] For example, they say that even if Article II.C is construed as a pour-over clause, it is distinguishable from the clause in issue in Quinn Estate and does not fall within the ambit of the holdings in Quinn Estate SC and Quinn Estate CA. In the further alternative, the opposing respondents submit Article II.C. should be construed in accordance with the law of the State of Connecticut (where it is recognized as a valid disposition) because it was Ms. Waslenchuk's domicile at the time the Will was made. In that respect, they submit the disposition of the residue should be in accordance with Connecticut law, or alternatively, movables located in Connecticut in accordance with Connecticut law and movables and real property located in this province in accordance with British Columbia law. They also argue that since the Trust document was stapled to the grant of probate, the position taken by Ms. Letourneau in her personal capacity is a collateral attack on an order of this Court in probate.
- [27] If the opposing respondents are correct in any of their arguments, then the residue will be distributed in accordance with the provisions of the Trust: one-third to Ms. Letourneau; one-third to the respondent, Brent Ross Waslenchuk (misspelled in the style of cause as "Brett"); and the remaining third to two charities, the respondents, Best Friends Animal Society located in Kanab, Utah and RedRover (formerly United Animal Nations) located in Sacramento, California.

The Will

- [28] The Will was executed before two witnesses in Connecticut. There is no dispute that it complied with the formalities and substance of Connecticut law and the law of this

province.

- [29] Ms. Letourneau was appointed executor per Article III, which named her as an alternate executor in the event that Dennis Waslenchuk fails or ceases to act as an executor.
- [30] It is useful to set out other relevant provisions in the Will for context before turning to the impugned provision, Article II.C.
- [31] Excerpts from the Will (and the Trust document in the section that follows) in bold are as they are shown in the Will.
- [32] Article II provides for payment of all debts, death taxes, and expenses, storage and delivery costs and distribution of movables and the residue of the estate.
- [33] Article II.B concerns the distribution of movables, described as "tangible personal property", to Dennis Waslenchuk, unless he predeceases Ms. Waslenchuk, in which case they shall be distributed as part of the residue:

Article II

Administration of My Estate Upon My Death

B. Tangible Personal Property

1. Distribution. My Executors shall distribute all Tangible Personal Property to my spouse, if my spouse survives me, or, if my spouse does not survive me, such property shall be added to my residuary estate.
3. Memoranda. I direct the attention of my Executors and my family to any memoranda I may leave for their guidance in dividing and disposing of any Tangible Personal Property.

[Emphasis added]

- [34] "Tangible Personal Property" is defined in Article V.P in relation to the laws of the jurisdiction where the Will is probated, which was British Columbia:

P. Tangible Personal Property. Unless otherwise expressly provided, "Tangible Personal Property" shall include jewelry, clothing, furniture, art, automobiles, boats, personal effects and other items that are considered tangible personal property under the laws of the jurisdiction where my Will is probated, together with any insurance policies insuring such items.

- [35] "Residuary estate" is also defined in the definitions section of the Will, Article V.M:

M. Residuary Estate. My "Residuary Estate" shall consist of all of my property, wherever located (except any property over which I have a power of appointment, it being my intention not to exercise any such power by the disposition of my Residuary Estate), remaining after payment of all debts, funeral and administration expenses and Death Taxes as provided for by the Article entitled "Payment of Debts, Death Taxes and Expenses," any preresiduary gifts and any other charges payable out of the principal of my estate.

[36] "Distribute" is defined as well:

D. Distribute. A direction to my Executors to "distribute" property shall mean that I "give, devise and bequeath" such property.

[37] Since Dennis Waslenchuk predeceased Ms. Waslenchuk, her Tangible Personal Property forms part of the residue of her estate.

[38] There is no specific provision in the Will concerning the distribution of Ms. Waslenchuk's real property (immovables). As a consequence of the definition of residue in Article V.M described above, her real property is included in the residue.

[39] As noted at the outset, Ms. Waslenchuk's estate is comprised of movables, including substantial funds (mostly in Canada although some in the United States), and real property located in British Columbia.

[40] The question posed by Ms. Letourneau on the application arises because the distribution of Ms. Waslenchuk's movables and real property form part of the residue of her estate.

[41] Distribution of the residue is governed by Article II.C, which provides it is to be distributed to the then acting trustee of the Trust and then disposed of in accordance with the terms of the Trust:

Article II

C. Addition of Residuary Estate to Revocable Trust. My Executors shall distribute my Residuary Estate to the then acting trustee of the LORRAINE R. WASLENCHUK REVOCABLE TRUST, to be disposed of as provided for in such document.

