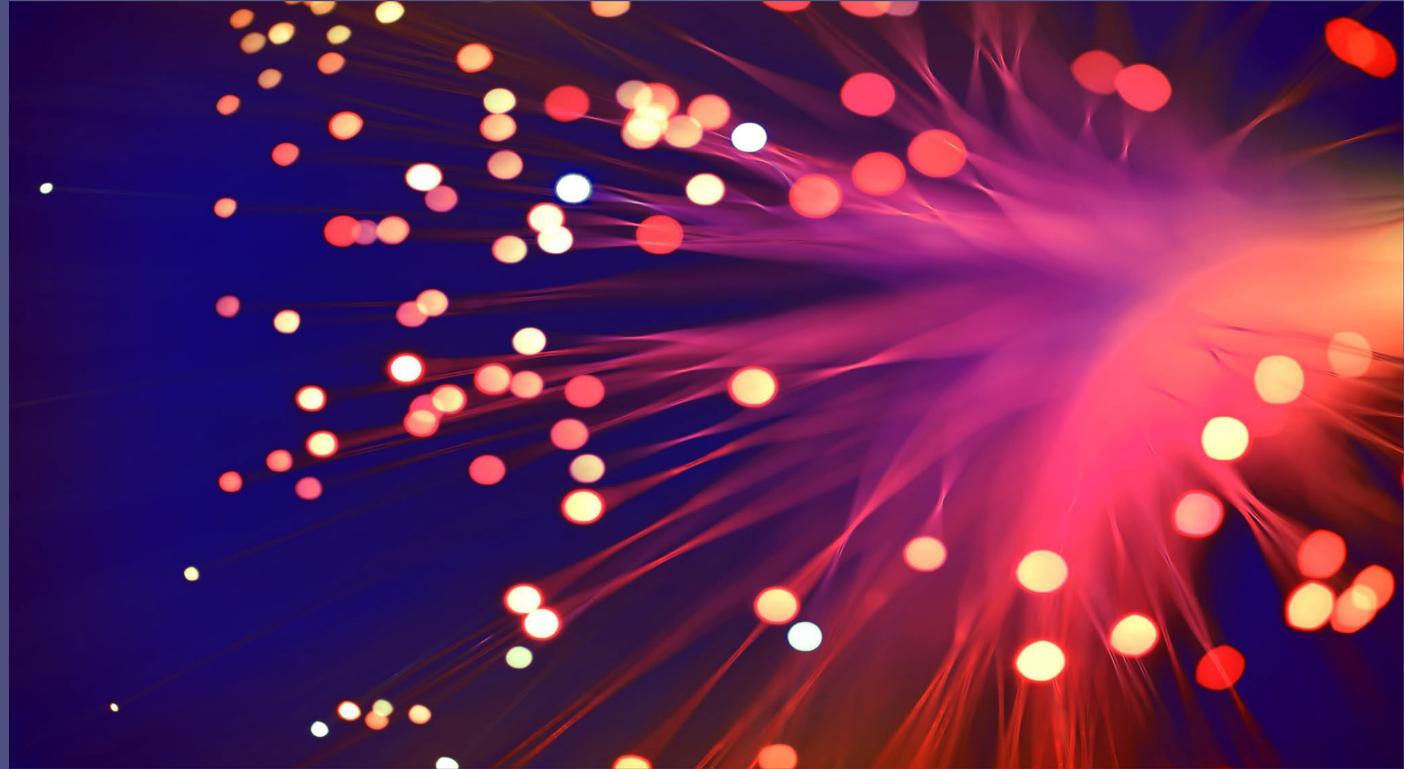


# What's New in the Trust and Estate Planning World?



Presenter: Nancy L. Golding K.C., TEP., ACI Arb

## Pour-Over Wills



- Common US planning tool
- Residue to pour over to living trust set up during lifetime

### **NOT VALID**

- *Quinn*, 2018 BCSC 365
- *Quinn Estate*, 2019 BCCA 91
- *Vilenski v. Weinrib-Wolfman* 2022 ONSC 2116

### **VALID**

- *In MacCallum Estate*, 2022 NSSC 34

## **Quinn, 2018 BCSC 365; 2019 BCCA 91**

- Pat Quinn died November 23, 2014
- Will executed Apr 1, 1996
- Residue to pour-over Canadian estate to revocable, amendable, *inter vivos* Quinn Family Trust
- Quinn Family Trust settled on March 4, 1996
  1. The 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*); and
  2. The Quinn Family Trust is amendable, which means one cannot know with certainty the actual disposition purported to be made by Mr. Quinn.
- Section 58 *WESA* - does not grant unreserved powers to validate a substantially non-compliant will
- Applicant seeking to bypass formalities altogether – not applicable



## ***In MacCallum Estate*, 2022 NSSC 34**

- Helen F. MacCallum died December 19, 2020
- December 15, 2017 executed Helen MacCallum Alter Ego Trust then will
- Residue to Trustee of AE Trust
- Trust established prior to execution of Will and fully constituted
- No amendment or revocation of Trust after Will
- Concerns raised by the BC Courts do not arise on facts of case
- Will valid:
  - supported by public policy presumption against intestacy
  - in keeping with obvious intentions of the testatrix



# Vilenski v. Weinrib-Wolfman, 2022 ONSC 2116

- Uncontested application by estate trustee for declaration that pour-over clause in Will to an unamended alter ego trust valid
- Reviewed:
  1. **Quinn** 2018 BCSC 365; 2019 BCCA 91
  2. **Waslenchuk Estate**, 2020 BCSC 1929
  3. **MacCallum Estate**, 2022 NSSC 34
- Court favoured BC approach



