MONEY & FAMILY LAW

FOUNDING EDITORS:
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PROVIDING NEWS AND INSIGHT TO PROFESSIONALS IN FAMILY LAW, ESTATE AND TAX PLANNING SINCE 1986

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COTTAGE AND SEPARATION/DIVORCE

By Nathalie Boutet*

Finding an affordable home or cottage continues to be inaccessible to many young couples. If parents want to help with a down payment or with regular monthly contributions, they need to understand what will happen to their contribution if the couple eventually separates.

In Ontario, how assets are divided if there is a separation or divorce is different if the couple is married or living common law.

Married Couples

Married couples equally divide the assets that they have each accumulated during the marriage, whether the asset is in one person's name or in both names, as provided in the *Family Law Act*.

However, assets received by gifts or inheritance during the marriage are excluded and do not need to be shared with the separating spouse. Assets that were received by gift or inheritance before the marriage are treated the same way as other pre-marriage assets, such that the growth in the value during the marriage is shared.

An important exception is that if a gift is applied towards the couple's matrimonial home, either before or during the marriage, there is no exemption, and the entire value of the gift is shared. There can be more than one matrimonial home; a cottage is usually found to be a matrimonial home.

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Unmarried (Common Law) Couples

In Ontario, the division of assets is based on ownership and there is no law giving them the right to equalize the assets accumulated during their relationship.

If this results in an unfair situation, for example, if a spouse made significant contributions to the maintenance or increase in value of the assets of the other, they have to resort to equitable principles, namely "unjust enrichment", to address their claims of inequitable distribution of assets upon the breakdown of a relationship.

Since an important decision of the Supreme Court of Canada in 2011, unmarried spouses can now resort to the concept of "Joint Family Venture". To be able to establish that there was unjust enrichment arising from a joint family venture, the person who is not on the title must demonstrate that a joint family venture existed and that there is a link between that person's contribution to the joint family venture and the accumulation of wealth or assets.

If the cottage was gifted to spouse 1 only, and spouse 2 is not a registered owner, spouse 2 could make such a claim to try to receive a portion of the assets of the other, including a gifted house or cottage. They would have to demonstrate fairly significant contributions towards the family unit and/or this particular asset.

How to Provide a Gift to Your Children

If the intention of the parents' financial contribution is to help their children and their spouse, which is common, then no planning is required. You can provide a sum of money for a down payment, or make contributions to mortgage payments. If there is a separation, the separation regime that applies to the situation will follow its course.

If the intention is not to share the gift with your child's spouse if there is a separation, there are a few options.

The best protection is for the couple who receives the gift to enter into a cohabitation agreement or marriage agreement to recognize the gift and to agree that if they separate, the gift will be returned to the donor. Strict rules apply to the negotiation of such agreements.

Another vehicle is to enter into a formal loan agreement with your child and if possible, also with their spouse. Such family loans are not always accepted as valid loans if there was no real intention that they will be repaid.

You can maintain the title of the house or cottage in your name. This may result in undesirable capital gains taxes for you though.

Finally, setting up a Trust that will own the house or the cottage where the couple can live is another option. Choosing how to set up the Trust and the beneficiaries is complex. This may not be the type of complicated setup you have in mind when deciding to help your children. The interplay of Trust laws and Family Law is extremely complex and requires collaboration between advisors who practice in these various fields.

My advice in these types of situations is to be clear about your intentions and to work with your child and their spouse openly and collaboratively at the time of making the financial contribution to maximize the chances of the gift ending up where you intended.

DOES RE-PARTNERING CHANGE SPOUSAL SUPPORT ENTITLEMENT? MAYBE NOT!

By Russell Alexander*

When a marriage ends, it's not uncommon for one or both former spouses to move on and find love elsewhere. If one of those spouses had previously been ordered to pay spousal support to the other, it may seem reasonable that the payor's support obligation might be adjusted or even terminated once the recipient has entered into a new relationship.

Not necessarily so, says the Ontario Court of Appeal in a case called *Politis v. Politis*. It involved a couple, both aged 48 at separation, who had been married 25 years. The wife was a homemaker during the marriage, and had a high school education. The husband was a civil engineer, making about $200,500. The wife never worked after their 2008 split, and about four years later she was diagnosed with Lyme disease. She asserted that this left her completely unable to work. She obtained court order requiring the husband to pay interim spousal support of about $5,300 per month, which was in line with the recommendations under the Spousal Support Advisory Guidelines (SSAGs).

The "wrinkle" was that since 2009, the wife had a new common law spouse. At the eventual trial, the husband accordingly asked the judge to terminate his support obligation entirely, so that it would shift to the wife's new partner instead. The judge agreed to reduce the support to $3,000 a month and cap its duration at the year 2026, but refused to eliminate it altogether. The judge acknowledged that the wife's new partner had an increasing obligation to contribute financially, but decided that in all the circumstances the husband was not off the hook.

The husband appealed to the Court of Appeal, unsuccessfully. That Court concluded that the trial judge had made no errors in confirming the husband's ongoing financial obligation.

The court noted that the SSAGs and its embedded support ranges are merely "tools" to assist courts in settling on a reasonable figure. The wife's re-partnering was just one of many factors to be considered on a case-by-case basis — and indeed the SSAGs specifically contemplate such a scenario as a reason for a court to revisit the issue of support and consider terminating it. However no outcomes are

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automatic, since re-partnering can have many different impacts, depending on the parties and their circumstances.

In this case, for example, the wife's new relationship was relevant to whether she could obtain self-sufficiency; on the other hand, it did not change the fact that she suffered from a chronic illness that made her gainful employment impossible.

True, the wife was receiving financial benefits from her new partner of at least another $3,100 a month, and was actually enjoying a standard of living that was comparable to — or better than — the one she had with the husband. But the judge took this into full account when arriving at the SSAG-based support amount payable by the husband. That figure reflected the fact that the economic loss suffered by the wife during the marriage had not been completely compensated-for, even though some of her current financial needs were being met by her new partner.