[Emphasis added]

[42] The Trust document was not attached to the Will. It is referred to in the Will as an amendable inter vivos trust that Ms. Waslenchuk settled the same day as she executed the Will:

Article VII

References to Inter Vivos Trust

Any reference to the "LORRAINE R. WASLENCHUK REVOCABLE TRUST" shall mean that certain trust agreement between me, as Grantor, and my spouse and me, as Trustees, signed by me on the same date as this document, as may be amended from time to time.

[Emphasis added]

[43] The Trust document also stipulates that it is amendable.

- [44] It is the combined effect of Article II.C and the Trust document settling an amendable trust which grounds Ms. Letourneau's position that Article II.C. constitutes a pour-over clause invalid in British Columbia.

The Trust

- [45] The Trust document recites that Ms. Waslenchuk entered into an agreement with herself and her husband, as trustee, both said to be "of New London, Connecticut". It was signed by Ms. and Mr. Waslenchuk in the presence of two witnesses. One of them was Mr. Holland. The Trust was settled upon payment of USD \$5. The governing law for the validity, construction, and administration of the Trust document is stated on the face of the trust document to be the law of Connecticut.
- [46] In accordance with the provisions of Article VIII, Janet Letourneau became a trustee following Dennis Waslenchuk's death and Mr. Holland became a co-trustee when Ms. Waslenchuk passed away.

Distribution of Trust Property on Ms. Waslenchuk's death

- [47] The Trust document contains various directions to its trustees regarding distributions of Trust property. Those relevant for the present application are set out in Article II. They concern the administration of the Trust following Ms. Waslenchuk's death (after death, the Trust is described as a "Terminating Trust"):

Article II

Administration of Terminating Trust Upon My Death

Upon my death, the trust (including any property added to the trust by reason of my death), which shall be referred to during the period of my estate administration and prior to the distribution of my residuary estate as the Terminating Trust, shall be administered as follows:

B. Tangible Personal Property. Any tangible personal property, together with any insurance policies relating thereto, shall be distributed to my spouse, if my spouse survives me, or, if my spouse does not survive me, to my Trustees to be added to my residuary estate. Any storage or delivery costs shall be paid out of the Terminating Trust. I direct the attention of my Trustees and my family to any memoranda which I may leave for their guidance in dividing and disposing of such property.

C. Residential Real Property. My Trustees shall distribute to my spouse, if my spouse survives me, my real property used by us as our residence or residences (whether permanent, temporary or seasonal in nature), together with the buildings and improvements thereon and insurance policies relating thereto. For the purposes of this section, the term real property shall include a condominium or cooperative apartment without regard to how such interests are treated under local law.

D. Balance of Terminating Trust. The balance of the Terminating Trust remaining after any payments or distributions permitted or required by any preceding section of this Article, referred to in this Agreement as my "residuary estate," shall be distributed as provided in the following Article of this Agreement.

[Underlining added]

- [48] Distribution of the Trust's residue, which is called the "residuary estate" in Article III of the Trust document ("Trust Residue"), provides that Trust Residue up to \$8 million is to be distributed in four equal shares. The first is to Ms. Letourneau. The second is to Ms. Waslenchuk's other sister, Ms. LeeAnn Letourneau. The third is to Ms. Waslenchuk's brother, Ross E. Waslenchuk. The fourth is divided equally between the two respondent charities. If the value of the Trust Residue exceeds \$8 million, then the excess amount is to be divided equally between the two charities.
- [49] Ms. LeeAnn Letourneau and Ross Waslenchuk have passed away. According to the Trust document, LeeAnn Letourneau's share of Trust Residue is to be distributed in thirds to the other beneficiaries (with the charities sharing in one-third). The result, however, is different for Ross Waslenchuk. On his death, his share of Trust Residue passes to his living descendants at the time of his death, which in this case is his son, the respondent, Brent Ross Waslenchuk.
- [50] In the result, if Article II.C. of the Will is valid, the residue of Ms. Waslenchuk's estate will be distributed to the Trust and form part of the Trust Residue, which will in turn be distributed one-third to Ms. Letourneau, one-third to Brent Waslenchuk, with the respondent charities sharing equally in the remaining third.

