POUR-OVER WILLS AND SEMI-SECRET TRUSTS IN NOVA SCOTIA

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In the recent case of *MacCallum Estate* (2022 NSSC 34), Norton J of the Nova Scotia Supreme Court interpreted the effect of a "pour-over" clause in the will of the late Helen F. MacCallum. In so doing he distinguished a series of recent cases that have held that such pour-over clauses are invalid, and ultimately upheld the gift of the residue made from the estate to the trustees of an inter vivos trust on the basis that the residue clause met the essential elements of a semi-secret trust.

In *MacCallum*, Royal Trust Corporation of Canada ("Royal Trust") was both the executor of Mrs. MacCallum's will and the trustee of the Helen MacCallum Alter Ego Trust, both dated December 15, 2017. Royal Trust sought the court's direction on whether the pour-over clause included in the will was effective to authorize Royal Trust to pay or transfer the estate residue to itself as trustee of the trust, or whether a partial intestacy would result.

MacCallum is a departure from an established line of cases in Canada to date, chiefly coming out of British Columbia and including *Kellogg Estate, Re* (2015 BCCA 203) and *Quinn Estate* (2018 BCSC 365; aff'd 2019 BCCA 91), which have held that wills that include residue clauses that effect a "pour over" of the estate residue into

an inter vivos trust are invalid. This line of cases focused primarily on the formal requirements of valid will execution not being met in wills that include pour-over clauses, on the basis that a testator could alter the distribution of the estate after a will has been executed by amending an inter vivos trust without complying with the applicable legislation governing will execution.

Norton J reviewed the British Columbia cases of *Kellogg and Quinn*, as well as the English House of Lords case of *Blackwell v. Blackwell* ([1929] All ER Rep 71; [1929] AC 318) and the Manitoba Court of Appeal case of *Jankowski v. Pelek Estate* ([1995] MJ No. 663 (CA)). Whereas *Kellogg* and *Quinn* focused on formal requirements for will execution, Norton J noted that *Blackwell* and *Jankowski* focused instead on the fiduciary duties of trustees of secret or semi-secret trusts, which have long been held as valid over centuries of years of use when the essential elements of such trusts have been met. On the facts of *MacCallum*, Norton J found that the English and Manitoba cases were more persuasive, and also noted that the reasoning set out in these two cases had not been considered by the British Columbia courts in *Kellogg* and *Quinn*.

Norton J held in *MacCallum* that Mrs. MacCallum's intention to pay or transfer the estate residue to Royal Trust in trust was very clear, and that the residue clause in the will created a semi-secret trust that disclosed the existence of the trust but kept the trust's terms private. Norton J drew the essential elements of a semi-secret trust from Blackwell, and held (at paragraph 23) that all of these essential elements were present—namely:

1. Mrs. MacCallum communicated the purposes of the trust to Royal Trust set out in a document signed by her.
2. Royal Trust promised in writing to execute the trust.
3. The trust document was signed by both parties prior to the will.
4. Mrs. MacCallum transferred substantial assets to Royal Trust as trustee during her lifetime (more than10 times the value of the estate assets), so the trust was fully constituted.
5. The trust was never revoked or amended. Royal Trust has a fiduciary duty to administer it on the terms agreed to before the will was executed.

Norton J held that, with the trust having been established prior to the execution of the will and having been fully constituted, and with no amendment or revocation of the trust having taken place after the will had been executed, the issues raised by the British Columbia courts in *Kellogg* and *Quinn* did not arise in *MacCallum*. He further noted that this approach was in keeping with both the public policy presumption against intestacy and the clear intentions of Mrs. MacCallum.

Norton J concluded his decision by noting that the formal validity requirements of the *Wills Act* (RSNS 1989, c. 505) are intended to safeguard against fraud, undue influence, and lack of testamentary capacity in the creation of wills. He noted further (at paragraph 26) that:

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

In light of *MacCallum*, practitioners should be aware of the essential elements of semi-secret trusts and how under some circumstances those elements may support the use of a pour-over residue clause in wills.