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STEP Inside

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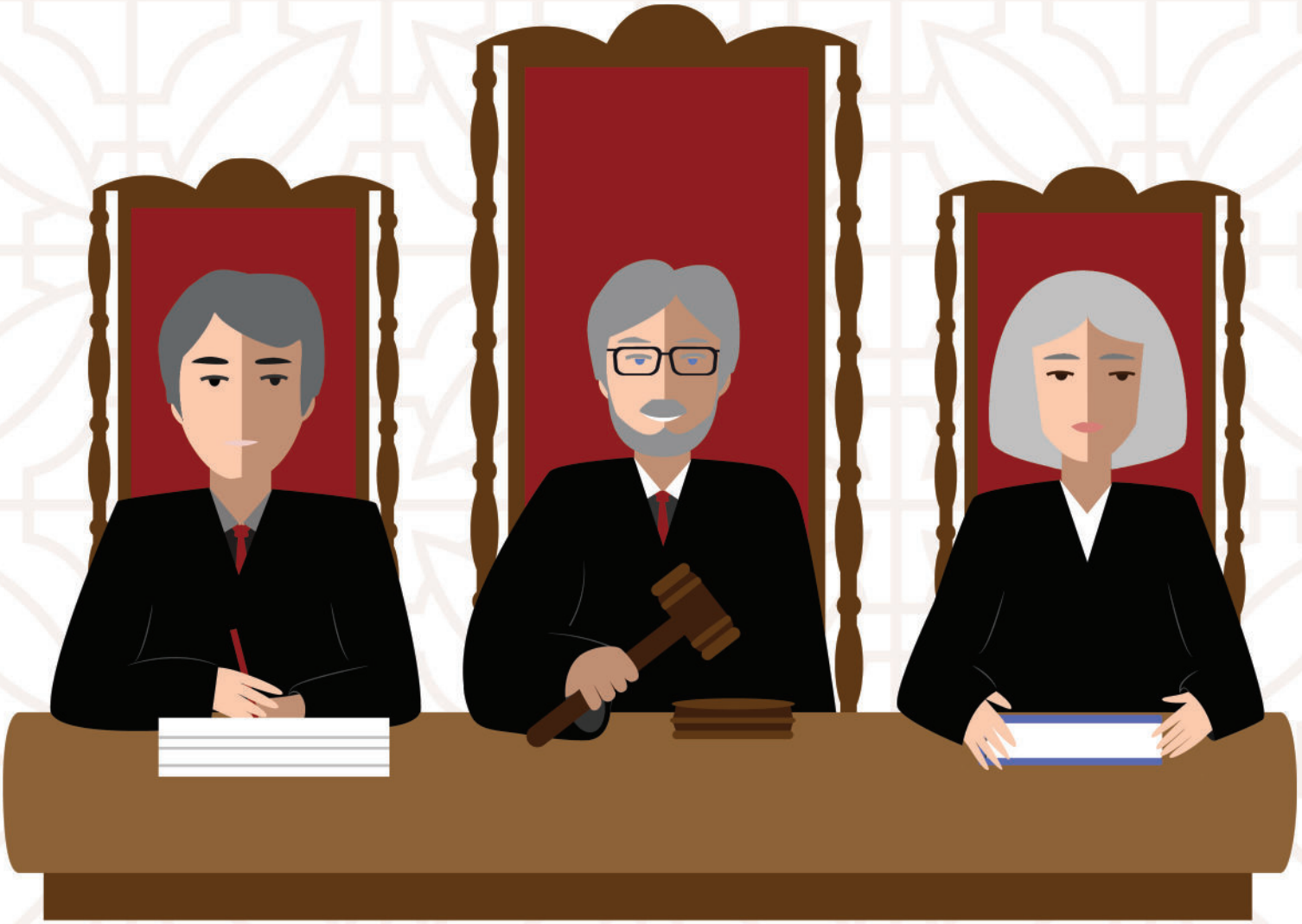

STEP Inside

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The Limits on a Trustee's Power and Fraud Upon a Power: *Wong v. Grand View Private Trust Company Ltd.*

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1. Introduction

Some of the most challenging issues on which to advise a client are the nature and extent of a trustee's discretionary powers and the considerations that ought to inform the exercise of that discretion.

In a series of judgments commencing with *Wong v. Grand View Private Trust Company Ltd.*,[1] three levels of courts considered the scope of a trustee's power, when that power has been exceeded, and when it was used for an improper purpose.

The three judgments also set out the questions that should be posed by trustees before exercising any discretion. Although the decisions were widely divergent, the courts' analyses are helpful for practitioners who advise clients on these issues—namely:

1. the scope of the power to amend a trust instrument, and
2. the exercise of a power to add beneficiaries or remove beneficiaries.

The cases also addressed drafting issues that should be helpful to practitioners in drafting trust indentures to accommodate a settlor's special wishes.

Finally, the courts' comments on the settlor's intentions in creating a trust are cautionary and suggest the need to document a settlor's intention at the time of the trust's creation.[2]

2. Background

The series of cases discussed in this article dealt with dynastic trusts and the continuation of a family business—in particular, the estate plan of two brothers, Y.C. Wang and Y.T. Wang ("the Founders"). The brothers were born into a poor family, but they founded a company that eventually became Formosa Plastics Group (FPG), one of the largest conglomerates in Taiwan.

Each of the Wang brothers had multiple marriages and a large number of children and grandchildren. A dispute arose between two groups of family members over the estate plans of the Founders and the implementation of those plans.

The Founders believed that one must "give back to society" and regarded FPG as a legacy to Taiwanese society. The Founders were generous in charitable gifting. They did not wish to have their heirs inherit the bulk of their assets. Rather, assets described as "corporate interests" would be settled upon trusts to further the vision of the Founders. The Founders intended that the bulk of the value of FPG should be used for charitable endeavours and to sustain the growth and success of FPG for the continued benefit of the community. According to Susan Wang, one of the members of the family who had initiated and implemented the actions that triggered this litigation,[3] neither of the Founders intended that the corporate interests should form part of their estates.[4]

Initially, the Founders' common estate plan was to have certain family members receive benefits under an inter vivos trust based on the efforts of the family members who carried on the legacy of "giving back." The intention was to incentivize the descendants of the Founders to perpetuate the success of the FPG companies.

(a) The Private Trust for Beneficiaries

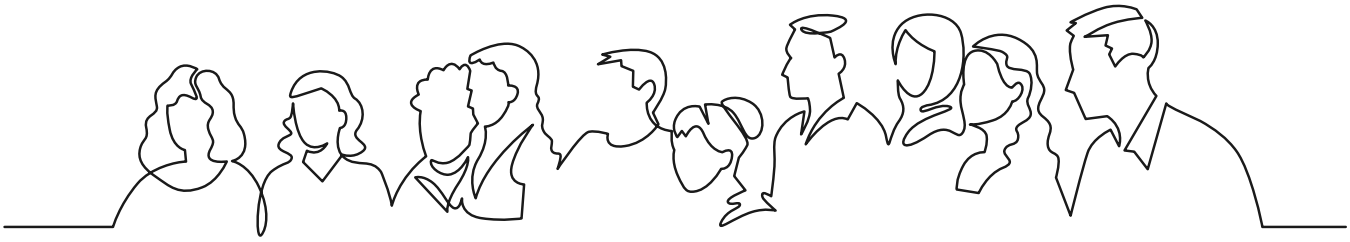
This complex arrangement proved to be challenging to implement. Eventually, the estate plan was changed to split certain "corporate interests" between two separate trusts. The first was a private Bermuda discretionary trust, settled on May 10, 2001, from which family members could benefit without the need to be involved in the management of the FPG companies. This became the Global Resource Trust ("GRT"). The trustee was Grand View

1 *Wong & Anor v. Grand View Private Trust Company Ltd.*, [2019] SC (Bda) 37 Com(5 June 2019) ("Bermuda SC"); *Grand View Private Trust Company Ltd. v. Wong*, Court of Appeal for Bermuda Civil Appeal No. 5A 2019 ("Bermuda CA"); *Grand View Private Trust Co. Ltd. & Anor v. Wen-Young Wong & Ors (Bermuda)*, [2022] UKPC 47 ("UKPC").

2 See also the discussion regarding the identity of the settlor and the expanded concept, infra.

3 There appeared to be other claims arising out of the estate plans of the Founders, but these claims were not relevant to the issues addressed in this action.

4 Presumably, each of the founders had "personal assets" such as real estate and possibly investment accounts that might be used to provide for spouses and other family members not included in the 2001 trusts.



Private Trust Company Ltd. ("Grand View Trust"), a private trust company in which several of the Wang family members were directors.[5] The intention of the Founders (also called the financial settlors) was critical in the courts' decisions regarding the interpretation of the scope of certain powers granted to the trustee.

The beneficiaries of the GRT were "[t]he children or remoter issue of Y.C. Wang and the children and remoter issue of Y.T. Wang."[6]

After execution of the trust deed, the Founders caused about $90 million of shares in a company called Grid Investors Corp. to be transferred to the GRT.

(b) The Purpose Trust

Also on May 10, 2001, Grand View Trust settled the Wang Family Trust. This was a perpetual mixed charitable and purpose trust from which, despite its name, members of the Wang family could never benefit. The Founders caused assets valued at $567 million to be transferred to the Wang Family Trust. There were no personal or individual beneficiaries of the Wang Family Trust.

(c) The 2001 Estate Plan

In summary, the 2001 estate plan of the Founders resulted in the creation of a discretionary family trust (the GRT) and a purpose trust for charitable activities, counterintuitively called the Wang Family Trust. The trustee of both trusts was Grand View Trust, a private trust company controlled by the issue of the Founders who were charged with the oversight of FPG. The Founders continued to hold significant personal assets. The "personal assets" apparently included shares in FPG, separate from those shares held by the two trusts which were known as the "corporate interests."

(d) Change of Plans

In 2005, the Wang brothers reconsidered their estate plans and chose to make certain changes. Although the Founders had intended to divest themselves of most of their personal wealth[7] during their lifetime, they had reconsidered and concluded:

1. such divestiture might damage public confidence in FPG;
2. if they retained their personal shareholdings in FPG, their heirs would inherit significant wealth; and
3. because of the need to retain the personally owned FPG shares, which would pass through their estates, there was no longer a need for a private trust to benefit the children in addition to those assets that they would inherit upon the Founders' death.[8]

If the issue were to inherit from the estate or the Founders, the GRT was considered to be surplus to requirements.

In light of this decision to have the descendants inherit from the Founders personally, the GRT trustee decided to transfer the assets of the GRT to the Wang Family Trust by amending the GRT.

(e) Exercise of Discretion to Add Beneficiary and Windup of GRT

To that end, and in reliance on the anticipated change in the estate plans to benefit the issue of the Founders through testamentary arrangements, the GRT trustee determined to execute a deed by which

1. Grand View Trust[9] would be added as a beneficiary of the GRT;
2. all current beneficiaries of the GRT (that is, the issue of the Founders) would be excluded as beneficiaries; and
3. the assets of the GRT would be transferred to the trustee of the Wang Family Trust, and the GRT would be wound up, effectively transferring all assets to the charitable trust and divesting the issue of the Founders of any rights in the "corporate interests."