# Resulting Trusts and Beneficiary Designations



## ***Mak Estate v. Mak*, 2021 ONSC 4415**

- Earlier ONSC decision, *Calmusky v Calmusky*, 2020 ONSC 1506, applied presumption of resulting trust to RRIF beneficiary designation
- Court said presumption of resulting trust does not apply to a beneficiary designation because:
  - it is not an *inter vivos* gift, and
  - this kind of beneficiary designation is supported by legislation

## ***Roberts v. Roberts*, 2021 ABQB 945**

- Similar to *Mak*, Alberta Queen's Bench case finds that presumption of resulting trust does not apply to beneficiary designations made under s. 71 *Wills and Succession Act*, RSA 2010, c. W-12.2
- Determination of whether a disposition is testamentary in nature depends on:
  - whether it takes effect on death,
  - whether it is revocable during the donor's lifetime, and
  - whether it effects any change in the rights of the donor and donee during the lifetime of the donor

## ***Roberts v. Roberts*, 2021 ABQB 945**

- Beneficiary designation made under s. 71 is testamentary in nature and presumption of resulting trust does not apply because:
  1. S.71 allows a beneficiary designation either by witness signature on the face of the instrument or by will, and they should have the same effect;
  2. A beneficiary designation is distinguishable from *inter vivos* ; and
  3. The beneficiary's interest is only enforceable after death

## ***Simard v. Simard Estate*, 2021 BCSC 1836**

- RRIFs and a TFSA with designated beneficiaries
- Court noted that there was “no dispute” that the presumption of resulting trust applied



## ***Chung v. Chung*, 2022 BCSC 1396**

- Application to bring action to apply resulting trust to registered accounts
- Court held: whereas the application of the presumption of resulting trust to the gratuitous transfers of .. registered accounts to was clear, the law in Canada is unsettled as to whether beneficiary designations are caught by presumption
- Referred explicitly to *Fitzgerald Estate* and *Mak Estate*
- Noted that the B.C. Court of Appeal has not considered the issue
- *Neufeld* and *Simard* support the application of the presumption
- Only need to prove “arguable case” – leave granted

## ***Gough v. Leslie Estate, 2022 NSCA 25***



- Considered nature of a side agreement, executed on the same day as Will
- Imposed obligations on beneficiary
- Trial court found agreement to be testamentary and therefore revoked by later Will
- Court of Appeal found agreement to be a secret trust, which was not revoked and not subject to repugnancy principle
- Secret trust need not be secret; just not a public document in the sense of a Will

## ***Duhn Estate*, 2021 ABQB 35**

- Testator with full capacity made significant and unequal *inter vivos* gifts to children and certain children sought an accounting of such gifts
- Executors applied to court for direction
- Court found that while courts have discretion to order production of accounts from period before death:
  1. competent testators are allowed to keep their financial decisions private if they so desire, and
  2. applicants must meet a minimal evidentiary threshold suggesting lack of capacity or suspicious circumstances.

## ***Gow Estate (Re)***, 2021 ABQB 305

- Applicants - two children initiating process of challenging will
- Advice and directions whether other two children may be compelled to produce documents relating to financial dealings under POA and documents pertaining to the deceased's corporation
- Court noted: in absence of genuine issue demonstrated and corroborated by other material evidence, testator's will is presumptively valid and estate should not be strained by "*complex, time-consuming and expensive discovery that bleeds the beneficiaries of their inheritance*"

## ***Gow Estate (Re)*, 2021 ABQB 305**

- Pre-trial disclosure:
- Ordered production of solicitor-client privileged communications
- Circumstances of deceased's will planning
- Insufficient information and submissions produced with regards to corporate records that are outside of solicitors' files
- Pre-death financial life of the deceased is confidential, referring to *Duhn Estate*.
- Declined to comment on disclosure of power attorney records noting applicants did not explain how records and transactions conducted by attorneys assist them in meeting their evidentiary burden

# ***Cottrell v Cottrell*, 2022 BCSC 1607**

- Treatment of a spouse's interest in a discretionary trust within the context of family law proceedings
- Under Part 5 of the *Family Law Act*, S.B.C. 2011, c. 25, (*FLA*) when considering proper division of family property, court must focus on whether there has been any increase in the value of a spouse's "beneficial interest" in such a trust, and not an increase in the value of the underlying property of the discretionary trust
- two discretionary trusts settled by parents: joint spousal trust and family trust
- Court found: only increase in the value of "beneficial interest" in trusts would be considered family property
- "contingent beneficial interest" in trusts was uncertain, given that beneficiary did not have the ability to compel a distribution, and there was no reliable assurance that she would receive a distribution in the future
- Court not satisfied that there was an increase in the value of beneficial interest in the trusts
- Even if underlying trust property had increased in value - does not demonstrate an increase in value of beneficial interest.



# Legislative Changes

## Ontario's *Succession Law Reform Act*

- Amendments to Ontario's SLRA came into effect on January 1, 2022.
- Notable changes include:
  1. Wills will no longer be revoked by marriage (already the case in BC, AB and Sask)
  2. Like a divorced spouse, a separated spouse (as specifically defined in the legislation) will be treated as if he or she predeceased the testator
  3. New section for curing formal deficiencies is now in place, such that Ontario is now also a substantial compliance regime.



# Legislative Changes

## *Trustee Act (Alberta)*

- March 29, 2022, Alberta introduced new *Trustee Act*
- Changes:
  1. New duty of care provision for trustees to exercise care, diligence and skill of a prudent person
  2. Duty to report to beneficiaries and be responsive to beneficiary requests
  3. Appointment of temporary trustees when trustee is absent or incapacitated
  4. Removal of unfit trustees
  5. Trustee resignation process
  6. Trustee may perform duties by majority
  7. Recognition of non-charitable trusts
  8. Extrinsic evidence may be used to ascertain the settlor's intention

# Questions





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