Amendable and Revocable Trust Provisions

- [51] It is Ms. Letourneau's position that at the heart of the decisions of Mr. Justice Funt in this Court and of the Court of Appeal in Quinn Estate is their determination that a will purporting to pour its residue over to an amendable trust is invalid in British Columbia.
- [52] It is the provisions found in Article X of the Trust below that Ms. Letourneau says are akin to the offending provisions of the trust in Quinn Estate:

Article X

Administrative Provisions

A. Revocable Trust. I reserve and retain the right at any time, by an instrument in writing, signed, acknowledged and delivered to my Trustees: (1) to alter, amend and modify this Agreement in any and every respect, provided that the duties, responsibilities and obligations of my Trustee shall not be increased without my Trustees' consent; and (2) to revoke, cancel, and anul this Agreement and the trust or trusts hereby created, in whole or in part. These rights are personal to me and may not be exercised by any person having a Power of Attorney or by my Conservator

or Guardian.

B. Additions to Trust. Any person may add property to the trust estate by lifetime gift or by transfer taking effect at death, provided such property is acceptable to my Trustees.

[Underlining emphasis added]

[53] On the other hand, as I noted at the outset, the respondents opposing Ms. Letourneau's position as an intestate beneficiary of the residue of Ms. Waslenchuk's estate, assert the facts of this case, including the provisions of the Will and Trust, are distinguishable from Quinn Estate. They characterize both documents as two pieces of a composite testamentary document recognized as valid in this province.

Analysis

- [54] A testamentary document such as a will is meant to reflect the testator's fixed and final intentions for the disposition of his or her estate upon death. A testator may change those intentions by revoking a will and executing a new one or by executing a codicil to the existing will, so long as the requirements in WESA are complied with: Hadley Estate (Re), 2017 BCCA 311 at para. 36, citing Estate of Young, 2015 BCSC 182 at paras. 34-35.
- [55] Section 101 of WESA provides that regardless of where a will is made, the administration of an estate of a deceased person who was ordinarily resident or domiciled in British Columbia at the date of the person's death is governed by the statute.
- [56] A person is ordinarily resident in the place where, in the settled routine of their life, they regularly, normally, or customarily live. It is not determined by counting the number of days a person spends in the jurisdiction: Cresswell v. Cresswell Estate, 2017 BCSC 178 at para. 26, citing Blazek v. Blazek, 2009 BCSC 1693 at para. 33.
- [57] Domicile is based on a person's choice to fix voluntarily their sole or chief residency in a particular place with an intention to continue to reside there for an unlimited time: Sato v. Sato, 2017 BCSC 1394 at paras. 7-10, 14, aff'd 2018 BCCA 287 at paras. 45-48, 51, 53.
- [58] In this case, there is no doubt, and I find, that Ms. Waslenchuk was resident and domiciled in British Columbia at the time of her death.

Pour-Over Clause

Quinn Estate SC and CA are Binding

- [59] The facts of this case fall squarely within the analysis and holdings in Quinn Estate. Similar to the clause in issue in the will in Quinn Estate, the impugned clause in the Will is, I find, a pour-over clause reflecting Ms. Waslenchuk's intention to pour the residue of her estate into the Trust, which could be amended or revoked at any time prior to her death.

- [60] The decisions in Quinn Estate in both courts establish that a pour-over clause to an amendable or revocable trust is invalid in this province since similar to a codicil, it reserves the right of the testator to make an unattested change (or codicil) to their will.
- [61] The point is clear from the reasons in Quinn Estate SC, where Mr. Justice Funt said :
- [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.

[Emphasis added]

- [62] In reaching his decision, Funt J. cited several authorities, including an article written by Dean H. Allan Leal and Oosterhoff on Wills that are particularly apt:
- [63] His discussion of Dean Leal's article is excerpted below:
- [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.

[Emphasis added]

[64] Citing the Oosterhoff text, Funt J. emphasized the point that the potential mischief that could result if a pour-over clause to an amendable or revocable trust was valid - it allows a testator to reserve the right to make a future unattested codicil to the will:

[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 in Funt J.'s reasons]