This series of transactions was effected with Grand View Trust, relying on the apparent stated intention of the Founders in 2005, some four years after the GRT and the Wang Family Trust were settled. None of the judgments recorded any deliberations by the GRT

5 It appears that the directors of Grand View Trust were those members of the family who were to be involved in the continued management of the FPG companies and who would be incentivized to perpetuate the success of these companies.

6 Bermuda SC, supra note 1, at paragraph 84.

7 Including the shares of FPG held personally, as noted above.

8 There was no indication why the respective estates would have to devolve upon the children and more remote issue, or why the estate assets could not be left to a charitable purpose trust at that time. There was also no discussion about any benefits to be left to any surviving spouses.

9 Presumably in its representative capacity as trustee of the Wang Family Trust.

trustee of the needs of the beneficiaries of the GRT, the impact of the divestiture, or the certainty of the replacement benefit through a testamentary plan.

It does not appear that the GRT trustee examined any proposed testamentary documents that would have evidenced the change of plans before making the decision to exclude the individual beneficiaries.

(f) The Claim

The plaintiffs (some of the disinherited issue) challenged the legality of the amendments and the windup of the GRT, and sought a declaration that Grand View Trust held the transferred assets on trust for the GRT trustee on the terms of the GRT before the amendments occurred.

At first instance, the trial judge of the Supreme Court of Bermuda held that the trustee had invalidly exercised its powers to add and exclude discretionary objects and declared the trustee's acts to be void. An appeal against this decision was allowed by the Court of Appeal of Bermuda, which also granted leave to appeal to the Privy Council.

3. The Terms of the GRT

Before the various decisions are analyzed, it is necessary to review the key terms of the GRT.

(a) Discretionary Nature of the GRT

Clause 3.1 of the GRT gave the trustees the discretion to hold the trust fund and income in trusts for the benefit of one or more of the beneficiaries in such shares or proportions as the trustees "shall, in their discretion, appoint." This is a fairly common clause in a discretionary trust.

(b) Remoteness of Vesting

The trust declaration provided that in exercising any discretion, the trustees' power would be subject to "any applicable rule governing the remoteness of vesting." This is also fairly standard. However, this latter condition formed the basis of one of the plaintiffs' challenges of the purported distribution to a charitable purpose trust, which would not be subject to any rules regarding the remoteness of vesting. In other words, this proviso would be meaningless for a perpetual charitable purpose trust, suggesting that any anticipated change to any GRT beneficiaries would be limited to adding individuals, trusts, or corporations that are controlled by private entities.[10]

(c) Gift-Over in Default of Appointment

Clause 4.1 of the trust declaration provided that, in default of any appointment made in favour of any beneficiaries before the end of the trust period, the trustees should hold the trust property for the issue of the Founders in equal shares *per stirpes*.

There was a further proviso that if all the other trusts failed, the capital and income would be held for charitable trusts.

The GRT was clearly established for the direct descendants of the Founders. The charitable purposes articulated in the trust declaration would take effect only if there were a complete failure of the trusts for the heirs. Given the extensive family tree, this was a remote possibility.

(d) Power to Amend and Power to Add Beneficiaries

The two clauses subject to the most detailed analysis concerned the power to amend the trust and the separate power to add or delete beneficiaries. These were the mechanisms used to divest all the issue of the Founders and to benefit the charitable purposes of the Wang Family Trust instead.

(i) Power to Add or Exclude Beneficiaries

Clause 8.1 dealt with the power to add or delete beneficiaries:

> 8.1 The Trustees may, at any time before the expiration of the Trust Period by deed revocable during the Trust Period or irrevocable, declare that:
>
> 8.1.1 any *person or class or description of persons shall ... be included as a Beneficiary* for the purposes of this Declaration. ...
>
> 8.1.2 any *person or class or description of persons* then included[11] as a Beneficiary shall ... *cease to be Beneficiary* for the purposes of this Declaration. [Emphasis added.]

The plaintiffs challenged the addition on the basis that a trustee of a charitable purpose trust did not qualify as a "person." However, the definition of person in clause 1.6 was exceptionally broad ("any individual, company, partnership and unincorporated association and any person acting in a fiduciary capacity") and included a trustee.

The position that a charitable purpose trust would qualify as a "person" only if it was established for the benefit of an individual beneficiary was not seriously addressed by the Court of Appeal. It was, however, examined in great detail by the Privy Council, as discussed below.

10 See the recommendation for drafting tips, infra, under the heading "7. Observations and Practical Advice."

11 This should likely be a reference to "excluded" rather than "included."

(ii) Power to Amend

Clause 10, titled "Power to Amend," provided as follows:

> The Trustees may at any time and from time to time by deed supplemental hereto, amend *in whole or in part* any or all of the provisions of this Declaration except for the provisions of Clause 23, which may not be amended. [Emphasis added.]

Despite the power to amend, clause 23 of the trust declaration provided:

> This Declaration shall be irrevocable.

The irrevocability clause was considered critical in the context of an amendment to the GRT that would amount to a revocation and resettlement of the GRT, which would violate clause 23.

(e) Absolute and Unfettered Discretion

Clause 15 of the trust declaration used language that indicated that the trustees possessed an extensive discretion that could not be challenged:

> ...every discretion or power hereby conferred upon the Trustees shall be *an absolute and unfettered discretion* or power. [Emphasis added.]

Practitioners have often considered this language, and drafters often seek to couch the language of a discretion in the widest possible terms, in an attempt to exclude judicial review or challenge.

While the Court of Appeal found this language compelling, neither the trial judge nor the Privy Council accepted that the discretion engaged the wide scope suggested by the language, and concluded that even a broad power can be subject to judicial review.

4. The Supreme Court of Bermuda's Decision

(a) Fiduciary Power

One of the bases of the plaintiffs' challenge was that the powers exercised were fiduciary powers and that the exercise of these powers to remove the personal beneficiaries and direct the trust assets to a charitable purpose trust constituted a fraud upon a power. This is to be contrasted with the concept of a personal power, which is not subject to fiduciary guidelines.

(b) The Concept of a Fraud Upon a Power

In addressing the concept that applies in the case of a fraud upon a power, the trial judge adopted the argument of the plaintiffs to illustrate the issue:

> [T]he donee of a fiduciary power commits a "fraud on the power" if the power is used for an ulterior purpose. "*Lewin on Trusts*," Nineteenth Edition (paragraph 29-289). *Lewin* also provides (at paragraph 29-290):
>
> > The term fraud in this context does not necessarily denote any conduct on the part of the appointor amounting to fraud in the common-law meaning of the term or any conduct which could be properly termed dishonest or immoral. *It merely means that the power has been exercised for a purpose, or with an intention, beyond the scope of or not justified by the instrument creating the power. Such an exercise is void*.[12]

In the case at hand, the exercise of the amending power coupled with the addition of a beneficiary not contemplated by the original trust would be tantamount to a fraud upon a power. However, the trial judge did not feel the necessity to characterize it as such, because the decision was made on the basis that the exercise of the discretion was for an improper purpose.

(c) The Power to Amend and the Substratum Argument

The trial judge examined in detail the power to amend the trust and articulated the rule of construction by reference to *Lewin*'s observations on the interpretation of a power to amend and the implicit limitations:

> It is important to properly identify the character of the relevant rule. *Lewin* (at paragraph 30-074), after noting that express restrictions are sometimes placed on a power of amendment, opines as follows:
>
> > Otherwise, its use must be confined to such amendments as can reasonably be considered to have been within the contemplation of the parties *when the trust instrument was made*, having regard to the nature and circumstances. Another way of expressing the point is that an amendment *must not change the whole substratum* of the trust or its basic purpose.[13]

12 Bermuda SC, supra note 1, at paragraph 51 (emphasis added).

13 Ibid., at paragraph 68 (emphasis added).

This passage from *Lewin* raises two important issues. The purpose of the power was to be assessed from the intentions determined at the time of settlement and not "from time to time." The second point was that an amendment power was simply that—a power to amend the trust but not to effectively revoke the trust.

The trial judge expressed concern that if the "substratum" of the GRT were undermined or were to disappear, the actions of the trustee would not amend the trust but revoke it.

This limitation and the concept of the substratum were dismissed by the Court of Appeal but not by the Privy Council.

(d) Who Is the Settlor?

All the decisions discussed the settlor's intention, but also appeared to characterize as a settlor the financial settlor or the person who caused the trust to be funded or the assets to be acquired. In many instances, trusts are settled with a nominal amount by a person who is unrelated to the trust beneficiaries yet has some connection to the family, but who has no knowledge of the purpose of the trust insofar as it relates to the larger estate plan. This suggests a need to document the intention of the financial settlor, while at the same time being careful not to run afoul of income tax rules, including the attribution rules.

(e) When Is the Relevant Time to Construe the Purpose and the Intention?

The respondents argued that the amendments reflected the Founders' vision and took account of the changes to the methods of achieving that vision, even if the mechanism to achieve the vision resulted in the resettlement of assets on new trusts.[14] To summarize, the respondents believed that the intentions of the Founders could change and that the trust could be interpreted on the basis of the intentions of the Founders from time to time, or that others might interpret the intentions of the settlors on the basis of future changes in events. This fluid concept of "intentions" was dismissed.

(f) The Purpose as Determined by the Settlor's Intention

The trial judge found no basis for such a construction either in the terms of the GRT or within the contemplation of the Founders at the time of settlement. He considered the extent to which evidence of background facts was admissible, and found that it was not admissible as evidence of the intention of the settlor:

> This evidence is clearly admissible (and relevant) in defence of the breach of fiduciary duty claim; it is almost as clearly inadmissible and/or unpersuasive in any event as an aid to construing the GRT instrument. *What happened after the instrument was executed is wholly irrelevant*.[15]

In constructing a "fence" around the trust declaration and limiting its elasticity, the trial judge stated unequivocally that the expansion of the trust purposes damaged the fundamental concept of the meaning of the trust declaration, and noted in a compelling analysis:

> The walls of the trust law temple will potentially tumble down if settlors are permitted to execute instruments on an irrevocable basis and later effectively revoke them for the *purposes of little more than administrative convenience, almost as if the terms of the instrument have no legal significance*. If I regard any provisions in the GRT as critical to this analysis, it is the provisions of the amendment power (Clause 10) which specify that the irrevocability clause (Clause 23) may not be amended. This aspect of the instrument was unambiguously intended to be "immutable."[16]

The trial judge concluded that the terms of the trust were not sufficiently elastic to permit either amendment or construction in the manner taken by the trustee of the GRT.

(g) The Substratum

The plaintiffs also claimed that the amendment to add beneficiaries outside the "general" class of original beneficiaries changed the substratum of the trust and amounted to a resettlement of the trust.