The Court of Appeal concluded that even if the judge deviated from the SSAG figures in some respects, the overall approach taken was consistent with them. It confirmed the trial ruling that required the husband to pay support at a reduced amount until 2026.

For the full text of the decision, see:

Politis v. Politis, 2021 CarswellOnt 10796, 2021 ONCA 541, 158 O.R. (3d) 230, 61 R.F.L. (8th) 27 (Ont. C.A.)

WHAT TO DO WITH "ORPHANED" WILLS

Barry S. Corbin*

Lawyers who offer to store a client's original will are faced with a problem when, for one reason or another, contact with the client is lost. Losing contact with such a client is a common problem, as oftentimes a client will, after a will is signed, let years — sometimes decades — go by before re-visiting an estate plan. In the interim, the client may have moved to another town or city — perhaps more than once — without notifying the law firm holding the will of a change of address.

To complicate matters, in some cases the client may have forgot entirely that an original will is in the custody of the law firm that drew it when making a new will with another lawyer. As a courtesy to one's fellow lawyers, when a lawyer's client has signed a new will, the client should be advised to retrieve any previously made original will that is in the custody of another lawyer, so that the client can see personally to its physical destruction. Were this the universal practice among lawyers — assuming, of course, that clients will heed such advice more often than not – the problem of revoked wills languishing in a lawyer's safekeeping facility could be considerably diminished.

Consider our lawyer in a solo practice — we'll call him Lou Pole — who is ready to retire and has several hundred original wills in safekeeping. Lou has sent out letters or e-mails to all of those clients, using each one's last known mailing address or e-mail address, as the case may be, advising of his impending retirement and asking for instructions as to what should be done with the client's original will. While the vast majority of clients have responded, Lou is disappointed to find that a dozen e-mails have bounced back as undeliverable, and several dozen letters have been returned to him with an indication that the client no longer lives at the address shown on the envelope. Subsequent detective work whittles down the list of non-responding clients by a few, but there remain a number of original wills that have gone unclaimed. What is Lou to do with all of those "orphaned" wills, each of which is the property of the client?

Section 2 of Ontario's *Estates Act*[1] provides that the office of the local registrar of each office of the Superior Court of Justice is "a depository for all wills of living persons given there for safekeeping" and requires the local registrar "to receive and keep those wills under such regulations as are prescribed by the rules of court." Rule 74.02 of the *Rules of Civil Procedure*[2] provides a detailed description of the procedures governing: (a) receipt of wills for deposit; and (b) the release of wills on deposit. The Estate Registrar for Ontario maintains a single computer database of all wills on deposit, irrespective of the particular court where a will has been deposited. This database is interrogated prior to the issuance of any certificate of appointment of estate trustee. In the case of an application for a certificate of appointment of estate trustee with a will, the purpose of that search is to ensure that a later will for the same individual is not on deposit. In the case of an application for a certificate of appointment of estate trustee without a will, the purpose of that search is to ensure that there is no will on deposit for the same individual, irrespective of its date of execution. (For an interesting anecdote regarding the results when a purported "match" is found, readers may refer to the article entitled "Back to the Future — Epilogue" in the January 2021 issue of this newsletter.)

Rule 74.02(1) sets out the following list of persons from whom a will can be accepted for deposit:

(a) the testator;
(b) a person authorized by the testator in writing;
(c) a lawyer who held the will or codicil at the time of retirement from practice;
(d) the estate trustee of a lawyer who held the will or codicil at the time of the lawyer's death;
(e) the representative of a trust corporation that held the will or codicil when it ceased to do business in Ontario; or
(f) a person authorized by the court to deposit the will or codicil.

Happily for Lou, he qualifies to make the deposit of his "orphaned" wills under paragraph (c) of this list. It will cost him a few dollars, but is well worth the expense, knowing he has acted responsibly in protecting the property of his clients.

Let us change the facts slightly. Suppose Lou is not planning to retire but has simply decided that he no longer wants the responsibility of holding original wills for his clients. If he had had the foresight to do so, he could have required each client whose original will he agreed to hold to sign a direction that makes the following statement:

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1 R.S.O. 1990, c. E.21.
2 R.R.O. 1990, Reg. 194.

> If at any time you are unable to contact me after what you consider to be a reasonable number of attempts to do so, I hereby authorize you, at your discretion and at your own expense, to deposit my original Will with the office of the local registrar of the Superior Court of Justice.

In that case, Lou would have been able to deposit those "orphaned" wills in the court depository using paragraph (b) of the above list.

What if our non-retiring Lou — or, for that matter, any law firm of sufficiently ancient pedigree — wants to be able to deposit all "orphaned" wills with the court registrar without having such a direction from the client? In that case, we would suggest an examination of paragraph (f) of the above list may provide an answer. As part of a court application for an order allowing those "orphaned" wills to be deposited with the local registrar, it would behoove such a lawyer or law firm to prepare an affidavit that explains in detail: first, the efforts that have been made, without success, to contact the client; and second, the rule of thumb that has been developed and followed in arriving at a determination, based on the date of execution of the will, that the client must no longer be living. We should think that with that type of evidence, a court would have no reason to deny the relief sought.

FAMILY MEMBERS LIABLE FOR KNOWING RECEIPT OF TRUST FUNDS

By James R.G. Cook*

People who receive funds from someone whom they know, or reasonably ought to have known, obtained the funds through a breach of trust may be liable to return the funds based on the doctrines of knowing assistance or knowing receipt. Turning a blind eye or otherwise failing to question the source of the funds will not absolve the recipients from liability.

In *Quantum Dealer Financial Corporation v. Toronto Fine Cars and Leasing Inc.*, 2022 CarswellOnt 2241, 2022 ONSC 1132, 27 B.L.R. (6th) 48 (Ont. S.C.J.), the plaintiff corporations were in the business of financing used car inventories for motor vehicle dealers in Ontario. One of the plaintiffs' customers, Toronto Fine Cars and Leasing (TFC), was a used car motor vehicle dealership in Mississauga. TFC was owned by an individual (Diego), who was the sole director, officer and controlling shareholder.