- [65] Funt J. also pointed out that the legislature of this province chose not to accept the recommendations of the Uniform Law Conference (made in 1967) to facilitate pour-over clauses when it enacted WESA:
- [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.
- [66] Mr. Justice Funt found, at para. 33, that the testator had no intention of incorporating the Quinn Family Trust into his will, but instead demonstrated a clear intention to make a gift to the Quinn Family Trust. As in the case at bar, Funt J. found the Quinn Family Trust was part of an estate plan functioning during the deceased's lifetime.
- [67] His findings were not challenged on appeal and were sustained by the Court of Appeal. In *Quinn Estate CA*, Chief Justice Bauman said:
- [2] The impugned provision is known as a "pour-over" clause as the residue figuratively "pours over" into the corpus of a non-testamentary inter vivos trust. It is not a clause finding much support in Anglo-Canadian law. Ms. Rydland seeks to validate it using either of two devices that I will identify in short form and discuss in some depth below. They are the doctrines of "incorporation by reference" and "facts of independent significance". In the alternative, Ms. Rydland argues that the frailties of the clause can be remedied by an application of s. 58 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 (WESA), a saving provision in that relatively new legislation in British Columbia.
- [3] The chambers judge held these doctrines and s. 58 inapplicable, 2018 BCSC 365. In my view, he was correct to do so.
- [16] Against this backdrop, there are two problems with the pour-over clause in Mr. Quinn's will. They both arise from the fact that the QFT is amendable and revocable and the fact that indeed it was amended after the execution of Mr. Quinn's will and without regard to the Wills Act formalities. The first problem is that the sixth clause purports to reserve onto Mr. Quinn the right to make, effectively, a testamentary disposition in the future without complying with the formalities of the Wills Act (or WESA).
- [17] The second problem is that because the QFT is amendable, one cannot know with certainty the actual disposition purported to be made by Mr. Quinn -- it is governed by terms that are not found in the will itself.

[21] The two possible documents for incorporation are the trust document, as originally drafted, and the trust document, as ultimately amended. Strictly speaking, resorting to incorporation by reference to incorporate the original trust document into the will belies the essential nature of a pour-over clause: here it is perfectly clear that the will-maker had no intention of incorporating the trust into his will. He rather demonstrated the obvious intention of making a gift to the trust. Indeed that was the express finding of the chambers judge:

[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.

[22] That is a finding of at least mixed fact and law (if not a pure finding of fact) and it is not impugned on appeal; it may well be enough to dispose of the "incorporation by reference" submission.

[68] The pour-over clause in issue in Quinn Estate, set out below, is similar in substance to the pour-over clause in the Will. The pour-over clause in Quinn Estate provided that the residue of Mr. Quinn's estate is to be distributed to the Quinn Family Trust, an amendable and revocable trust and held or distributed as provided under the terms of the trust agreement:

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.

[Emphasis added]

See Quinn Estate SC at paras. 12, 16-17.

[69] I find there is no difference in substance between that provision and the pour-over clause and reference to the Trust found in Articles II.C and VII of the Will, which merit repeating for comparison with Quinn Estate:

II.C Addition of Residuary Estate to Revocable Trust. My Executors shall distribute my Residuary Estate to the then acting trustees of the LORRAINE R. WASLENCHUK REVOCABLE TRUST, to be disposed of as provided for in such document.

VII

Any reference to the "LORRAINE R. WASLENCHUK REVOCABLE TRUST" shall mean that certain trust agreement between me, as Grantor, and my spouse and me, as Trustees, signed by me on the same date as this document, as may be amended from time to time.

[Emphasis added]

[70] Ms. Waslenchuk's intent is clear on the face of the Will and the Trust document.

[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.

[72] Her intent is also corroborated from the reporting letter sent by Mr. Holland to the Waslenchuks, dated November 29, 2013 ("Holland Letter"), that the opposing respondents asked me to review when considering their submissions.

[73] Testator intention, including intention to pour-over the residue to an amendable, revocable trust with no certainty of disposition of its corpus after Ms. Waslenchuk's death, is confirmed in the following excerpts from the Holland Letter:

A. Management of Your Assets During Your Lifetimes.

Article I of your Revocable Trusts governs the distribution of trust funds in the event the trusts are funded during your lifetime. Each of you is entitled to withdraw all or any part of the net income and principal of any property that is added to your trust during your lifetime.

C. Avoidance of Probate: Your Revocable Trusts also serve a useful purpose if you wish to accomplish before your deaths some of the work that is otherwise accomplished after death as part of the estate settlement process. By transferring assets to your Revocable Trust before your death, you avoid the need for your Executor to transfer these assets into the name of your estate after your death. Although the value of "avoiding probate" is often exaggerated, it may result in a modest reduction in estate settlement costs.

VII. Your Ability to Change the Estate Plan

Your Wills and Revocable Trusts can be changed at any time prior to your death or incapacity. In addition, after the death of the first of you to die, the surviving spouse has a power of appointment over the trusts created for the survivor, whereby the surviving spouse can change how the trust funds remaining at his or her death are to be divided among and distributed to your descendants.