The trial judge found that any actions that effectively revoked the

In many instances, trusts are settled with a nominal amount by a person who is unrelated to the trust beneficiaries yet has some connection to the family, but who has no knowledge of the purpose of the trust insofar as it relates to the larger estate plan.

14 Ibid., at paragraph 117.
15 Ibid., at paragraph 122.
16 Ibid., at paragraph 127.

trust and resettled the assets on new trusts would change the substratum of the trust, and determined as follows:

> The original trusts in the present case consisted of family Beneficiaries and default beneficiaries whose rights would vest in 100 years. Replacing the family Beneficiaries and default beneficiaries with purpose trusts which are perpetual *would prima facie constitute resettling the Trust assets on entirely new trusts and effectively revoking the original trusts altogether rather than merely amending or varying them*.[17]

5. The Court of Appeal's Decision

The Court of Appeal disagreed with the trial judge on virtually every issue.

(a) The Purpose and Intention

The Court of Appeal paid significant attention to the purpose of the power based on the intention of the settlor.

The Court of Appeal focused on the extent of the discretion and power and the language of the trust declaration, which seemed to imply that the exercise of any discretion could not be challenged so long as the three rules cited in *Pitt v. Holt*[18] were followed, namely:

1. was the exercise within or contrary to the express or implied terms of the power (the scope of the power rule);
2. did the trustee give adequate deliberation as to whether and how he should exercise the power; and
3. was the use of the power, although within its scope, for an improper purpose (the improper purpose rule)?[19]

(b) The Scope of the "Absolute and Unfettered" Power

In analyzing the scope of the powers, the Court of Appeal gave deference to the broad discretion available to the GRT trustee *and concluded that the unfettered nature of the power was confirmed by the provisions of clause 15*.[20]

This conclusion was troublesome and distinctly at odds with the concept of the "walls of the trust temple" cited by the trial judge.

(c) The Substratum Rule

The Court of Appeal dismissed the trial judge's review of the need for the substratum of the trust to remain after the exercise of the Trustee's discretion:

> The second error underlying the judge's conclusion was the Respondents' proposition, accepted by the judge, that there exists a rule of construction which prohibits powers of amendments from being exercised in a manner which alters the "substratum" of the trust. *In truth there is no such rule*.[21]

The Court of Appeal believed that this rule was relevant only in the case of a variation of trust.

The Court of Appeal did not address at all the issue of prohibition against the revocation of the trust.

(d) The Timing of the Intention

The Court of Appeal adopted without any authority the fact that the intention of the settlor, which would inform the proper purpose, could be fluid and could change over a period of time:

> The natural assumption as to what the economic settlors contemplated as the purpose of the conferment of the power was that the GRT Trustee would, if it thought it right, exercise the power having regard to the economic settlors' known intentions and wishes when setting up the trust and *from time to time thereafter*, however such intentions and wishes were communicated; or at any rate in a manner which it was thought that they would have wished (and, *a fortiori*, in the manner which they did, in fact, wish).[22]

This analysis skipped entirely the concept of the admissibility of evidence as to the Founders' intention and the

17 Ibid., at paragraph 113 (emphasis added).
18 *Pitt v. Holt*, [2013] 2 AC 108.
19 Bermuda CA, supra note 1, at paragraph 168.
20 Ibid., at paragraph 93.
21 Bermuda CA, supra note 1, at paragraph 96 (emphasis added), but see the UKPC decision, supra note 1. The Court of Appeal's view was that changed circumstances could be considered.
22 Bermuda CA, supra note 1, at paragraph 195 (emphasis added).

lack of corroboration for the apparent change in intention. The Court of Appeal appeared to be comfortable with the concept of a changing and "variable" expression of a settlor's intention. The Privy Council dismissed this concept.

In short, the Court of Appeal reversed the trial judge on virtually every issue.

6. The Privy Council's Decision

Just as the Court of Appeal disagreed almost entirely with the trial judge, the Privy Council dismissed the Court of Appeal's views and agreed with the trial judge, thereby adding some clarity by placing "guardrails" around the limits of the discretion and dismissing the more fluid approach to the GRT adopted by the Court of Appeal.

(a) The Proper Purpose or the Range of Purpose

The Privy Council addressed the proper purpose of discretion. It went on to challenge the exercise of the power by Grand View Trust because it considered that the discretion to add or remove persons as beneficiaries was to be exercised by taking account of the views of the Founders "or what the GRT trustee believed would have been their views."[23]

The Privy Council placed great emphasis on the interpretation of the trust as a whole, as well as on details not mentioned by either the Supreme Court or the Court of Appeal. For example, the Privy Council noted that the private trust did not contain the usual clauses employed in a trust for charitable purposes. The absence of such clauses suggested that it was not intended that a charity be added.

The Privy Council concluded that, on the basis of the plain language in several clauses, the scope of the power was limited to individuals:

> In the Board's view, the natural reading of the GRT trust deed as a whole demonstrates that it established a family trust, for the benefit of the direct descendants of the Founders. ... The only specified objects of the discretionary dispositive powers are the children and remoter issue of the Founders, as provided in Schedule 2. Likewise, the ultimate beneficiaries who have fixed but defeasible interests are the same as those within the class of specified objects who are living at the expiry of the trust period. ... Recital (A) to the GRT refers to it as "a private express trust," language not found in the WFT trust deed, which in Recital (A) refers to "a trust for certain charitable and non-charitable purposes." Clause 14 provides for the trustee's remuneration to be agreed between the trustee and the adult beneficiaries, or in default of agreement, in accordance with the trustee's published terms and conditions. *It does not envisage that the GRT will be without individuals as beneficiaries*. While the terms of clause 19, quoted above, are of limited significance, they serve to emphasise the nature of the trust as being *for the benefit of individuals*.[24]

The Privy Council dismissed the Court of Appeal's view that the provision for the issue of the Founders exhausted the range of possible persons who could be considered to be beneficiaries, and listed numerous other objects and individuals that could be considered to be beneficiaries, assuming that the power was to be exercised for the benefit of the beneficiaries,[25] and noted:

> Examples of additions which could benefit one or more existing Beneficiaries are spouses, other dependants, unmarried partners, stepchildren, and other individuals to whom a moral duty may be owed by one or more Beneficiaries. Other examples include charities or other organisations to which a Beneficiary owes a moral obligation. ... The power to exclude a Beneficiary is likewise capable of benefitting other Beneficiaries or the excluded Beneficiary, for example where their continued inclusion in the class has adverse

...the Privy Council noted that the private trust did not contain the usual clauses employed in a trust for charitable purposes. The absence of such clauses suggested that it was not intended that a charity be added.

23 UKPC, supra note 1, at paragraph 76.
24 Ibid., at paragraph 80 (emphasis added).
25 A term of the trust that was not addressed by the Court of Appeal.

tax consequences[26] for some or all of the other Beneficiaries or for the excluded Beneficiary.[27]

The broad scope of potential beneficiaries who would properly be added is helpful guidance for advisers who are often asked whether payments could be made to individuals other than those named in the trust. Generally, a payment to an individual who is not a beneficiary would be considered a fraud upon a power. However, where the trustees may make a payment to "or for the benefit of" a named beneficiary, consider whether a payment to a spouse or other person listed in the quotation immediately above would be proper.

Finally, in interpreting the purpose of the power to add or delete beneficiaries, the Privy Council placed great emphasis on the fact that the GRT and the Wang Family Trust were established at the same time and that there was no crossover or link whatsoever between the beneficiaries of each trust.

(b) The Interests of the Beneficiaries

The Privy Council also noted that "the purpose of the powers of addition and exclusion was to *further* the interests of the Beneficiaries, or one or more of them."[28]

The appellants took the position that the GRT trustee could not use its powers under clause 8 "to *destroy, rather than to advance*, the interests of the identified Beneficiaries and the default beneficiaries."[29] The court agreed:

> The purpose of a typical family trust is coterminous with its identified beneficiaries. *Radical changes may properly be made to such a trust, or to the beneficial interests under it, provided the changes are in the interests of one or more identified beneficiaries. The only possible exception was if the trust instrument expressly provided that the power could be exercised for purposes other than the best interests of the identified beneficiaries.*[30]

(c) Conclusion on Proper Purpose

After this extensive review, the Privy Council concluded that the challenged decision was taken by the GRT trustee for an improper purpose.

7. Observations and Practical Advice

The series of judgments in *Wong v. Grand View Private Trust Company Ltd.* is helpful in focusing on the interpretation of a trust document and the surrounding circumstances.

(a) Intention

All three of the courts paid attention to the intention of the settlor. In circumstances where a nominal settlor is used, there will be few indicia to inform anyone who is attempting to discern the real purpose of the trust and how to construe the intention of the settlor/economic settlor. This suggests the need for drafters of trust indentures to record intentions in detail and to address with the economic settlor the terms of a trust that are often glossed over as "boilerplate." Although the term "benefit of a beneficiary" is considered to impart generosity and breadth of accommodation, it might be advisable to include a more detailed definition that provides examples of such extended benefits so as to avoid a narrow interpretation of the phrase.[31] This will ensure that trustees consider the consequences of a broad definition, including any gift tax implications.

The purpose of a typical family trust is coterminous with its identified beneficiaries.

(b) Substratum

Critically, the Privy Council confirmed that a power to amend coupled with a prohibition against revocation is similar to the prohibitions that inform the guidelines for a variation of trust. Further, the very important determination that the trustee's discretion must be exercised for the benefit of the beneficiaries moves the analysis closer to the concepts considered under a variation of trust. For this reason, any amendment that affects the rights of minors or persons under an incapacity should be considered, because it is likely that the consent of personal representatives at the Office of the Children's Lawyer should be obtained.

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26 The Privy Council's observation that it would be permissible to exclude a beneficiary where the continued inclusion would result in adverse tax consequences is an interesting and helpful one, particularly given the number of discretionary family trusts in Canada where some of the discretionary beneficiaries include US residents or US persons in circumstances where there is a private company that results in extensive reporting for US tax purposes.

27 UKPC, supra note 1, at paragraph 82.

28 Ibid., at paragraph 94 (emphasis added).

29 Ibid., at paragraph 115 (emphasis added).

30 Ibid. (emphasis added).

31 Caution should be exercised when making a payment to, say, a dependant of a beneficiary who is not a beneficiary of the trust.

In many jurisdictions, this would require court approval. If the trust indenture specifies that such amendments can be made without receiving the consent of the beneficiaries, who might be affected? In a discretionary trust, the addition of beneficiaries might not require the consent of adult beneficiaries, but the court might consider that if a variation of trust had occurred, it would require not only the consent of the adult beneficiaries but also the approval of the court on behalf of minor beneficiaries.