In October 2016, the plaintiffs attended at the TFC dealership and found that Diego was not present, nor was anyone else from TFC. The premises appeared to be abandoned but for some vehicles which they had not financed. The plaintiffs later determined that the cars had been sold in the United States. The plaintiffs were unable to recover the proceeds of sale of the vehicles. Cheques from TFC were returned NSF.

The plaintiffs commenced an action alleging that Diego and TFC had fraudulently sold off the vehicles that they had financed without paying for them. The action named several other defendants who appeared to have participated in or received funds from the fraudulent scheme, including Diego's wife, who was part of the management team at TFC, her sister, a numbered company (for which the sister was the sole officer, director and shareholder), and the sister's spouse.

The plaintiffs brought a motion for summary judgment, arguing that Diego sold off practically the entire car lot overnight and dissipated the proceeds through overseas and non-arm's length transfers including to the other defendants. To conceal his fraud and to defeat creditors, Diego acquired the numbered company, using his sister-in-law as the putative owner and operator, while he called the shots. Diego then used the numbered company to launder funds and to flow through cash to the family member defendants.

As an example, in the two years following the sale of TFC inventory, the numbered company paid $182,233 to Diego's wife, while also paying their children's private school tuitions. The plaintiffs also alleged that Diego's sister-in-law received $175,000 from Diego's wife, ostensibly her share of the proceeds of the sale of the matrimonial home, which was then spent on a series of questionable transfers, such as sending $67,000 to a woman in Argentina for a completely undocumented business venture.

By the time of the motion, Diego's whereabouts were unknown and he was noted in default. The remaining defendants denied any wrongdoing and argued that there was no evidence that they ever received money from the plaintiffs, and that there was credible evidence that Diego's sister-in-law legitimately operated the numbered company. Diego's wife and sister-in-law claimed not to have seen Diego since October 2019 and suggested that he was now living in South America.

In February 2022, the Ontario Superior Court of Justice granted summary judgment to the plaintiffs: *Quantum Dealer Financial Corporation v. Toronto Fine Cars and Leasing Inc.* 2022 CarswellOnt 2241, 2022 ONSC 1132, 27 B.L.R. (6th) 48 (Ont. S.C.J.).

The court reviewed the extensive evidentiary record and found that the defendants had not provided a sufficient response to the plaintiffs' allegations regarding the receipt of the funds, notwithstanding interim court orders that had mandated full particulars of various transactions.

The defendants claimed that Diego's marital infidelity led to the breakdown of his marriage which, in turn, led to the sale of the matrimonial home. Diego's wife claimed that she was suspicious that he was having an affair with a receptionist at work. She claimed that she left the TFC dealership because she did not feel safe. However, she did not file evidence from anyone else who had worked at TFC to corroborate her story.

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Supposedly, Diego and his wife then agreed to settle their matrimonial affairs with her accepting half of the proceeds of the home in exchange for forgoing her right to commence any family law claims against him.

The court noted that Diego's wife would also have almost certainly been entitled to child support, spousal support, and a net family property equalization payment that would take into account the proceeds of sale of the matrimonial home, and his other assets including TFC. The court reasoned that it was highly improbable that Diego's wife would have simply agreed to walk away from such claims only to get a reduced payment of something that was already owed to her.

In the court's view, "[m]any things are possible, but only a few things are probable." The defendants' narrative was so far-fetched, internally inconsistent, and poorly documented, that their version of events was very unlikely to be true.

Conversely, the explanation put forth by the plaintiffs as to the defendants working together to perpetrate a fraudulent scheme by flowing trust funds through the family members was more straightforward and accorded with the available evidence and common sense.

The plaintiffs argued that the case had all the "badges of fraud" under the *Fraudulent Conveyances Act* and that the defendants were liable under the legal doctrines of "knowing assistance in breach of trust" and "knowing receipt of funds in breach of trust" as outlined in *Boal v. International Capital Management Inc.*, 2021 CarswellOnt 1724, 2021 ONSC 651 (Ont. S.C.J.).

The court determined that the plaintiffs were the beneficiaries of a trust or fiduciary relationship and that Diego and TFC fraudulently and dishonestly breached their equitable duties to them. The defendants knew about the fiduciary relationship between the plaintiffs, Diego and TFC.

For liability under "knowing assistance," the plaintiff must show that a defendant has actively assisted the fiduciary in their fraudulent or dishonest misconduct. Actual knowledge includes wilful blindness or recklessness.

Conversely, "knowing receipt" is not fault-based. A plaintiff must show that the defendant has received property from the fiduciary in their personal capacity and has actual or constructive knowledge that the property was transferred to them in breach of trust or fiduciary duty. Knowing receipt is based an objective state of knowledge and notions of unjust enrichment, where regardless of fault, it is unjust that the defendant receive and keep an enrichment. Thus, the remedy for knowing receipt is measured by the defendant's ill-gotten gain.

In the circumstances of the case, the defendants were liable under either doctrine. The court found that Diego's wife concocted the story about his affair and that she had actual knowledge of Diego's plans, particularly since she had banking authority at TFC and assisted with other suspicious transactions. Her sister had signing authority for the numbered company and they were the beneficiaries of tens of thousands of dollars a month that were filtered through the numbered company's accounts to their families. The evidence was that the numbered company could not have sustained such financial outlays based on its purported revenue.

The court determined that a reasonable person would have inquired into and determined that Diego and TFC had engaged in wrongdoing and that the plaintiffs' trust property was being misapplied and diverted to the families. The defendants' lack of inquiry rendered their enrichment unjust.

In the result, the defendants were held liable to the plaintiffs for the amounts traced back to the fraudulent sales of the vehicle inventory of more than $1.2 million and punitive damages of $250,000. The plaintiffs were awarded legal costs of more than $232,000.

DEATH AND TAXES: EXECUTOR'S COMPLIANCE RESPONSIBILITIES

By Marly Peikes*

Executors are generally responsible for income tax compliance for a deceased person and their estate, including preparing and filing all necessary tax returns in all relevant jurisdictions, paying any taxes owing and obtaining all tax clearances, if appropriate.