[Bold in original; underlining added]

[74] The opposing respondents contend that the holding in Quinn Estate is inapplicable to the case at bar. They point to select remarks from the reasons in Quinn Estate SC and say that unlike this case, the trust document in Quinn Estate was amended while Mr. Quinn was alive (para. 40), the pour-over clause directed the residue of the estate to pass to the Quinn Family Trust as opposed to its trustees (para. 30), and the Quinn Family Trust was not executed in compliance with WESA (para. 61).

[75] However, the opposing respondents' submissions overlook the context in which Funt J.'s remarks were made and more importantly, the clear basis of his decision as demonstrated in paras. 49-51 (excerpted in para. 61 in these reasons) and paras. 64-65 of his reasons:

[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.

[Emphasis added]

[76] Funt J.'s remarks (below) are also clear that failure to meet the execution requirements under WESA was not a determinative factor (the language relied upon by the opposing respondents is italicized):

[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.

[Emphasis added]

[77] The opposing respondents also point to some passages from the reasons in Quinn Estate CA for further support of their submission that the holdings in Quinn Estate are inapplicable to the case at bar; for example, they refer to para. 16, where Chief Justice Bauman referred to amendable trust and the fact of amendment in the conjoined elements:

[16] Against this backdrop, there are two problems with the pour-over clause in Mr. Quinn's will. They both arise from the fact that the QFT is amendable and revocable and the fact that indeed it was amended after the execution of Mr. Quinn's will and without regard to the Wills Act formalities .

[Opposing respondents' point is underlined]

[78] However, the remainder of that paragraph and the reasoning in the paragraphs that follow demonstrate that the Court of Appeal's determination is of universal application to pour-over clauses to amendable revocable trusts:

[16] The first problem is that the sixth clause purports to reserve onto Mr. Quinn the right to make, effectively, a testamentary disposition in the future without complying with the formalities of the Wills Act (or WESA).

[17] The second problem is that because the QFT [Quinn Family Trust] is amendable, one cannot know with certainty the actual disposition purported to be made by Mr. Quinn -- it is governed by terms that are not found in the will itself.

[Emphasis added]

[79] I would also add that it is not possible in the case at bar to know from the Trust document whether it was amended. Uncertainty is created if the lack of an actual amendment is dispositive since extrinsic evidence is required to establish that it was amended and done so in compliance with the strictures set out in WESA.

[80] In Quinn Estate CA, Bauman C.J.B.C. considered two proposed validating devices which were argued in that case to give effect to the pour-over clause: incorporation by reference (one of the alternative positions advanced by the opposing respondents) and the doctrine of facts of independent significance.

[81] Bauman C.J.B.C. rejected both.

[82] Incorporation by reference, he said, is not a recognized doctrine to effect pour-over clauses:

[4] Briefly, incorporation by reference cannot be invoked in the circumstances, facts of independent significance is not a doctrine I would recognize as extending to validate a pour-over clause, and s. 58 of WESA has no application to the infirmities with which the clause presents.

...

[24] In my view, the pour-over clause here cannot be validated by incorporating the trust by reference into the will because as of the date of that will, the trust, being amendable and revocable, was not a "presently existing document" and the testator cannot, by his will, create for himself a power to dispose of his property by an instrument not duly executed as a will or codicil.

[Emphasis added]

[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.

[84] The doctrine of facts of independent significance attempts to resolve issues of potential uncertainty in a will. In *Quinn Estate CA*, Bauman C.J.B.C. gave as an example potential uncertainty arising from testamentary language in a bequest that directed, "my car to my partner at the time of my death." Certainty, he said, is achieved by referring to who the testator's partner is at the time of death, which is a fact of independent significance: *Quinn Estate CA*, at para. 25.

[85] As he did with incorporation by reference, Bauman C.J.B.C. rejected the doctrine as an appropriate device to validate pour-over clauses:

[31] In my view, this doctrine should not be seen as a device to validate a pour-over clause like that at bar both as a matter of statutory interpretation and as a matter of principle. When WESA came into force in 2014, it heralded a significant overhaul of the wills, estates and trusts law of the province. Nothing in WESA addresses pour-over clauses. Were the doctrine of facts of independent significance applied to pour-over clauses, it would allow a will-maker to avoid the formalities and the necessity of testamentary intent embodied in WESA so long as the will-maker had sufficient assets in the trust at the time of amending the trust (at least on the American authorities). Had the Legislature intended to allow amendments to a will so long as the amendment presently affected significant assets, the legislature could have provided for it. Extending this doctrine to apply to an amendable, revocable trust would permit a testator to avoid the strictures of WESA and thus defeat the legislature's intent.