(c) Flexibility

Is there a possibility that a drafter could expand the circumstances under which a trust could gain elasticity, as was suggested by the Court of Appeal? The Privy Council seemed to suggest that, on its face, the trust indenture must identify in specific terms the circumstances in which the use of a power of addition and exclusion could be exercised where the power did not further the interests of the beneficiaries. Much more careful and specific language would be required.

(d) Always for the Benefit of the Beneficiaries

It is clear that any power that is exercised by the trustee must be exercised for the benefit of one or more of the beneficiaries.[32] This raises the issue of exercising a fiduciary discretion to exclude one or more beneficiaries. Most precedents will provide that the trustee has the discretion to pay or apply income or capital to any one or more of the beneficiaries "to the exclusion of the other or others." To the extent that this clause has been removed from any precedents, it should be reconsidered.

The Privy Council made it clear that where there is to be a power to amend and add or delete beneficiaries, if the settlor wishes to permit the trustee to exercise this discretion without regard for the interest of the identified beneficiaries, this intention must be made perfectly plain.

The Privy Council made it clear that where there is to be a power to amend and add or delete beneficiaries, if the settlor wishes to permit the trustee to exercise this discretion without regard for the interest of the identified beneficiaries, this intention must be made perfectly plain. However, the exercise of such a power might well result in adverse tax consequences.

(e) Amendment Versus Revocation

Wherever there is a statement of irrevocability, the power to amend will be limited. If, however, the power to amend is to be sufficiently broad to permit a resettlement, the trust must not be irrevocable. This, of course, presents its own set of problems, because a revocable trust will result in certain, often adverse, tax consequences and could result in a finding of an incomplete trust or a reversion.

(f) Discretions Always Reviewable

There seems to be a suggestion that no matter how broad the discretion is stated to be, every discretion will still be subject to review. Consequently, complete and unfettered discretion should be explained to clients as having "a fence" around it to ensure that the discretion is not abused. While most lawyers understand this, it is not always apparent to non-lawyers, who believe that the exercise of a complete and unfettered discretion may not be challenged or reviewed.

(g) Standard Clause That May Need Clarification or Modification

The courts considered a fairly standard clause that limited the power to appoint by addressing the concept of remoteness of vesting. If the intention is to permit the addition of charitable beneficiaries, this clause should be excluded or modified.

8. Conclusion

The three decisions in *Wong v. Grand View Private Trust Company Ltd.* are helpful in assisting advisers in drafting specific clauses in a more detailed manner and in recording intentions. More importantly, advisers to trustees will welcome the guidance in considering specific issues to be addressed before exercising their discretion. Finally, determining the identity of the "settlor" continues to be a challenging issue.

32 UKPC, supra note 1, at paragraph 94.

Protectors in Trust Instruments

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With special thanks to Graham Bowden, Articling Student

Introduction

Establishing a trust is an effective way to safeguard and distribute assets. However, the benefits of establishing a trust also come at a cost to the person establishing it. The settlor must forfeit control over the property once the trust has been settled, leaving power over the assets in the hands of another—the trustee. Giving up authority over hard-earned property can be extremely difficult.

If the settlor attempts to maintain control over the property after the trust has been settled, they open themselves up to potentially severe consequences; the settlor may incur personal tax liability for the gains and obligations of the trust, or a court may find that the trust is a sham. What is a settlor to do when they wish to settle their assets, but fear losing power and control over their property?

This is where the role of the protector comes in. A protector is a fourth party to the trust, distinct from the settlor, trustee, and beneficiary. The trust instrument creates the protector and gives them powers and rights to participate in the administration of the trust and the disposition of its assets.[1] The protector acts as a guardian of the trust, empowered to oversee and govern trustees' and beneficiaries' actions as mandated by the trust instrument. By appointing a protector, the settlor can install a trusted delegate to protect their interests at a safe enough distance to avoid the hazards that come with exercising control directly.

> The protector acts as a guardian of the trust, empowered to oversee and govern trustees' and beneficiaries' actions as mandated by the trust instrument.

Protectors are a relatively new import to Canadian estate planning; however, their use has become more common in recent years. The role of a protector provides an exciting opportunity for Canadian estate planners to construct effective strategies to address their clients' needs.

History and Introduction to Canada

The protector role finds its roots in English law. The use of the term protector to describe someone given powers to oversee the actions of trustees occurs as early as 1833 in England's *Fines and Recovery Act*, parts of which are still in force today. The legislation contemplates that a protector could be a beneficiary given authority to protect their own self-interests, or, alternatively, an independent party empowered to protect the interests of others.[2] For example, in England, protectors have become a longstanding feature for the protection of beneficiaries who are mentally incapable.[3]

Although "protector" is the most recognizable term used to describe this role, it is one of many that have been used to describe an individual with powers of control over a trust. Expressions such as consultant, adviser, committee, guardian, appointer, specified person, and others have also been used historically to refer to an individual with this type of authority.[4] The precise term used is less important than the substantive powers granted by the trust instrument.

The concept of the protector has since expanded from its English origins into what is its most popular use today—a device for offshore trust practices. Jurisdictions such as Bermuda, the Bahamas, the Isle of Man, and Jersey have developed the protector role into a hallmark of the international trust.[5] This is a trust spanning several legal

1 Andrew Holden, *Trust Protectors* (Bristol, UK: Jordan Publishing Ltd., 2011).
2 Paul Matthews, *Underhill and Hayton Law Relating to Trusts and Trustees*, 20th ed. (London, UK: LexisNexis, 2022), at 998.
3 Ibid., at note 3.
4 Matthews, supra note 2, at 997-98; Geraint Thomas and Alastair Hudson, *The Law of Trusts* (Oxford, UK: Oxford University Press, 2004), at 715.
5 Donovan W.M. Waters, Mark R. Gillen, and Lionel D. Smith, *Waters' Law of Trusts in Canada*, 5th ed. (Toronto: Carswell, 2021), at 136-137.

systems. The settlor resides in a mainland jurisdiction, the trustee resides in an offshore jurisdiction, the trust property is often spread across several jurisdictions around the world, and the beneficiaries reside in any number of other jurisdictions. Ultimately, the trust is governed by the law of the jurisdiction where the trustee is resident.[6] Because of the complexity and distance associated with this arrangement, a protector who can supervise the trust's parties and assets is a valuable resource for a settlor to ensure that their interests are protected.

The protector role started to appear in Canadian trust practices by the mid-1980s. Initially, Canadian practitioners employed protectors primarily in international trusts as a tax-avoidance strategy.[7] In recent years, however, the protector role has begun to gain more traction and popularity with estate planners for domestic trusts as well.[8]

Protectors in Canada

The role of the protector in Canadian trusts is almost exclusively a creature of practice. There is no established definition of the term in Canadian case law, and it is nowhere to be found in federal or provincial legislation.[9] As a result, the nature and extent of a protector's authority is almost entirely governed by the construction of the trust instrument. This provides estate planners with the opportunity to be creative and strategic when choosing whom to appoint and how to achieve the settlor's goals.

In Canada, the most common protector powers include the authority to appoint and dismiss trustees, to authorize the breach of the self-dealing rule, and to require the protector's consent for the exercise of powers of appointment by the trustees.[10] However, protector powers can also include directing or vetoing investment decisions, amending the trust to respond to tax changes, and consenting to or vetoing trust distributions, among many others.[11] Canadian estate planners can be creative when employing a protector to address the specific needs of their clients.

One common use of protector powers is the protection of the incapable. A protector may be empowered to safeguard the interests of the mentally incapacitated, minors, the elderly, or unborn beneficiaries. A protector can also watch over beneficiaries who are unfamiliar with investment decisions or business generally.[12]

Protector powers may also be used to create an internal dispute resolution mechanism. Where trustees cannot agree on a course of action, the protector can mediate the dispute, or take the decision upon themselves as a tiebreaker. The appointment of a protector to arbitrate these types of disputes can avoid unnecessary delays and the costs of litigation and protect beneficiaries who may ultimately suffer from this type of disagreement.[13]

These powers can be given to any party within the trust relationship. The settlor, a co-trustee, a beneficiary, or a third party may be given the role of protector for different reasons, and each comes with its own set of important considerations.

A settlor may appoint a trustee to be the protector, making them a type of "super-trustee," with veto or decision-making power over their fellow trustees. Alternatively, the settlor may wish to appoint a beneficiary as protector. By doing so, it allows the beneficiary to ensure that the trustee administers the trust in such a way that will ultimately benefit those for whom the trust was created—themselves.[14] Although in theory this may seem to be an effective way of governing the trust, these types of arrangements have also been known to discourage the cooperative and harmonious administration of trust business between the trustees and beneficiaries.[15]

Appointing a third party as protector is the most common way to avoid the messiness of giving control powers to the existing parties to the trust. Tapping a close friend, trusted associate, or a professional group to fill the protector role can be a valuable tool to the settlor. It allows the settlor to retain a level of control over the trust through their relationship with the protector, while avoiding an adversarial dynamic between the trustees and beneficiaries. Where the protector disagrees with a proposed action or investment decision by the trustees, they can step in and exercise their authority to block or redirect the trustee's discretion in a direction

6 Ibid., at note 90.
7 Dennis Pavlich, *Trusts in Common-Law Canada*, 3rd ed. (Toronto: LexisNexis Canada, 2019), at 347.
8 Waters, Gillen, and Smith, supra note 5, at 137.
9 Ibid., at 136.
10 James Kessler and Fiona Hunter, *Drafting Trusts and Will Trusts in Canada*, 5th ed. (Toronto: LexisNexis, 2020), at 7.33.
11 Pavlich, supra note 7, at 358.
12 Waters, Gillen, and Smith, supra note 5, at 137.
13 Ibid.
14 Ibid., at 138.
15 Ibid., at 139.

most favourable to the settlor. Or the protector may remove or add trustees who will administer the trust in a more appropriate way. The protector can act as a type of referee, ensuring that the trust is administered in a way that preserves the settlor's interests.[16]

The Importance of Construction

Because protector powers are entirely determined by the wording of the trust instrument, the drafting of these powers is a crucial issue to consider for Canadian estate planners. It is a question of construction of any particular trust when determining the nature and extent of a protector's powers and duties.[17] It is essential that the estate planner understand the settlor's wishes, and the provisions of the trust instrument are drafted accordingly in order to avoid ambiguity or dispute.

One consideration that Canadian estate planners should always address in the trust instrument is whether the settlor wishes the protector to be bound by fiduciary duties or not. Courts from jurisdictions such as Bermuda and England have ruled that in the absence of language to the contrary, the protector will generally be presumed to be a fiduciary. However, it is a question of construction for each specific trust whether the powers and duties conferred on the protector are fiduciary in nature or not.[18] Typically, a settlor will want the protector to be bound by fiduciary duties that require them to act in the interests of the trust. However, the possibility is open to the settlor to remove these duties if they wish.[19]

The best practice is to address the issue by stating clearly in the trust instrument whether the powers granted to the protector are fiduciary or non-fiduciary in nature in order to avoid uncertainty, and to establish the specific constraints and responsibilities that the protector has with regard to the trust and its beneficiaries. Careful consideration and drafting are essential, and assumptions should not be relied on when conferring protector powers.