Canadian Tax Compliance

Under the Canadian *Income Tax Act*, executors are required to file the following Canadian income tax returns:

- Returns for any taxation year prior to the year of death not previously filed;
- A final or what is referred to as the "terminal" return for the year of death covering the period from January 1 to the date of death; and
- In certain cases, a T3 trust return covering income received on the estate assets from the date of death to either the end of the calendar year or within the first 12 months after death if the executors designate the estate as a Graduated Rate Estate.

For any year prior to death where the death occurred before the prior year's return due date, the tax return is due on the later of the date the return is otherwise due or six months after death.

The following due dates apply for the terminal return (unless the deceased was carrying on a business, in which case different deadlines apply):

- For deaths that occurred between January 1 to October 31 inclusive — April 30 of the year following death; or

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- For deaths that occurred between November 1 to December 31 inclusive — 6 months after the date of death.

For estates (that are not Graduated Rate Estates) and trusts, including *inter vivos* and testamentary trusts, tax filings are due 90 days after December 31, which is March 31 or March 30 if it's a leap year.

In order to obtain certain income tax benefits for the estate, it will be necessary to ensure that a Graduated Rate Estate designation is made for the estate in the estate's first income tax filing. An executor may choose the year end for a Graduated Rate Estate, which can be any date within the first 12 months after the date of death, and the tax filing is due 90 days after the chosen year end.

Foreign Tax Compliance: Spotlight on the U.S.

It's also important for executors to be aware of any foreign tax compliance and different filing due dates in different jurisdictions. U.S. tax compliance may be especially relevant to many Canadian citizens and residents. If the deceased was a U.S. person or had U.S. situs property, the executor must consider whether there are any U.S. filing requirements.

For a U.S. person or for a non-U.S. person who owns U.S. situs property with a value exceeding $60,000 U.S., a U.S. estate tax return is required, whether or not U.S. estate tax is payable. U.S. situs property may include, for example, a U.S. vacation home or directly held U.S. securities (in a Canadian registered or non-registered account). The tax filing deadline is nine months following the date of death, although it is possible to obtain a six-month extension if requested before the nine-month deadline.

Personal Liability of Executors

Failing to file tax returns may result in interest and penalties. It may also result in personal liability if distributions are made without obtaining a tax clearance certificate (see Susannah Roth's case study on the 2019 Alberta case, *Muth Estate v. Liesch*). It is important for an executor to be aware of his or her responsibilities in this regard, including the relevant requirements and timelines in each jurisdiction.

We hope this blog will act as a resource for our readers. We have highlighted some of the primary tax compliance considerations for executors. Executors should seek professional advice from a tax advisor to assist with tax compliance for the estate, including filing tax returns, considering the Graduated Rate Estate designation, and obtaining all tax clearances, among other matters.

"POUR-OVER" WILL CLAUSES IN ONTARIO

By Barry S. Corbin*

In the United States, the use of "pour-over" wills is common-place. The will directs the personal representative to pay any debts, taxes and other obligations and then transfer whatever remains to a previously settled *inter vivos* trust; typically, a trust that is both amendable and revocable. One of the advantages of this arrangement is that the trust, unlike the will, is a private affair, shielding from public view the manner in which the individual intends to distribute his or her estate. In this respect, the alter ego trust and joint partner trust can achieve a similar objective.

However, the validity of the pour-over clause in a will has received a less than enthusiastic reception from some Canadian courts. Specifically, in *Quinn Estate v. Rydland*, 2019 CarswellBC 514, 2019 BCCA 91, 20 B.C.L.R. (6th) 93, 432 D.L.R. (4th) 418, 44 E.T.R. (4th) 173, [2019] 8 W.W.R. 165 (B.C. C.A.), the British Columbia Court of Appeal held that a pour-over clause in a will that directed the residue of the estate to be transferred to a trust that, by its terms, was both amendable and revocable, was invalid. The rationale given was that because the trust was both amendable and revocable, it could not be regarded as a document in existence at the time the will was signed and, accordingly, could not be treated as part of the will by application of the doctrine of incorporation by reference.[1]

More recently, in *MacCallum Estate, Re*,[2] a Nova Scotia court was asked to decide the validity of a pour-over clause in Helen MacCallum's will, directing the residue of the estate to be transferred to the trustee of an alter ego trust she had previously settled. The pour-over clause in the will, which appointed Royal Trust as executor, was expressed in the following terms:

> Pay or transfer the rest of my estate to Royal Trust, as trustee of the Helen MacCallum Alter Ego Trust (the "Trust"), to be added to the capital of the Trust and administered and distributed in accordance with the terms of the Trust. The receipt of the trustee of the Trust shall be a sufficient discharge and release to all concerned without any need to inquire into or investigate the terms of the Trust. If the Trust does not exist at my death, distribute the rest of my estate on the same trusts, terms and conditions as the Trust as it existed as of the date of this will.

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* Corbin Estates Law

1 In an earlier decision, *Kellogg Estate v. Kellogg*, 2013 CarswellBC 3793, 2013 BCSC 2292, 94 E.T.R. (3d) 277 (B.C. S.C.), it was held that the *inter vivos* trust in question, though also amendable and revocable, could be incorporated by reference into the will. In that case, the trust was already in existence when the will was signed, but had been amended subsequently. However, the testator clearly contemplated the possibility that the "pour-over" clause in the will might be judicially invalidated and included an "escape clause" which said that in such an event, the estate assets should be transferred to the person who was the trustee under that inter vivos trust, to be dealt with on the same terms as existed in the trust at the time the will was signed; that is, before the trust was amended.

2 2022 CarswellNS 79, 2022 NSSC 34, 74 E.T.R. (4th) 48 (N.S. S.C.).