[32] Applying the doctrine to validate a pour-over clause would also differ in character to the existing applications recognized in the Anglo-Canadian jurisprudence. The traditional applications of the doctrine validate de facto amendments to the will only with regard to limited "facts". The terms "partner" and "car" are inherently limited. A trust document recognizes no such limit. Extending the doctrine to pour-over clauses would grant testators unlimited power to amend the disposition of their estate without following the strictures of WESA. In my view, this is not an extension the common law should permit.

[Emphasis added]

Composite Testamentary Document

[86] I reject the opposing respondents' contention that the Trust is one part of a composite testamentary document, or alternatively, integrated with the Will such that both constitute testamentary documents on the whole.

[87] They say that Canadian law recognizes that a person's will may consist of more than one document, and cite *British & Foreign Bible Society v. Tupper* (1905), 37 S.C.R. 100. They argue that a comprehensive testamentary document, such as the Trust, is one that "might disclose a completeness of thought, albeit with a reservation for a later change" and should be included as part of a composite testamentary disposition.

[88] They point to three English authorities where a court of construction was able to give effect to a will and a trust document where the later provided for a future, extrinsic, unattested amending document: *In the Goods of Adamson*, L.R. 3 P. 253; *Edwards' Will Trusts, In Re*, [1948] 1 Ch. 440 (C.A.); *Schnitz' Will Trusts, In Re*, [1951] Ch. 870. However, those authorities are without binding effect since they pre-date the clear and binding holdings in *Quinn Estate* concerning the law in this province.

[89] In respect of their integration argument, the opposing respondent, Brent Waslenchuk submits:

6. Where both a trust document and a will are executed concurrently, and each in compliance with the statute of wills, they may together be admitted to probate under the integration principle. Arguably, the inference of testamentary intent is stronger in the case of concurrent execution, than where execution is years apart. Also, the interrelationship between the various documents executed concurrently is important. If one document refers to the other (as here), the two are more likely to be considered integrated. Some authors call this "internal sense connection."

[90] He cites various American decisions and texts in support of that submission, along with what he says is obiter dicta in a case decided in this Court in 1984: *Re Jackson*, 1984 CanLII 512 (B.C.S.C.).

- [91] An initial problem with his submission is that there is no evidence that the Trust document was submitted to be probated with the Will as an integrated testamentary documents. The grant does not refer to the Trust, only the Will.
- [92] I have not been taken to any cases decided in this province or elsewhere in Canada where the concept of integration has been approved of or adopted.
- [93] Jackson does not assist the opposing respondents. The issue in that case was whether parol evidence should be admitted to determine whether a memorandum signed on July 18, 1975 ("1975 will") by the testator in front of two witnesses (with an attestation clause) eight days after she executed her will, should be admitted into evidence to determine what Cowan, L.J.S.C. said in his brief reasons at para. 6, "the meaning of the reference in the will to 'the memorandum made and signed by me'".
- [94] The 1975 will did not refer to the memorandum. However, that will was revoked in 1978 when the testator executed a new will ("1978 will") that referred to the memorandum. The 1978 will contained a general devise that required her estate trustee:

To distribute all articles of personal, domestic and household use or ornament belonging to me at my death, including consumable stores in accordance with, and as are noted in a Memorandum made and signed by me and filed with this my Will.

[Emphasis added]

- [95] The memorandum was found together with the 1978 will. Parol evidence was admitted to identify the memorandum as the document described in the 1978 will. Both documents were admitted into probate to identify.
- [96] Unlike the case at bar, there is nothing in the reasons in Jackson to suggest that the case involved a provision in the 1978 will that purported to leave the residue of the estate to be determined by a memorandum capable of amendment or revocation.
- [97] There was no discussion in the reasons about a doctrine of integration.
- [98] Jackson illustrates the distinction between admissibility of evidence to prove a testamentary document and evidence to explain its meaning: Jackson at para. 8, citing *Allen v. Maddock* (1985), 11 Moo. P.C.C. 427, 14 E.R. 757 (P.C.). That is the point of the notion of integration: it is to identify testamentary documents as opposed to interpret their meaning. In that respect, the issue does not arise in the case at bar because there is no issue concerning the identity of the Trust document.
- [99] Even if integration could be said to apply to construing testamentary intention in this case, it would not assist the opposing respondent because the testamentary disposition is a pour-over clause to an amendable, revocable trust which is invalid in this province in light of *Quinn Estate SC and CA*.