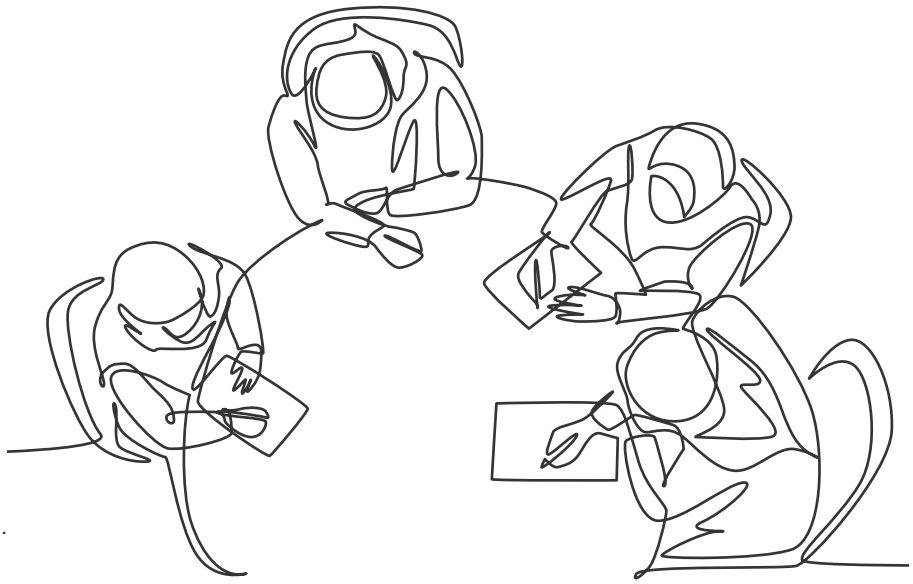
Another vital consideration for the trust instrument is the succession of the protector. If the protector dies, becomes incapacitated, or retires, who fills their role? The trust instrument may name an individual to succeed the protector in such circumstances, or it may allow the protector to name their successor after they are appointed. Alternatively, the trust instrument could allow the trustees to choose the new protector.[20] Whichever avenue is chosen, it is critical that Canadian estate planners provide a clear succession plan in order to ensure a seamless transition of power and avoid gaps.

Finally, the trust instrument should address whether and how a protector ought to be compensated. This is particularly important for protectors because of their novelty in Canadian law. While trustee legislation and the common law generally allow trustees to receive "fair and reasonable" compensation, it is less certain how the office of protector is to be compensated, if at all.

Caution

Although the protector concept does not yet have established judicial or legislative restraints in Canada, it is still vital for estate planners to understand that the canvas is not completely bare. There are established principles of trust law that still govern, and important practical considerations must be reviewed to ensure that unintended consequences are avoided.

For example, if a protector is a fiduciary, it is important that their powers do not enlist them to do anything that would violate that duty. It is likely that a protector will have to operate under many constraints, just as a trustee does.[21] Although Canadian courts have



16 Ibid., at 137-138.
17 Kessler and Hunter, supra note 10, at 7.33.
18 Ibid.
19 Ibid.
20 Ibid., at 7.32.
21 STEP, "Canadian Protectors: The Pros and Cons" (September 23, 2015) *Trust Quarterly Review* (https://www.step.org/tqr/tqr-september-2015/canadian-protectors-pros-and-cons).

not outlined the scope or substance of a protector's fiduciary role, both planners and individuals acting in a protector capacity should be aware that they are under a responsibility to act in the best interests of the trust.

Practical considerations, such as tax residence and income attribution, should also be carefully considered. A trust is resident for tax purposes in the jurisdiction where its central management and control is exercised.[22] For this reason, planners should be careful in appointing a protector who resides outside Canada. If the protector's powers enable them to exercise sufficient management and control over the trust, this could change the residence of the trust and result in significant tax consequences.[23]

Additionally, planners must be sure not to enable a settlor to continue to exercise direct control over the trust. For example, if the settlor appoints themselves as protector and retains the right to consent to the exercise by the trustees of any power relating to the disposition of trust property, they run the risk of having the trust property attributed back to them personally and incurring personal liability for all income, gains, and losses of the trust.[24]

Ultimately, it is essential that Canadian estate planners implement the protector role in harmony with established trust law and be mindful of potential ramifications. Further, as the law in this area develops and courts and legislatures potentially consider speaking more substantively on the topic, planners must take notice and adapt accordingly.

Conclusion

As a developing area of estate planning in Canada, the role of protector provides an additional tool for estate planners to carry out their clients' wishes in an effective way. Practitioners should be both creative and careful when executing this strategy, and be attentive to its further development in the years to come.

22 *Fundy Settlement v. Canada*, 2012 SCC 14, at paragraph 15.
23 STEP, supra note 21.
24 *Income Tax Act*, RSC 1985, c. 1 (5th Supp.), as amended, subsection 75(2);and STEP, supra note 21.

The Importance of a Trust Settlor's Intention and the Role of the Letter of Wishes

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Introduction

Trusts are an essential tool in estate and financial planning, allowing individuals to protect and manage their assets for the benefit of themselves, their loved ones, or specific causes. Central to the establishment and administration of a trust is the settlor's intention, which forms the foundation of the trust's purpose and direction. The role of the settlor has been described by Thomas and Hudson[1] as follows:

> The role of settlor is simply that of creator. Once creation has taken place, then there is no evident role for the settlor in the operation of the trust in his capacity as settlor … . The settlor … drops from the picture absolutely and has no rights qua settlor, either to direct the trustees how to deal with the trust property or to reclaim the property which has been settled on trust.

Trust drafting has undergone significant changes over the years such that trust deeds generally grant trustees almost absolute dispositive powers including, in many cases, broad discretionary powers to terminate the trust. These powers are typically seen in offshore trusts but are becoming more common in Canadian onshore trusts. Professor Lionel Smith calls these modern trusts "massively discretionary trusts."[2]

The deeds that settle such massively discretionary trusts outline the legal framework of the trust, but they may not clearly or precisely express the settlor's intention in settling the trust. In Canada, for tax reasons,[3] the legal settlor of an inter vivos trust is often only remotely connected to the beneficiaries, while the driving force behind the trust is not the legal settlor but the economic settlor. In some respects, the legal settlor's intention may not demonstrate the actual intention in settling the trust. This is where letters of wishes come into play.

A letter of wishes was described by Justice Briggs in *Breakspear v. Ackland* [4] as follows:

> The essential characteristic of a wish letter … is that it is a mechanism for the communication by a settlor to trustees of the settlement of non-binding requests by him to take stated matters into account when exercising their discretionary powers. Typically, wish letters are concerned with the exercise of dispositive discretions, but they may include wishes in relation to the exercise of powers of investment, or of other purely administrative powers. For present purposes I am concerned with a wish letter which is substantially contemporaneous with the settlement itself. The question whether later wish letters have the same status is beyond the scope of this judgment.

Taking into account a settlor's wishes expressed outside the trust deed conflicts with the orthodox role of the settlor set out above. In *Kain v. Public Trust*,[5] the New Zealand Court of Appeal explained the justification of letters of wishes by citing the following passage from *Lewin on Trusts*:[6]

> In a conventional family trust the funds comprised in the settlement are the settlor's bounty. Except to the extent that he has reserved powers to himself or conferred them on third parties, the trustees are the means that he has chosen to benefit the beneficiaries out of a property of his own. …
>
> Trustees therefore rightly give great weight to the settlor's wishes, either expressed from time to time during his lifetime or recorded, usually in documentary form, before his death.

While letters of wishes are common in offshore jurisdictions, they are being

1 Geraint Thomas and Alastair Hudson, *The Law of Trusts*, 2nd ed. (Oxford, UK: Oxford University Press, 2010), at 1.37-1.38.
2 Lionel Smith, "Massively Discretionary Trusts" (2017) 70 *Current Legal Problems* 17-54.
3 Subsection 75(2) of the *Income Tax Act* (Canada), RSC 1985, c. 1 (5th Supp.), as amended.
4 *Breakspear & Ors v. Ackland & Anor*, [2008] EWHC 220 (Ch), at paragraph 5.
5 *Kain v. Public Trust*, [2021] NZCA 685.
6 Lynton Tucker et al., *Lewin on Trusts*, 20th ed. (London: Sweet & Maxwell, 2020), at 29-045 to 29-046.

seen more and more frequently in the Canadian onshore context.

Understanding the Settlor's Intention

At its most basic, a trust begins with the settlor, the person who places assets in trust for the benefit of specific individuals or purposes. Modern trusts usually describe the objects of the trust in very broad and general terms such that the beneficiaries are mere objects of powers with only a hope of receiving property.[7] Since the settlor's intention, or the motivation behind creating the trust, is a fundamental element in trust law, understanding this intention is essential because it defines the overarching purpose of the trust and shapes the decision making of the trustees who manage the trust assets.

The settlor's intention can be wide-ranging and may include:

- Asset protection: protecting assets from creditors or other potential threats.
- Wealth preservation: ensuring the financial well-being of loved ones, especially in the case of minors or dependants.
- Philanthropy: donating to charitable causes or organizations.
- Estate planning: facilitating the efficient transfer of assets to heirs.
- Business succession: ensuring a smooth transition of business ownership.

In many cases, settlors want to provide for loved ones but may not want to impose rigid constraints on how the funds are used.

The Role of the Letter of Wishes

While the trust deed is a legally binding document that outlines the trust's structure, a letter of wishes is not legally binding but serves as an invaluable complement to the trust. The letter allows the settlor to express preferences, guidance, and intentions regarding the trust without imposing strict legal obligations on the trustees or beneficiaries. It provides a more flexible and personalized approach to the management of the trust.

The letter of wishes can address a range of considerations:

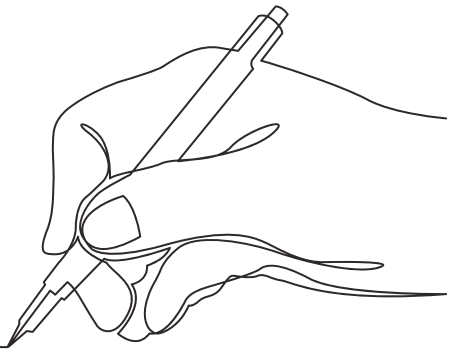
- Guidance on distribution: The settlor can specify how, when, and to whom the trust's assets should be distributed. For example, funds may be used for education, health care, or the support of specific life events.
- Beneficiary considerations: The settlor can provide insights into the beneficiaries' individual needs, aspirations, and circumstances. This personal touch can help trustees to make informed decisions.
- Charitable donations: If the trust has a philanthropic purpose, the letter of wishes can detail the settlor's preferred causes and organizations to support.
- Succession planning: In cases of business succession trusts, the settlor can offer guidance on how the business should be managed and who should take over.
- Special requests: The letter can include any special requests or considerations that the settlor wants trustees to follow.