> Although I wish to note it here for the benefit of my trustees, *I expressly do not incorporate the trust Helen MacCallum Alter Ego Trust establishing the Trust into my will be reference and it does not form part of my will*. I want it to remain a private document. [our emphasis]

Justice Norton considered two separate lines of authority: one which, as the British Columbia courts did, focused on the principle of incorporation by reference; and the other, articulated by the English House of Lords in *Blackwell v. Blackwell*[3] and followed by the Manitoba Court of Appeal in *Jankowski v. Pelek Estate*,[4] which considered the matter to be governed by the law of trusts — in particular, the requirements for a half-secret trust. In the context of succession law, the half-secret trust principle provides that where A has made a will leaving money or property to B, in trust and where, prior to A's execution of the will, A has communicated the specific terms of the trust to B and B has communicated to A acceptance of the trust obligation, then upon A's death, B is bound, upon receipt of the money or property, to honour the previously communicated terms of the trust.

Justice Norton preferred the latter over the former and, finding present all the pre-requisites that established the existence of a half-secret trust, held the pour-over clause to be valid in these terms:

> The Trust was clearly established prior to the execution of the Will and was fully constituted. There was no amendment or revocation of the Trust after the Will was executed. The concerns raised by the British Columbia Court decisions do not arise on the facts of this case. I find that this approach is supported by the public policy presumption against intestacy and is in keeping with the obvious intentions of the testatrix.

Very recently, an Ontario court had occasion to deal with a will that contained a pour-over clause; a case that was, in our view, on all fours with the *MacCallum Estate* decision. In *Vilenski v. Weinrib-Wolfman*,[5] Justice Kimmel was confronted with a will that directed the residue of the estate to be dealt with as follows:

> My Estate trustee shall pay or transfer the residue of my estate to the trustees of The Lynda Weinrib Alter Ego Trust (the said trust having been established by me immediately prior to the signing of this my Will) who are holding such office at the time of my death or, if there is no person holding the said office at the time of my death, the trustees who are first appointed to such office after my death.

Justice Kimmel was presented with the decisions in both *Quinn Estate* and *MacCallum Estate*. She opted to follow the British Columbia line of authority. About the *MacCallum Estate* decision, she had this to say:

> However, I have some difficulty with the retrospective consideration that was adopted in *MacCallum*. The formalities are there to prevent these abuses. In my view, a loosening of the restrictions after the fact does not serve the intended objectives of the formalities. The court in *MacCallum* points to exceptions where there has been a loosening of the procedural safeguards as a justification for a further loosening to validate pour over clauses in wills, but the exceptions noted were statutory exceptions that have been vetted through the legislative process, not *ad hoc* exceptions applied after the fact.[6]

As it turned out, the value of the residue was a mere $18,000, so relatively little was at stake in this matter.[7] For that reason, there is no reason to believe that the decision, at least in so far as the invalidity of the pour-over clause is concerned, might be appealed.[8] A missed opportunity, perhaps?

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3 [1929] A.C. 318.

4 1995 CarswellMan 447, 131 D.L.R. (4th) 717, 10 E.T.R. (2d) 117, [1996] 2 W.W.R. 457, 107 Man. R. (2d) 167, 109 W.A.C. 167, [1995] M.J. No. 663 (Man. C.A.).

5 2022 CarswellOnt 4780, 2022 ONSC 2116 (Ont. S.C.J.).

6 She appears here to have been taking issue with Justice Norton's justification in *MacCallum Estate* for asserting that a pour-over clause in a will should be valid:

> It would be ironic if the *Wills Act* upholds both holograph wills and testamentary "writings", both of which have no witnesses and therefore no procedural safeguards, but the statute was interpreted to forbid "pour-over" wills in the circumstances of this case.

7 That the value of the residue would turn out to be as small as it was would not have been evident at the outset of the proceeding. One of the other issues addressed by Justice Kimmel pertained to the nature of the transaction whereby the testator had, prior to her death, conveyed her Toronto condominium into joint tenancy between herself and one of her two daughters. Was it a true gift of an undivided one-half interest in the condominium or, by virtue of the Supreme Court of Canada decision in *Pecore v. Pecore*, was the daughter holding her one-half legal interest in the condominium in trust for her mother and, following her mother's death, was she holding the entire condominium in trust for the estate? Justice Kimmel ruled that it was a gift. Had she found otherwise, the value of the estate that would pass on an intestacy would have been substantially larger. There was, by the way, no challenge by any of the respondents to the transferee daughter's position that it had been a gift from her mother; neither by her sister (who would share on an intestacy) nor by either The Children's Lawyer or by the charity named as a respondent (evidently reflecting interests under the alter ego trust in the event that the pour-over clause were held to be a valid disposition).

8 It was suggested to Justice Kimmel that the question of the validity of the pour-over clause might be dealt with as a decision *in personam* (based on consents and non-objections of all parties) rather than *in rem*, so as to avoid her decision having value as a precedent. Justice Kimmel could not assent to this:

> That might have been available to the court if the declaration sought could have been made on the strength of the consent/non-opposition alone. But the issues in this case could not have been decided on that basis alone. The existing legal authorities and precedents needed to be considered. Once a principled analysis has been undertaken it exists for whatever persuasive effect or authority it may have in future cases.

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(a) **Licence**. Vous pouvez utiliser notre logiciel hébergé uniquement à des fins commerciales internes.

(b) **Livraison**. Nous livrons notre logiciel hébergé en vous fournissant un accès en ligne. Lorsque vous accédez à notre logiciel hébergé, vous acceptez de l'utiliser conformément à l'Accord.

(c) **Contenu**. Notre logiciel hébergé est conçu pour protéger le contenu que vous téléchargez. Vous autorisez Thomson Reuters à utiliser, stocker et traiter votre contenu conformément à la loi applicable. L'accès et l'utilisation de votre contenu par Thomson Reuters, nos employés et nos sous-traitants seront dirigés par vous et limités dans la mesure nécessaire pour fournir le logiciel hébergé, y compris la formation, l'assistance à la recherche, le soutien technique et d'autres services. Nous pouvons supprimer ou désactiver votre contenu si requis par les lois applicables et, dans de tels cas, nous déploierons des efforts raisonnables pour vous en informer. Si votre contenu est perdu ou endommagé, nous vous aiderons à restaurer le contenu du logiciel hébergé à partir de votre dernière copie de sauvegarde disponible.