Intestacy

[100] The opposing respondents argue that Ms. Waslenchuk's intention to distribute her residue in specific tranches to specific beneficiaries will be defeated if I find the impugned clause in the Will to be invalid, such that the residue passes on an intestacy. I disagree, as it is clear, I find, that Ms. Waslenchuk's intention was to add the residue of her estate to the corpus of her separate, existing inter vivos trust that could be amended or revoked at any time. The facts of this case engage the concerns expressed in *Quinn Estate*: it could effect a testamentary disposition in future without complying with the formalities of WESA and since it is amendable, the actual disposition of the residue is governed by terms not found in the Will itself.

Possible Application of Connecticut Law

[101] The opposing respondents also assert that I should construe testamentary intent in accordance with the laws of Connecticut because s. 81 of WESA allows a court of construction when construing intent, to resort to the law where the testator was domiciled or ordinarily resident at the time they made their will.

[102] In this respect, s. 81 is permissive:

Resort to other aids to construction

81 In the construction of a will to which this Division applies, the court may resort to the law of the place where the will-maker was domiciled or was ordinarily resident at the time the will was made.

[Emphasis added]

[103] I do not need to look to Connecticut law to construe what I have found to be Ms. Waslenchuk's clear intent.

[104] Even if I did, I would reach the same conclusion: Ms. Waslenchuk intended to pour-over the residue of her estate to an amendable, revocable inter-vivos trust.

[105] However, even if I thought it necessary, resorting to Connecticut law to construe intent does not assist the opposing respondents. Evidence of Connecticut law is found in Mr. Holland's affidavit (and his correspondence to the Waslenchuks) His evidence confirms Article II.C of the Will is a pour-over clause (albeit valid under Connecticut law) intended by Ms. Waslenchuk to distribute the residue of her estate into an amendable, revocable trust settled and in force and effect during her lifetime.

[106] The Holland Letter summarizes the operation of their wills and trusts in that state's jurisdiction. Testator intention, including intention to pour-over the residue to an amendable, revocable trust with no certainty of disposition of its corpus trust after the death of the testator, is confirmed from the excerpts below:

II. Revocable Trust Agreements

Your Revocable Trusts, which are often referred to as "Living Trusts", serve the following purposes:

A. Management of Your Assets During Your Lifetimes.

Article I of your Revocable Trusts governs the distribution of trust funds in the event the trusts are funded during your lifetime. Each of you is entitled to withdraw all or any part of the net income and principal of any property that is added to your trust during your lifetime. If you ever become incapacitated, the Trustees will have discretion to distribute income and principal to you or to your spouse as needed.

C. Avoidance of Probate: Your Revocable Trusts also serve a useful purpose if you wish to accomplish before your deaths some of the work that is otherwise accomplished after death as part of the settlement process. By transferring assets to your Revocable Trust before your death, you avoid the need for your Executor to transfer these assets into the name of your estate after your death. Although the value of "avoiding probate" is often exaggerated, it may result in a modest reduction in estate settlement costs.

D. Probate Court Accountings. A further purpose of establishing your Revocable Trust Agreements is to minimize the ongoing costs of administering the trusts for the benefit of your family members after your deaths. The trusts established under a Living Trust are not subject to ongoing probate court jurisdiction and thus avoid certain potentially costly administrative requirements such as the filing of periodic probate court accountings. In contrast, if you were to establish trusts under Wills, then the Trustees of these trusts would be required to expend the time and money necessary to file formal accountings with the probate court every three years.

VII. Your Ability to Change the Estate Plan

Your Wills and Revocable Trusts can be changed at any time prior to your death or incapacity. In addition, after the death of the first of you to die, the surviving spouse has a power of appointment over the trusts created for the survivor, whereby the surviving spouse can change how the trust funds remaining at his or her death are to be divided among and distributed to your descendants.

[Bold in original; underlining added]

[107] The case relied upon by the respondent charities - *Barna Estate, Re*, 1990 CarswellBC 558 (S.C.) - does not support a contrary interpretation. The reasons in that case, issued under a pre-WESA statutory regime, affirm a presumption at common law that the testator's intention is construed under the law of the testator's domicile at the date of execution of the will: para. 8. It is a rebuttable presumption.