The non-binding nature of the letter of wishes allows for flexibility. Trustees can take into account the settlor's guidance but can also adapt to changing circumstances, thus ensuring that the trust remains relevant and effective over time.

The letter of wishes is commonly drafted at the same time as the trust deed, but there is no reason why it cannot be drafted later. Equally, there is no reason why a settlor cannot provide additional wishes to the trustees that supplement existing letters of wishes, or even completely revoke them. Indeed, in *Hartigan Nominees Pty Ltd v. Rydge*,[8] the New Zealand Court of Appeal confirmed that subsequent wishes expressed by a settlor can and should be taken into consideration by the trustees:

> There is, in my opinion, no distinction to be drawn between the views of a settlor expressed during the administration of the trust and those expressed before the constitution of it. Provided that the trustee is satisfied that views expressed before the constitution of the trust remain those of the settlor or would have been such, he may act upon or in accordance with those wishes.[9]

The New Zealand Court of Appeal confirmed this position in *Kain v. Public*



7 Smith, supra note 2, at 35.
8 *Hartigan Nominees Pty Ltd and Another v. Rydge* (1992), 29 NSWLR 405 (NZCA).
9 Ibid., at 431.

Trust[10] and provided an example in support of its decision:

> [A] settlor of a trust who settles a farm into the trust may express a wish that the farm be retained within the family but then, as events and circumstances later change, might take the view that it was no longer appropriate or in the best interests of the family for the farm to be retained. The settlor could then change that particular wish so that the trustees would not have to consider that former wish when making decisions as to dispositions under the trust.[11]

Conclusion

The settlor's intention is the driving force behind the establishment of a trust, and a letter of wishes serves as a valuable means of expressing and preserving that intention. While the trust deed provides the legal framework, the letter of wishes adds a personalized and adaptable dimension to the trust's administration. It ensures that the trustees and beneficiaries understand and honour the settlor's vision while allowing for adjustments in response to changing circumstances. By acknowledging the importance of both the settlor's intention and the letter of wishes, trusts can effectively fulfill their intended purposes and provide valuable support to beneficiaries or charitable causes.

10 Supra note 5.
11 Ibid., at paragraph 146.

APPROPRIATE EXERCISE OF DISCRETION OR FAILURE TO ACT: ZALESCHUK (RE)

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A refusal by a trustee to take certain actions can sometimes appear to a beneficiary to be a failure to act. But it can also be an appropriate exercise of the trustee's discretion.

Zaleschuk (Re), 2022 BCSC 943, considered the terms of a trust established by Kenneth Zaleschuk Sr. soon after he received a terminal cancer diagnosis. The trust was created by Kenneth Sr. for the benefit of his adult son, Kenneth Jr., in part to ensure that the funds put aside for his son would not be controlled by Kenneth Sr.'s ex-wife, Marina. According to the decision, Kenneth Jr., owing to a learning disability, is not able to live independently, currently lives with Marina, and will require care for the rest of his life. When Kenneth Sr. passed away in 2015, the year after the trust was established, the terms of the trust appointed Kenneth Sr.'s two sisters as the replacement trustees.

At the time of the decision, Kenneth Jr. was 36 years old. The petition was brought by Marina on behalf of Kenneth Jr. via a power of attorney. Kenneth Jr. had granted the power of attorney in favour of his mother following the death of his father in 2015. Although the trustees raised a question about the validity of the power of attorney, the court made no finding on that point because it did not find it relevant to the petition. The decision commented on the longstanding animosity between Marina and the trustees. However, Justice Ross also pointed out that there was no evidence of animosity between the trustees and Kenneth Jr., the sole beneficiary of the trust during his lifetime.

The petitioner sought an order to remove the trustees and appoint Marina in their place on the basis that the trustees had delayed and refused to act in the best interests of the beneficiary. Some of the evidence put forward by the petitioner in support of this claim was the fact that the trustees refused to pay for or reimburse certain purchases or expenses, including the purchase of a motorized scooter, new eyeglasses, massage and acupuncture treatments, a new cellular phone and laptop, certain travel expenses, and a new bed.

In response, the trustees provided explanations for their refusal to fund certain of those items, and focused on their position that they had acted in the best interests of the beneficiary by administering the trust property in a manner that would ensure that Kenneth Jr. will have support for the rest of his life. The trustees also pointed to other factors, such as potential reimbursement of certain expenses through disability or other provincial assistance, expenses relating to normal living expenses, and regard for whether an expense would provide a benefit or a danger to Kenneth Jr. While the terms of the trust deed included a

broad and express provision giving the trustees "absolute and uncontrolled discretion to the extent enabled by law" regarding expenditures made from the trust property, the trust deed also directed the trustees to pay so much of the income and capital of trust property as the trustees decide is advisable for the care, maintenance, education, well-being, and benefit of Kenneth Jr. during his lifetime, and to purchase any items, services, or products as the trustees decide are necessary or advisable for the care, maintenance, education, well-being, and benefit of Kenneth Jr.

In his decision, Justice Ross concluded that the petitioner did not meet the test for the removal of trustees. In reaching this conclusion, the court commented on the related question of whether the trustees had exercised their discretion appropriately in administering the trust. Justice Ross took the position that the trustees had sufficient discretion through the trust deed to make the decisions that they made. By exercising that discretion, the trustees demonstrated that they were administering the trust for the long-term benefit of Kenneth Jr.

The comments made in this decision with respect to trustee discretion are illustrative of the varied ways that trustee discretion can be applied in a permissible way to benefit beneficiaries. While the petitioner in this case felt that the trustees were not exercising their discretion appropriately because they were not taking the action the petitioner had requested in all circumstances, the court agreed with the trustees in finding that their discretion was appropriately exercised by focusing on the long-term purpose of the trust.

DISCRETION OF EXECUTORS/ ADMINISTRATORS TO APPROVE THE SALE OF REAL PROPERTY

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In recent years, the Saskatchewan courts have clarified the discretion of an executor/administrator to approve the sale of real property from an estate. The relevant legislative provisions in Saskatchewan respecting the sale of real property from an estate are sections 50.3, 50.4, and 50.5 of *The Administration of Estates Act*, SS 1998, c. A-4.1 (AEA):

> 50.3 Real property in which a deceased person has an interest, not ceasing on death, devolves to and is vested in the executor or administrator in the same manner as personal property.
>
> 50.4 Subject to section 50.5, the executor or administrator may sell real property for the following purposes:
>
> a. paying debts;
> b. distributing the estate among the persons beneficially entitled to it.
>
> 50.5(1) The executor or administrator shall not sell real property for the sole purpose of distributing the estate among the persons beneficially entitled to it unless those persons concur in the sale.
>
> (2) Subject to subsections (4) to (6), any sale of real property in contravention of subsection (1) is invalid with respect to any person beneficially interested who did not concur in the sale. ...
>
> (4) The executor or administrator may apply to the court for an order approving the sale of real property when any of the following circumstances exists:
>
> a. an adult beneficially interested in the real property appears to lack capacity and is not represented by a property guardian or a property attorney;
> b. an adult beneficiary does not concur in the proposed sale of the real property;
> c. under a will:
> i. there are contingent interests or interests not yet vested; or
> ii. the persons who may be beneficiaries are not yet ascertained

The AEA also allows the executor/administrator to apply to the court for an order approving the sale of real property in certain circumstances, including when an adult beneficiary does not concur in the proposed sale of the real property. The Saskatchewan courts have recently had the opportunity to provide clarity on the application of these rules in the context of a dispute between a beneficiary and an executor, and a dispute between executors/administrators.

Choquette v. Viczko

Choquette v. Viczko, 2021 SKQB 167, involved a dispute between a beneficiary and an executor regarding the sale of real property. The testator died with a will that named an executor and provided direction to that executor to sell certain property and distribute the proceeds of sale among certain beneficiaries. The executor ultimately sold the land to one of the beneficiaries for its appraised value. Following the transfer, one of the other beneficiaries (who was to receive proceeds of sale under the will) objected to the transfer of the land.

The court distinguished between a beneficiary who is entitled to receive

land under the will and a beneficiary who is entitled to receive the proceeds of sale from that land. The court clarified that only those beneficiaries who are actually entitled to the land itself are required to consent to the sale of land from an estate.

Prior to this decision, there had been some question among Saskatchewan practitioners as to whether it is always necessary for an executor to seek court approval for the sale of real estate if a beneficiary disagrees with the terms of sale. This decision confirmed that where there is a specific direction in the will to sell the land, and the beneficiaries named in the will are only to receive a distribution of the proceeds of sale, the consent of those beneficiaries is not required. The court further confirmed that where there is a specific direction in the will to sell the land, the executor has full discretion to determine the terms on which the land is sold. Such discretion is subject only to the usual legal principles governing the conduct of an executor and trustee.

Geran v. Geran Estate

The more recent decision of the Saskatchewan Court of Appeal in *Geran v. Geran Estate*, 2022 SKCA 143, provides interesting commentary on what happens when co-executors/co-administrators are in disagreement regarding the sale of a house. In *Geran*, the testator died intestate with four adult children (Ronda, Jonathon, Crystal, and Larry). Two of those children (Ronda and Jonathon) were appointed administrators of the estate.

One of the assets in the estate was a house that was situated on an acreage property. The administrators disagreed as to whether the house should be sold, and on what terms. All other beneficiaries opposed the sale. One of the co-administrators applied to the court pursuant to section 50.5(4) of the AEA to request an order approving the sale of the property. The question before the court was the proper interpretation of the phrase "[t]he executor or administrator" in section 50.5(4)—namely, did such an application require unanimity among co-administrators, or could the application be commenced by only one of the co-administrators?

After a lengthy review of the history of *The Devolution of Real Property Act* (which was repealed and replaced with specific provisions in the AEA), the court noted that previous case law on this issue had always focused on a dispute between an administrator and a beneficiary as opposed to a dispute between co-administrators or co-executors with respect to the sale of real estate. The court also reviewed section 41 of *The Trustee Act, 2009*, which states that trustees shall act unanimously in discharging their duties and exercising their powers as trustees, unless the instrument creating the trust provides otherwise.

The court concluded that Saskatchewan personal representatives are "trustees and must act unanimously when carrying out their duties" (at paragraph 21). Therefore, the phrase "[t]he executor or administrator" in section 50.5(4) of the AEA means "all" co-executors or co-administrators, because it would not make sense to vest real property in only one co-executor or co-administrator. The court also noted that it should give more deference to the actions of an executor who is appointed by a testator than to the actions of a court-appointed administrator (at paragraph 63). The application of the co-administrator for an order approving the sale was dismissed by the court.

LIMITATIONS ON TRUSTEE DISCRETION: PETERS V. WATRAL

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The recent case of *Peters v. Watral*, 2022 MBKB 217, is a reminder of a trustee's obligation to act with an even hand in balancing the interests of beneficiaries, and that there are limitations on a trustee's discretion in administering assets.