5. FRAIS

(a) **Paiement et taxes**. Vous devez payer vos frais dans les 30 jours suivant la date de facturation dans la devise indiquée sur votre bon de commande. Si vous êtes un abonné non gouvernemental et que vous ne payez pas les frais qui vous sont facturés, vous êtes responsable des frais de recouvrement, y compris des honoraires d'avocat. Vous devez également payer les taxes et les droits applicables, autres que les taxes sur les revenus, en plus du prix indiqué, sauf si vous fournissez une preuve valide que vous êtes exempté. Les litiges relatifs aux factures doivent être notifiés dans les 15 jours à compter de la date de la facture.

(b) **Modifications**. Sauf indication contraire mentionnée dans le bon de commande, nous pouvons modifier les frais de nos produits et services à compter du début de chaque période de renouvellement en vous informant au moins 30 jours à l'avance.

(c) **Utilisation excessive**. Vous devez payer des frais supplémentaires si vous dépassez la portée d'utilisation spécifiée dans votre bon de commande, selon les tarifs qui y sont spécifiés ou nos tarifs standard actuels, selon le montant le plus élevé. Nous pouvons modifier les frais si vous fusionnez, acquérez ou êtes acquis par une autre entité, entraînant un accès supplémentaire à nos produits, à nos services et à nos données.

6. VIE PRIVÉE

Chacun de nous, à tout moment, traitera, protégera et divulguera les informations nominatives reçues à la suite du présent Accord (« Informations nominatives ») conformément à la loi applicable, et déploiera des efforts raisonnables pour s'entraider dans le cadre de l'enquête et du traitement de toute réclamation, de toute allégation, de toute action, de toute poursuite, de tout litige concernant la destruction, la perte, la modification, la divulgation ou l'accès non autorisés ou illicites aux Informations nominatives. Vous reconnaissez et acceptez le transfert et le traitement des Informations nominatives dans les régions géographiques nécessaires afin que Thomson Reuters remplisse nos obligations. S'il y a lieu, des conditions supplémentaires peuvent s'appliquer à l'Accord, y compris les conditions du Règlement général sur la protection des données (2016/679) (RGPD) disponibles au www.tr.com/privacy-information.

7. CONFIDENTIALITÉ

Les renseignements confidentiels reçus des parties ne seront divulgués à personne, sauf dans la mesure requise par la loi ou dans le cadre de l'Accord. Si un tribunal ou un organisme gouvernemental ordonne à l'une ou l'autre des parties de divulguer les renseignements confidentiels de l'autre, celle-ci sera rapidement avisée afin qu'une ordonnance de protection appropriée ou un autre recours puisse être obtenu, à moins que le tribunal ou l'organisme gouvernemental n'interdise l'avis préalable. Cette section doit être disponible pendant trois (3) ans après la résiliation de l'Accord ou jusqu'à ce que les renseignements ne soient plus considérés comme confidentiels en vertu de la loi applicable, selon la première éventualité.

8. GARANTIES ET EXCLUSION

LES GARANTIES DE CETTE SECTION SONT EXCLUSIVES AUX ÉTATS-UNIS ET EXCLUENT TOUTES LES AUTRES GARANTIES, CONDITIONS OU CLAUSES (EXPRESSES OU IMPLICITES), Y COMPRIS LES GARANTIES DE PERFORMANCE, DE QUALITÉ MARCHANDE, DE NON-VIOLATION, D'ADÉQUATION ET D'ACTUALITÉ. PAR LE PRÉSENT ACCORD, AUCUNE PARTIE NE S'EST FIÉE À LA DÉCLARATION, LA REPRÉSENTATION, LA GARANTIE OU L'ACCORD DE L'AUTRE PARTIE, SAUF CEUX QUI SONT EXPRESSÉMENT CONTENUS DANS LE PRÉSENT ACCORD.

(a) **EXCLUSION DES RESPONSABILITÉS. DANS TOUTE LA MESURE PERMISE PAR LES LOIS APPLICABLES, NOUS NE GARANTISSONS OU NE CONSTITUONS OU N'INCLUONS AUCUNE AUTRE CONDITION QUE LES PRODUITS OU SERVICES SERONT LIVRÉS EXEMPTS DE TOUTE INEXACTITUDE, DE TOUTE INTERRUPTION, DE TOUT RETARD, DE TOUTE OMISSION OU DE TOUTE ERREUR, OU QUE CEUX-CI SERONT CORRIGÉS. NOUS NE GARANTISSONS PAS LA VIE D'UNE URL OU D'UN SERVICE WEB TIERS.**

(b) **RENSEIGNEMENTS. NOS PRODUITS D'INFORMATION SONT FOURNIS « TELS QUELS » SANS AUCUNE GARANTIE, CONDITION OU CLAUSE D'AUCUNE SORTE.**

(c) **LOGICIEL. NOUS GARANTISSONS QUE NOS PRODUITS INFORMATIQUES SERONT CONFORMES À NOTRE DOCUMENTATION PENDANT 90 JOURS APRÈS LA LIVRAISON.**

(d) **EXCLUSION. VOUS ÊTES SEUL RESPONSABLE DE LA PRÉPARATION, DU CONTENU, DE L'EXACTITUDE ET DE L'EXAMEN DES DOCUMENTS, DES DONNÉES OU DES SORTIES PRÉPARÉS OU RÉSULTANT DE L'UTILISATION DE TOUT PRODUIT OU SERVICE, AINSI QUE DES DÉCISIONS OU DES ACTIONS PRISES EN FONCTION DES DONNÉES CONTENUES DANS OU GÉNÉRÉES PAR LES PRODUITS OU SERVICES. EN AUCUN CAS, NOUS OU NOS FOURNISSEURS TIERS NE POURRONS ÊTRE TENUS RESPONSABLES DES MONTANTS IMPOSÉS PAR TOUTE AUTORITÉ GOUVERNEMENTALE OU RÉGLEMENTAIRE.**