[108] However, the common law presumption spoken of in *Barna* is, in my opinion, replaced by the permissive approach ("may") in s. 81 of WESA.

- [109] Separate from intent, determining whether the substantive provisions of a will are permissible in law (which is referred to as "essential validity") depends on the nature of the estate asset. Provisions concerning distributions of immovable property (real estate) are governed by the *lex situs* of the property, which is British Columbia. For immovable property, the common law rule is that essential validity is governed by the law of the domicile of the testator at the time of death, which was also British Columbia: *Hammill Estate v. McDonnell*, [1994] O.J. No. 765 at para. 16.
- [110] I have not been taken to any case that takes a conflict of law approach under WESA to look to the jurisdiction where the will was signed to determine essential validity.

Collateral Attack

- [111] I disagree with the opposing respondents' submission that Ms. Letourneau's position amounts to a collateral attack on the grant of probate.
- [112] The fact that the Trust document was attached to the application for probate and a copy of it was stapled to the grant is immaterial. The grant itself refers to the Will and not the Trust. It states:

Whereas Lorraine Rose Waslenchuk, a.k.a. Lorraine R. Waslenchuk a.k.a. Lorraine Waslenchuk (the "deceased"), whose last known address was #307-2788 Vine Street, Vancouver, BC died on 2 August, 2016 and left a will dated 27, November, 2013, a copy of which is attached.

Administration of the estate of the deceased is granted to Janet Katherine Letourneau.

- [113] Moreover, there is no evidence that the Registrar or court officer who issued the grant treated the Will and Trust as part of a composite testamentary document.

Summary

- [114] In conclusion, Article II.C of the Will is a pour-over clause to an amendable, revocable inter vivos trust and per the holdings in *Quinn Estate* is invalid in this province.
- [115] The curative provisions in s. 58 of WESA cannot be invoked to save the pour-over clause. Section 58 of WESA may be used to cure a defect that does not meet the formal requirements of s. 37; it cannot be used to cure a will that is substantively invalid: *Re Hadley Estate* at para. 34; *Quinn Estate CA* at paras. 2, 3; *Quinn Estate SC* at paras. 64-66.
- [116] The Trust is not a testamentary document. An inter vivos trust is made by deed, oral declaration, or in writing, to take effect during the lifetime of the settlor. Unlike the case at bar, where the settlor provides, through the trust instrument, the trust is dependent on death to take effect, the trust is testamentary in nature. A trust, such as the Trust, which takes immediate effect and is not dependent on the settlor's death, even though performance may take place after death, is not a testamentary document.

- [117] The Trust was fully constituted and settled at the time the Trust instrument was executed. The Trust instrument contains provision for dealing with Trust assets during Ms. Waslenchuk's lifetime. The fact that Ms. Waslenchuk did not utilize all of its provisions prior to her passing does not change the nature of the Trust. It is her intention when she settled the Trust that is dispositive: *Wonnacott v. Loewen*, 1990 CarswellBC 46 at paras. 16-23; *Norman Estate v. Watch Tower Bible and Tract Society of Canada*, 2014 BCCA 277 at paras. 18-22, 24; *Mordo v. Nitting et al*, 2006 BCSC 1761 at paras. 321-322, 331-335.
- [118] I reject the opposing respondents' submissions that Quinn Estate is distinguishable in substance from the case at bar because the Trust was never amended or the pour-over was to the Trust and not trustees. The holding in both decisions turns on whether the pour-over clause is to an amendable or revocable trust. Incorporation by reference and the doctrine of facts of independent significance may not be used to give effect to the pour-over clause in the Will.
- [119] Mindful that the law presumes against an intestacy, this is a case where the testator's intention was to effect a testamentary disposition that the Court of Appeal in *Quinn Estate* CA held is invalid in this province. The authorities cited by the opposing respondents from the United States and the United Kingdom validating pour-over provisions are of no effect in view of the binding holdings in *Quinn Estate* SC and CA.

Disposition

- [120] Article II.C of the Will is a pour-over clause that is invalid in British Columbia.
- [121] Distribution of the residue of Ms. Waslenchuk's estate passes on an intestacy to Janet Letourneau.
- [122] The parties asked to reserve submissions concerning costs until after my reasons are issued. If they are unable to resolve the issue, they may arrange to appear before me with the assistance of Vancouver Trial Scheduling.

"Walker J."

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Prepared on 26 October 2026 · Esheria