Henry Peters died on March 9, 2002. His will left the entirety of his estate to a spousal trust for his wife, Helen. Upon Helen's death in 2019, the remainder of the trust was to be divided between Henry and Helen's daughters, Connie and Brenda. Henry's will named Brenda's spouse, Wally, as the executor of his estate and consequently the trustee of the spousal trust.

The trust held three adjacent parcels of land that totalled 80 acres. The land was the primary asset of the trust. Wally believed that it was Henry's wish to consolidate the parcels and subdivide the land, and accordingly he took steps to implement such redevelopment. There were substantial costs associated with the consolidation and subdivision proposal, and there was a lack of funds available to pay these costs. Further, there was no evidence that the benefit of executing the redevelopment would outweigh the costs. Wally's wife, Brenda, supported the redevelopment and was opposed to an immediate sale. The other beneficiary, Connie, was strongly opposed to any long-term

subdivision plan, and insisted that the land be sold immediately.

Wally's proposal was directly aligned with Brenda's interests. Connie's desire to sell the land did not appear to be adequately considered by Wally. Connie took the position that Wally had a duty to sell the land, even if Brenda objected to its sale.

The court found that Wally was not objective in the exercise of his discretion as executor and trustee. Wally pursued Brenda's interests contrary to Connie's desire to sell the land and split the proceeds. Wally was in a clear conflict of interest and consistently acted in accordance with his wife's interests, which did not align with his duties to the beneficiaries of the trust collectively.

Wally was compelled to sell the land because he had no authority to delay the sale or proceed with the subdivision. Although Wally had believed that he was exercising his discretion and acting in accordance with the wishes Henry expressed during his life, no explicit authorization in the will allowed him to proceed with such plans. Without the agreement of all beneficiaries, there was no basis to proceed with the redevelopment plans.

A trustee's discretion is limited where there is no agreement among the beneficiaries. Connie had a right to demand that Wally liquidate and distribute trust assets without unnecessary delay. Wally's decision to retain the land and distribute it *in specie* was contrary to the beneficiaries' collective wishes and was not an appropriate course of action given the lack of direction to do so in the will. Where the beneficiaries cannot agree regarding an *in specie* distribution, the fallback approach is liquidation and division of the proceeds. Wally was not in a position to refuse to convert the land to cash in these circumstances.

A trustee's discretion is limited where there is no agreement among the beneficiaries.

As a result of his failure to act with an even hand, and his delay in selling the land, the court found that Wally had breached his fiduciary duty. He was therefore removed as executor and trustee.

Peters v. Watral presents a valuable lesson for executors and trustees, namely, that they cannot go beyond the terms of the written will, even where they feel they know the true intentions of the testator. It is also a reminder that, unless specifically authorized in the will, the trustee cannot distribute assets *in specie* without agreement from the beneficiaries impacted by that manner of distribution.

JOINT TENANCY AND PROBATE PLANNING: A CAUTIONARY TALE

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The probate-planning strategy of adding another person on title as a joint tenant with a right of survivorship is still predominant in Ontario, yet its implications appear to escape those involved. The recent case of *Jackson v. Rosenberg*[1] is "a cautionary tale for persons who might be tempted to use joint tenancy as an estate planning mechanism to avoid the payment of probate fees."[2]

Facts

The facts of the case are typical of a "probate planning" strategy. In 2011, Mr. Jackson purchased a property in Port Hope and was the sole registered owner. In 2012, he transferred title of the property to himself and Ms. Rosenberg[3] as joint tenants with a right of survivorship. Mr. Jackson attests that this was done with the sole intention to avoid probate fees.

Sometime in 2020, Ms. Rosenberg's husband, Mr. Lopez, told Mr. Jackson of their plan to upgrade Mr. Jackson's property so that they could sell it and use the proceeds of sale to purchase another property where Mr. Jackson could live with them.

Shocked and frightened at the idea of possibly being forced to vacate his home, Mr. Jackson asked a real estate lawyer to sever the joint tenancy and convert it to a tenancy in common. He also brought an application seeking a declaration that Ms. Rosenberg held her interest in the property on a resulting trust. Ms. Rosenberg brought her own application challenging the unilateral severance of the joint tenancy, and sought a declaration that she was a beneficial owner of the property.

This decision is noteworthy because it provides a good summary of *Pecore*,[4] gifts of the right of survivorship, and severance of a joint tenancy.

1 *Jackson v. Rosenberg*, 2023 ONSC 4403.
2 Ibid., at paragraph 1.
3 Ms. Rosenberg is the grandniece of Mr. Taube, who was Mr. Jackson's deceased partner. Mr. Jackson has no family of his own.
4 *Pecore v. Pecore*, 2007 SCC 17.

Gift of the Right of Survivorship

The Ontario Superior Court held that where there is a gratuitous transfer (not between spouses), there may be a resulting trust or a gift of the right of survivorship, and that the question of which it is depends on the transferor's intention at the time of the transfer. If the intention is a gift of the right of survivorship, the intention is to make an immediate inter vivos gift of the property. That holds true even if the gift is to take effect upon the death of the donor. Further, in the context of a gratuitous transfer, the donee (the newly added owner) shall hold title as a resulting trust during the donor's lifetime.

As a result, the court held that Mr. Jackson intended to make an immediate gift of the right of survivorship to Ms. Rosenberg when he added her on title.

The court went on to specify that although the gift is immediate, the gift itself is whatever remains at the time of death of the donor, not what existed at the date of the transfer. During the donor's lifetime, he or she retains all remaining rights and interest in the property. To illustrate, the court used the example of a joint bank account from which the donor can withdraw all the money during his or her lifetime, leaving an empty gift on death.

Right to Sever the Joint Tenancy

Concerning Ms. Rosenberg's argument that Mr. Jackson could not unilaterally sever the joint tenancy, the court held that while Mr. Jackson could not revoke the gift, he retained the power to convert the joint tenancy into a tenancy in common, even though it is done with the purpose of getting rid of the right of survivorship.

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The court confirmed that the severance of joint tenancy eliminates the right of survivorship in the 50 percent interest in the property held by Mr. Jackson, but that Ms. Rosenberg retained her right of survivorship in her 50 percent interest in the tenancy in common. Essentially, the right of survivorship is then limited to Ms. Rosenberg's tenancy in common interest.

Conclusion

Jackson v. Rosenberg serves as a cautionary tale that using joint tenancy as a way to minimize probate fees entails legal risks that should not be ignored. In the event of a disagreement between parties, the legal fees incurred to resolve the dispute may well exceed any benefits that were originally envisaged.

WILL VALIDITY: COMPLIANCE WITH FORMALITIES NOT STRICTLY REQUIRED

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Both the Superior Court and the Court of Appeal of Quebec have recently had to rule on the validity of wills that did not meet all the formal requirements applicable to their particular form under the *Civil Code of Quebec* [1] (CCQ).

Since notarial wills are subject to the strictest formalities, the courts have been more severe, requiring strict compliance with the formalities set out in article 716 CCQ and following:

- A notarial will must be executed by a notary, *en minute*, in the presence of a witness, and it must note the date and place where it was received.
- The will must be read by the notary to the testator alone or, if the testator chooses, in the presence of a witness.
- Once the reading is done, the testator must declare in the presence of the witness that the will read contains the expression of his last wishes.
- The will must then be signed by the testator, the witness, and the notary in each other's presence.
- In addition, certain formalities must be observed in special circumstances, such as when the testator is blind, deaf, or unable to speak.

1 CQLR c. CCQ-1991.

The main advantage of a notarial will over other forms of will is that compliance with the required formalities verifies the authentic status of the deed. Failure to comply with all applicable formalities, whether general or specific to particular circumstances, results in the loss of such status. This does not mean, however, that the testator's wishes expressed in this document cannot be recognized and respected. Article 713 CCQ expressly states that a notarial will that does not meet the requirements of this form may be valid as a holograph will or as a will made in the presence of witnesses, and thus be verified as such by the court.

The formalities of a holograph will, set out in article 726 CCQ, are simple: the will must be written entirely by the testator and signed by him, without the use of technical means.

The formalities for a will made in the presence of witnesses are set out in article 727 and following:

- The will must be written by the testator or by a third person.
- The testator must then declare in the presence of two witnesses of full age that the document he is presenting is his will.
- The testator must sign the will or cause a third person to sign it for him in his presence and according to his instructions.
- The witnesses must then sign the will forthwith in the presence of the testator.
- Where the will is written by a third person or by technical means, the testator and witnesses must also initial or sign each page of the will that does not bear their signature.
- As with a notarial will, additional formalities apply where the testator is unable to read or speak, for example.

It may also happen that a will that was intended to be a notarial will does not meet all of the formal requirements applicable to the other two forms of will. In such cases, it is still possible for the courts to verify the will, provided that the two conditions set out in article 714 CCQ are met.

Article 714 CCQ gives the court discretion to give effect to a will when it is satisfied that the document unquestionably and unequivocally contains the last wishes of the deceased. First, the court must verify whether the "essential" formal requirements have been met. The courts have rejected the *in abstracto* approach in favour of the *in concreto* approach, thus abandoning the idea of establishing a pre-constituted list of essential and non-essential conditions.[2] Under this latter approach, the fact that a formality has not been fulfilled does not invalidate the act, provided that the purpose for which the formality was required is fully achieved in another way in the circumstances of the case.

Second, the court must be satisfied that the will unquestionably and unequivocally contains the deceased's last wishes. In exercising the discretion conferred by this provision, the court must seek to avoid depriving a testator of the right to assert his or her last wishes because of a simple defect of form.

Through this provision, the courts have verified a will before witnesses in the absence of the signature of a second witness,[3] or when the witness was not present at the time of the testator's signature.[4] A holograph will written partly by hand and partly by technical means was also verified by the court.[5] In these cases, the court was of the opinion that, despite the failure of the will to comply with these requirements, the underlying objectives were otherwise fulfilled, and that it was possible to conclude that the will in question unquestionably and unequivocally contained the last wishes of the deceased.

The main advantage of a notarial will ...is that compliance with the required formalities verifies the authentic status of the deed.

However, it goes without saying that article 714 CCQ cannot have the effect of rendering completely void the formal requirements prescribed by the legislator for each of the three forms of will. Article 714 CCQ allows for the upholding of wills with certain formal irregularities, without authorizing the disregard of all formalism. For example, the Court of Appeal recently refused to verify as a will an unsigned email sent to a notary, because it did not meet any of the formal requirements of either a holograph will or a will made in the presence of witnesses.[6] The Superior Court also refused to verify as a will an

2 *Succession de Blanchet c. Succession de Fournier*, 2023 QCCA 987; and *Leduc c. Succession d'Amos*, 2023 QCCA 1020.
3 *Plante*, 2022 QCCS 2063; and *Succession de Picard*, 2022 QCCS 2708.
4 *Succession de Lizotte*, 2022 QCCS 3216.
5 *Succession de Pineault*, 2022 QCCS 4793.
6 *Damary c. Bitton*, 2022 QCCA 349.

affidavit that had not been signed by the deceased in the presence of the witnesses and that had never been presented by the deceased as being his will.[7]

This review of recent case law on the mechanisms for will recognition leads us to conclude that compliance with formalities is not strictly necessary, and that failure to comply with the same formalities could lead to different conclusions depending on the circumstances. Indeed, the court's conviction of the deceased's intentions seems to weigh heavily in these decisions. Unfortunately, this often leads to a debate over what seems reasonable in the circumstances, which takes us further away from the notion of testamentary freedom, which should leave it entirely up to the testator to make whatever will he or she wishes, whether reasonable or not. However, this is the price of not following the formalities of the law.