(e) **ABSENCE DE CONSEILS. NOUS N'OFFRONS PAS DE CONSEIL D'ORDRE FINANCIER, FISCAL, JURIDIQUE ET PROFESSIONNEL VOUS PERMETTANT D'ACCÉDER ET D'UTILISER NOS PRODUITS, NOS SERVICES ET NOS DONNÉES. VOS DÉCISIONS RELATIVES AUX PRODUITS OU SERVICES, OU À VOS INTERPRÉTATIONS DE NOS DONNÉES SONT DE VOTRE RESPONSABILITÉ.**

9. RESPONSABILITÉ

(a) **LIMITE. TOUTE RESPONSABILITÉ DES FOURNISSEURS OU DE SES TIERS, PENDANT TOUTE UNE ANNÉE CIVILE POUR LES DOMMAGES DÉCOULANT DE, OU RELIÉS À L'ACCORD, Y COMPRIS POUR NÉGLIGENCE, NE DÉPASSERA PAS LE MONTANT QUE VOUS AVEZ PAYÉ DANS LES 12 MOIS ANTÉRIEURS POUR LE PRODUIT OU SERVICE QUI EST LE SUJET DE LA RÉCLAMATION DE DOMMAGES. AUCUNE PARTIE NE SAURAIT ÊTRE TENUE RESPONSABLE DE DOMMAGES INDIRECTS, ACCIDENTELS, PUNITIFS, SPÉCIAUX OU CONSÉCUTIFS, OU DE PERTES DE DONNÉES ET DE BÉNÉFICES (DIRECTES OU INDIRECTES), MÊME SI CES DOMMAGES OU CES PERTES ONT ÉTÉ PRÉVUS OU PRÉVENUS.**

(b) **Responsabilité illimitée.** La Section 9 (a) ne limite pas la responsabilité de l'une ou l'autre partie pour (i) une fraude, une déclaration frauduleuse, une faute intentionnelle ou un comportement qui démontre un mépris inconsidéré des droits d'autrui ; (ii) la négligence causant la mort ou des blessures personnelles ; ou (iii) une violation des droits de propriété intellectuelle. La Section 9 (a) ne limite pas votre responsabilité en ce qui concerne la Section 9 (d) ou pour les demandes de remboursement découlant de cette section ; ou de payer les frais sur le bon de commande et tous les montants pour l'utilisation des produits et services qui dépassent les autorisations d'utilisation et les restrictions qui vous sont accordées.

(c) **Propriété intellectuelle de tiers**. Si un tiers vous poursuit en prétendant que nos produits, nos services ou nos données, excluant toute partie de ceux-ci fournit par nos fournisseurs tiers, enfreignent leurs droits de propriété intellectuelle et que votre utilisation de ces produits, de ces services ou de ces données se conforme aux conditions générales mentionnées dans l'Accord, nous vous défendrons contre la réclamation et les dommages-intérêts que le tribunal accorde finalement contre vous ou qui sont compris dans un règlement approuvé par Thomson Reuters, à condition que la réclamation ne résulte pas de : (i) une combinaison de tout ou d'une partie de nos produits, de nos services ou de nos données avec des technologies, des produits, des services ou des données qui ne sont pas fournis par Thomson Reuters ; (ii) la modification de tout ou d'une partie de nos produits, de nos services ou de nos données autrement que par Thomson Reuters ou nos sous-traitants ; (iii) l'utilisation d'une version de nos produits, de nos services ou de nos données, après que nous vous ayons informé d'une obligation d'utiliser une version ultérieure ; ou (iv) votre violation de cet Accord. Par notre obligation dans cette Section 9 (c), vous êtes conditionné (A) d'aviser rapidement Thomson Reuters par écrit de la réclamation ; (B) de fournir les renseignements que nous demandons raisonnablement ; et (C) d'autoriser Thomson Reuters à contrôler la défense et le règlement.

(d) **Vos responsabilités**. Vous êtes responsable (i) de vous conformer à cet Accord ; (ii) d'utiliser correctement nos produits et services conformément à toutes les instructions d'utilisation ; (iii) de respecter les exigences techniques minimales recommandées ; (iv) des modifications que vous apportez à nos produits, à nos services ou à nos données ; (v) de votre combinaison de nos produits, de nos services ou d'autres biens avec tout autre matériel ; (vi) de mettre en place et de maintenir une protection adéquate et appropriée contre les virus ou les logiciels malveillants et des systèmes de sauvegarde et de récupération appropriés et adéquats ; (vii) d'installer les mises à jour ; (viii) des réclamations présentées par des tiers en utilisant ou en recevant le bénéfice de nos produits, de nos services ou de nos données par vous, sauf les réclamations couvertes par la Section 9 (c) ; et (ix) des réclamations résultant de votre violation de la loi ou de la violation de nos droits ou de ceux de tiers. Vous devez nous rembourser les pertes que nous subissons en raison de votre non-respect de ces responsabilités ou autrement en lien avec ces responsabilités. Nous ne serons pas responsables du non-fonctionnement de notre produit en raison de votre logiciel tiers, de votre dysfonctionnement matériel, de vos actions ou de votre inaction. Si nous apprenons que notre produit a mal fonctionné en raison de l'un de ces problèmes, nous nous réservons le droit de vous facturer notre travail d'enquête sur la défaillance. À votre demande, nous vous aiderons à résoudre le problème moyennant des frais à convenir.

10. DURÉE, RÉSILIATION

(a) **Durée**. Les conditions de renouvellement des produits et des services sont décrites dans votre bon de commande. Sauf indication contraire mentionnée dans le bon de commande, l'Accord sera automatiquement renouvelé annuellement, sauf si l'un d'entre nous donne un préavis écrit d'au moins 60 jours à l'autre partie avant la fin de la période en cours.