EXECUTOR DISCRETION AND THE APPLICABLE STANDARD OF CONDUCT: ALLSOPP ET AL. V. EDGAR GRAHAM ESTATE

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The recent Nova Scotia Supreme Court case of *Allsopp et al. v. Edgar Graham Estate*, 2023 NSSC 249, involving a contested passing of the executor's accounts, is an interesting look at (among other issues) the standard of conduct applicable to executors and the ability of a court to intervene in respect of the exercise of an executor's discretion.

Among other things, the applicants asserted that the executor breached his fiduciary duties by selling some woodland lots at what they considered to be an undervalued price to the person who had appraised the land for the estate, which caused a loss to the estate.

Edgar Graham died on July 26, 2019, and the sole executor of his estate was Earl Wayne Graham ("the estate" and "the executor," respectively). Kristina Allsopp, Derek Jann, and Darren Hann ("the applicants") contested the passing of the executor's accounts on a number of grounds. Among other things, the applicants asserted that the executor breached his fiduciary duties by selling some woodland lots at what they considered to be an undervalued price to the person who had appraised the land for the estate, which caused a loss to the estate. As a result, the applicants argued, the executor should not be entitled to any commission and should be required to reimburse the estate for the loss. In response to these claims, the executor asserted that he had met or exceeded the standard of conduct required of an executor.

Although the standard of conduct for an executor was only one aspect of this case, and the court addressed several other interesting issues, this article focuses on the portion of the decision that dealt with the executor's standard of conduct.

Standard of Conduct Applicable to an Executor

In his written decision, Justice Muise addressed the question of the applicable standard of conduct for an executor in the case at hand. The executor argued that there are "different standards of conduct for the Executor depending on whether: the Will gives him absolute discretion; he is acting on professional advice; or he is otherwise conducting the affairs of the Estate" (at paragraph 5). Conversely, the applicants asserted that "only one standard of care and diligence, ie. 'that of a person of ordinary prudence in managing their own affairs'" (at paragraph 6) applies to an executor.

While agreeing that the applicants correctly set out the general rule for the applicable standard, Justice Muise cited *Walters v. Walters*, 2022 ONCA 38, which in turn referenced *Waters' Law of Trusts in Canada*, 5th edition, as follows:

> [8] In relation to matters for which a will expressly grants the executor discretion, particularly absolute discretion, the court's power to intervene is altered. As stated at paragraphs 47 and 48 of *Walters v. Walters*, 2022 ONCA 38:
>
> > [47] The court's approach in Canada to intervention with the exercise of a trustee's discretionary power is described in *Waters' Law of Trusts in Canada* at p. 989: "The court will intervene, however, if (1) the decision

7 *Succession de Chriqui*, 2023 QCCS 4002.

is so unreasonable that no honest or fair-dealing trustee could have come to that decision; (2) the trustees have taken into account considerations which are irrelevant to the discretionary decision they had to make; or (3) the trustees, in having done nothing, cannot show that they gave proper consideration to whether they ought to exercise the discretion." ...

[48] To sum up, court intervention into the exercise or failure to exercise a discretionary power flows from a trustee's fiduciary status. The court may intervene even where the testator has conferred an absolute discretion on the trustee. *Mala fides* and improper consideration of extraneous matters are encompassed by this analytical framework. ...

Justice Muise continued:

> [9] This strikes a balance between giving effect to the intentions and directions of the testator and maintaining judicial oversight: *Waters*, pp. 1049-1053.
>
> [10] It supports the Executor's position that the "so unreasonable" standard applies to exercise of "absolute discretion." ...

...“the will directed the types of investments that had to be made and only allowed the trustees to choose the investments amongst those directed that they deemed appropriate”... rather than permitting the exercise of an executor’s absolute discretion.

> [12] Express wording in a will or in statute may also exonerate executors from liability for action or inaction falling below the general standard: *Waters*, p. 1040.

For their part, the applicants, relying on *Critchley v. Critchley*, 2006 NSSC 219, submitted that an executor must "properly" exercise discretionary powers, insofar as the exercise of such powers should comply with the *Trustee Act*, RSNS 1989, c. 479.

Justice Muise observed that in *Critchley*, "the will directed the types of investments that had to be made and only allowed the trustees to choose the investments amongst those directed that they deemed appropriate" (at paragraph 11), rather than permitting the exercise of an executor's absolute discretion. On this basis, the court found that *Critchley* did not affect the higher standard for court intervention into the exercise of absolute discretion that was referenced in *Walters*. Further, Justice Muise noted that "Clause 9 of the Will authorizes the Executor to 'act on the opinion or advice of or information obtained from any lawyer ... or other expert' and Clause 8 provides that if he does so, in good faith, he shall not be subject 'to liability of any kind'" (at paragraph 13).

In conclusion, Justice Muise held that this reasoning supported the executor's assertion that the "in good faith" test was applicable to an executor acting on professional advice, but not as a separate standard of conduct; rather, it did so as an application of the express exoneration principle. Accordingly, Justice Muise upheld the appropriateness of the executor's decisions, and the executor was awarded the full amount of the commission he sought.

The key principle to draw from this case on the applicable standard of conduct for an executor is that there is truly no one-size-fits-all standard of conduct, and that the standard that applies in a given situation will need to be context-specific. It is hoped that the principles outlined by Justice Muise will assist practitioners in advising their clients in analogous situations.

CHAIR'S MESSAGE

RACHEL BLUMENFELD, TEP

Happy new year to the STEP Canada community! I hope each of you enjoyed some well-deserved time off to conclude 2023 and begin 2024, and to reflect on everything that happened in the past year. Let's all hope that 2024 brings peace, prosperity, and happiness to our local communities and those around the world.

Members of our national board travelled to London, England in December to attend STEP-focused strategy sessions, a STEP Canada board meeting, and the Worldwide Branch Chair's Assembly—a great opportunity to collaborate with 160+ STEP senior officers from around the globe. Everyone came away with new ideas, new connections and a good understanding of what is happening across STEP and how we can work together to make STEP even better. Our senior staff took the opportunity to spend a day building closer relations with their counterparts from the global office.

Canadian members of the STEP Council remain active in their roles. Leanne Kaufman chairs the branch development committee; Kim Whaley continues to be involved with the mental capacity special interest group; and Pamela Cross, who was recently elected to the STEP Worldwide Board, continues to contribute to the global public policy committee. Congratulations, Pam!

I am pleased to see that over 700 members have subscribed for their 2023-24 local branch or chapter bundle of continuing professional development seminars. Delegates are enjoying an excellent lineup of seminars designed by their local branches and by STEP National. On behalf of the board of directors, I extend a sincere thank you to all the program officers and branch executives who concentrated their efforts to organize such vibrant programming. Personally, I'm looking forward to the January 17 national seminar in the series, *Better Breadcrumbs: Assisting Clients in Preparing a Clear, All-Inclusive, and Tax-Efficient Road Map for Their Fiduciaries and Families*.

Planning for our 2024 national conference is well underway. Keep an eye on your email and the step.ca website for announcements of our plans, and be sure to mark June 3-4, 2024 in your calendars. The conference will be held at the Sheraton Centre Toronto Hotel.

A special committee of STEP Canada and STEP USA members is planning a 1½-day in-person stand-alone conference with a delegate attendance goal of 200 for the inaugural event in Chicago on October 6-8, 2024. The conference will offer tremendous potential to grow, educate, and nurture a network of practitioners who focus on the complicated issues that arise between the two countries. Details will be announced in the spring.

The superb education programs, branch bundle seminars, national webcasts, our national conference, and our biannual specialty-focused 1- or 2-day courses support all participating members' learning journey throughout their careers. This inspired the new tag line on our domestic logo, *Supporting trust and estate practitioners in their pursuit of excellence*. To support the tag line, I'd like to share some recent stats that were captured about our activities between November 2022 and October 2023:

- 966 students are currently enrolled in our formal education programs, 92 percent of whom are pursuing the TEP designation
- 80,000 hours of study time were spent in preparation for the 700 exams that were written
- 2,194 delegates attended the branch bundle seminars, the national webcast, and our biannual specialty-focused 2-day online course
- 1,023 delegates attended the 2023 national conference—the 25th!
- 3,452 members are registered with STEP Canada, 2,245 of whom are fully designated TEPs
- 7,589 unique searches were performed using the incredible Searchable Resource Tool (SRT), accessible to members on step.ca

If you see yourself in one of these groups, thank you for supporting our efforts to support you. If you don't see yourself, please consider engaging with your fellow members while pursuing your own learning journey through one of our superb offerings.

Another shout-out to the Public Policy Committee for their digital publication *Client Service Resource: A Guide for Assisting Persons in Vulnerable Situations*, which was

distributed in fall 2023. The guide has been downloaded by 500+ members, and the online version has received more than 30,000 unique page views. The committee will continue its work on this topic by developing a public resource that addresses vulnerable situations, in addition to studying public disclosure of private information and wealth tax.

The Tax Technical Committee prepared a submission to Finance for the September 8 deadline relating to the application of the alternative minimum tax (AMT). The committee continues to contemplate the effect of GAAR proposals on post-mortem pipeline planning and a possible submission on subsection 164(6) of the *Income Tax Act*.

I hope you have all received STEP Canada's newly published book, *A Collection from the STEP Canada/CRA Roundtable 2004-2023*, to commemorate STEP Canada's 25th anniversary. Over two decades, countless volunteer hours have been dedicated to organizing the roundtables, and the lion's share of those hours can be attributed to the efforts of two past chairs of STEP Canada, Michael Cadesky and Kim Moody. STEP Canada is eternally grateful for their contributions.

To the sponsors of our events and conferences, you remain an essential part of STEP Canada's success and ability to provide value to our membership. We are thankful for your collaboration and support, and we continue to develop additional and creative ways for even more robust connections with our membership.

I will end my message with an expression of thanks to the national committee chairs; to the many volunteers who drive our initiatives forward; to the members of the STEP Canada Executive Committee, Richard Niedermayer, Brian Cohen, Aileen Battye, Corina Weigl, and Chris Ireland; and to our steadfast STEP Canada senior staff, Janis Armstrong and Michael Dodick. All of us continue to work closely and effectively to foster an even better and stronger STEP Canada.