(b) **Suspension**. Nous pouvons, sur préavis, résilier, suspendre ou limiter votre utilisation de tout ou d'une partie de nos produits, de nos services ou d'autres biens si (i) vous êtes invité à le faire par un fournisseur tiers, un tribunal ou un organisme de réglementation ; (ii) vous devenez ou êtes raisonnablement susceptible de devenir insolvable ou affilié à l'un de nos concurrents ; ou (iii) s'il y a eu ou qu'il est raisonnablement probable qu'il y aura : une violation de la sécurité ; un manquement à vos obligations en vertu de l'Accord ou d'un autre accord entre nous ; une violation de notre Accord avec un fournisseur tiers ; ou une violation des droits de tiers ou des lois applicables. Notre avis précisera la cause de la résiliation, de la suspension ou de la limitation et, si la cause de la suspension ou de la limitation de la résiliation est raisonnablement susceptible d'être corrigée, nous vous informerons des mesures que vous devez prendre pour rétablir le produit ou le service. Si vous ne prenez pas les mesures ou si la cause ne peut être résolue dans les 30 jours, nous pouvons suspendre, limiter ou résilier l'Accord en totalité ou en partie. Les frais demeurent payables en totalité pendant les périodes de suspension ou de limitation découlant de votre action ou inaction.

(c) **Résiliation**. Nous pouvons résilier tout ou une partie de l'Accord en lien avec un produit ou un service en cours de suppression. Chacun de nous peut résilier l'Accord immédiatement après un avis écrit si l'autre commet un acte de violation substantielle et ne parvient pas à remédier à la violation matérielle dans les 30 jours suivant son avis. Tout défaut de paiement d'un montant lorsqu'il est dû selon le présent Accord constitue une violation substantielle à cet effet.

(d) **Effet de la résiliation**. Sauf dans la mesure où nous en avons convenu autrement, à la résiliation, tous vos droits d'utilisation se terminent immédiatement et chacun de nous doit désinstaller ou détruire toutes les propriétés de l'autre et, sur demande, le confirmer par écrit. La résiliation de l'Accord (i) ne vous décharge pas de votre obligation de payer à Thomson Reuters les montants que vous devez, y compris

la date de résiliation ; (ii) ne touche pas d'autres droits et obligations accumulés ; ou (iii) ne résilie pas les parties de l'Accord qui, par leur nature, devraient continuer.

(e) **Modifications.** Nous pouvons modifier les présentes conditions générales de temps à autre en vous informant par écrit au moins 30 jours à l'avance. Vous pouvez demander des négociations de bonne foi concernant les conditions modifiées. Si les parties ne parviennent pas à un accord mutuel sur les conditions modifiées dans les 30 jours, vous pouvez résilier l'accord immédiatement après l'avis écrit.

11. FORCE MAJEURE

Nous ne sommes pas responsables des dommages ou des manquements à nos obligations en vertu de l'Accord en raison de circonstances indépendantes de notre volonté. Si ces circonstances entraînent des défaillances matérielles dans les produits ou les services et se poursuivent pendant plus de 30 jours, l'un ou l'autre de nous peut résilier tout produit ou tout service concerné sur avis à l'autre.

12. DROITS DES TIERCES PARTIES

Nos sociétés affiliées et nos fournisseurs tiers bénéficient de nos droits et de nos recours en vertu de l'Accord. Aucun tiers ne dispose de droits ou de recours en vertu de l'Accord.

13. GÉNÉRAL

(a) **Affectation**. Vous ne pouvez pas affecter, déléguer ou transférer l'Accord (y compris vos droits ou vos recours) à quiconque sans notre consentement écrit préalable. Nous pouvons céder ou transférer l'Accord (y compris l'un de nos droits ou recours) en totalité ou en partie à une société affiliée ou à toute entité qui succède à la totalité ou à la quasi-totalité des actifs ou des activités associées à un ou plusieurs produits ou services, et nous vous informerons de toute affectation ou de tout transfert. Nous pouvons donner en sous-traitance l'un des services à notre seule discrétion. Toute affectation, toute délégation ou tout autre transfert en violation de la présente Section 13 (a) est nul.

(b) **Commentaires**. Vous accordez à Thomson Reuters un droit perpétuel, irrévocable, transférable et non exclusif d'utiliser tous les commentaires, toutes les suggestions, toutes les idées ou toutes les recommandations que vous fournissez relativement à l'un de nos produits ou services de quelque manière et à quelque fin que ce soit.

(c) **Conformité à l'Accord**. Nos représentants professionnels ou nous-mêmes pouvons examiner votre conformité à l'accord pendant toute la durée de l'Accord. Si l'examen révèle que vous avez dépassé l'utilisation autorisée permise par l'Accord, vous paierez tous les frais impayés ou sous-payés.

(d) **Droit applicable**. Sauf indication contraire mentionnée dans le bon de commande, l'Accord sera régi par les lois de la province de l'Ontario et les lois fédérales du Canada qui s'y appliquent, et chacun de nous se soumet irrévocablement à la compétence exclusive des tribunaux de la province de l'Ontario et tous les tribunaux compétents pour entendre les appels contre ceux-ci et régler tous les litiges ou réclamations découlant de ou relié à l'Accord.

(e) **Préséance**. L'ordre de préséance décroissant est le suivant : termes de licence tiers contenus dans la Section 1 (f) de ces conditions ; le bon de commande applicable ; et les autres dispositions de l'Accord.

(f) **Essais.** Tous les essais de nos produits et services sont soumis aux présentes conditions générales, sauf avis contraire de notre part. L'accès à nos produits et services pour les essais ne peut être utilisé qu'à des fins d'évaluation.

(g) **Soutien fourni.** Pour aider à résoudre les problèmes techniques liés aux services, Thomson Reuters peut fournir un accès téléphonique ou en ligne à son service d'assistance, ou fournir des outils d'auto-assistance. Des renseignements supplémentaires sur le soutien fourni par Thomson Reuters sont disponibles au http://thomsonreuters.com/support-and-training ou comme prévu par Thomson Reuters.