IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Larochelle v. Soucie Estate,*
2019 BCSC 1329

Date: 20190809
Docket: 050776
Registry: Kamloops

Between:

Shirley Annette Larochelle

Plaintiff

And

The Estate of Al Joseph Soucie also known as Elphege Joseph George Soucie, Holly Jean McNeil-Hay, in her personal capacity, and in her capacity as the Executrix of the Estate of Al Joseph Soucie also known as Elphege Joseph George Soucie, Daniel James Soucie, Roland Lawrence Soucie and Richard Bomford

Defendants

Before: The Honourable Madam Justice Donegan

Reasons for Judgment

Counsel for the Plaintiff:	R. Lammers J. Brown
Counsel for the Defendants:	S.T. Rule
Place and Date of Trial:	Kamloops, B.C. June 8-12, September 6,7,11, November 1, 2018
Place and Date of Judgment:	Kamloops, B.C. August 9, 2019

Contents

INTRODUCTION

[1] Al Joseph Soucie ("Al") died in October 2013 at the age of 78. Originally from Quebec, he settled in British Columbia in 1959, later married Barbara Soucie ("Barbara") and together they raised three children – Roland Soucie ("Roland"), Daniel Soucie ("Daniel") and Holly McNeil-Hay ("Holly"), who are now all adults with their own children. Through their own initiative and hard work, Al and his family members worked together to build and establish a successful family business.

[2] After Barbara passed away in January 2013, Al turned to consider his own estate planning. On October 18, 2013, he executed both a will (the "Will") and a trust agreement (the "Trust"). He held substantial assets at the time. The Trust purported to effectively transfer the beneficial interest of the assets he held at the time into the Trust. The Will made appointments and distributions consistent with the Trust, purporting to capture any property that Al might acquire in the future that he chose

not to contribute to the Trust. While the Will and the Trust made provisions for Roland, Daniel and Holly, neither instrument mentioned or made provisions for the plaintiff, Shirley Annette Larochelle ("Shirley"), Al's other biological child.

[3] Four days after executing the Will and Trust, Al unexpectedly died from natural causes.

[4] Al played no role in Shirley's upbringing. The two only met when Shirley sought him out when she was in her mid-30s. They had contact for a few years at that time, but then had no contact at all for many years prior to his death.

[5] Shirley commenced this proceeding, seeking to vary the Will to provide her with an interest in Al's estate under the provisions of the *Wills Variation Act*, R.S.B.C. 1996, c. 490 [*WVA*]. Although now repealed, the *WVA* applies in this case because of the date of Al's death. Central to her action, however, is her challenge to the validity of the Trust. If found to be invalid, or if the various assets are found to have never been constituted to it, the disputed assets would fall into Al's estate, making them available for redistribution within the context of her *WVA* claim. However, if the Trust is found to be valid and the various assets properly constituted to it, there would be no assets available for redistribution within the context of Shirley's *WVA* claim, rendering her claim moot.

FACTS AND CHRONOLOGY

[6] Twelve witnesses testified in this trial. In addition to herself, Shirley called five witnesses – her mother, two of her adult children, her half-brother and a lawyer. The defendants also called six witnesses – Al's three adult children, two of his grandchildren and a lawyer. Many documents were tendered. Many facts were agreed upon. Although there are some minor controversies on some of the factual aspects (and the inferences to be drawn from the proven facts) of this case, I will say from the outset that I found each witness credible and his/her evidence mostly reliable. All of the witnesses in this trial are honest, hard-working people who did their best to provide the court with an accurate factual basis upon which to anchor a resolution to this difficult legal problem. I appreciate their honest and straightforward

approach and recognize that their evidence was sometimes difficult and, in the case of Al's family members, understandably emotional.

[7] The following facts reflect evidence that was not, for the most part, in dispute. Where disputed, my findings are based upon consideration of the evidence as a whole. I will explain the reasoning behind my findings in disputed matters where the evidence conflicts on a material point or where I draw particular inference from the evidence. As I indicated in my introductory remarks, I will refer to the parties and family members by their first names. I do so for simplicity because some share a common surname, and do not intend any disrespect.

Shirley Larochelle and Her Family

[8] Shirley was born in Lillooet, British Columbia on May 15, 1955. She is currently 64 years old. Her mother, Mary Popoff ("Mary"), met her biological father, Al, in about 1953. After Mary and Al dated for about a year, Mary learned she was pregnant. She told Al about the pregnancy and they planned to marry. Mary was about 17 years old at the time and Al would have been about 19. Their plans to marry were short-lived and dashed by Mary's mother. For reasons not explained in the evidence, Al chose to leave Lillooet when Mary was about three months pregnant. Mary never saw him again.

[9] I accept Mary's evidence that Al knew Mary was pregnant with his child when he left Lillooet; however, whether Al was told about Shirley's birth several months later is a fact in dispute.

[10] Mary is the only witness to testify on this point. Although I find her to be a very credible witness, I find her evidence in this one area to be unreliable. She is in her early 80s now and her memory of some of these events is understandably less than perfect. Mary expressed uncertainty on this point. She believes that Al was told about Shirley's birth, but was unable to recall how this information may have been passed to him. She thought she may have told Al herself or that perhaps his best friend, Noel Baker, told him. In light of Mary's evidence as a whole, I cannot find that she told Al about Shirley's birth. Mary clearly did not want Al involved in their

daughter's life all of those years ago. She did not identify him as the father on Mary's birth certificate. She testified that she had no contact with Al after he left Lillooet. The other person who she thinks may have told him, Mr. Baker, was not a witness in this trial. With this uncertain evidence, I am unable to find that Al was informed of Shirley's birth.

[11] Although Al may not have been informed of his daughter's birth, he was certainly aware that Mary was pregnant with his child when he left Lillooet. He made no efforts to learn about the fate of his child, did not seek out information, did not visit and did not seek to be involved in her life. Al played no role in her upbringing, and provided no financial or emotional support to her.

[12] Shirley's upbringing can fairly be described as tumultuous and financially disadvantaged. When she was about two years old, her mother started living with George Popoff ("George"), who assumed the role of Shirley's step-father. George and Mary eventually had children together and the family lived in Lillooet until Shirley was eight or nine years old and then in Ashcroft until she was about 12 years old. By this time, her step-father's drinking and violence in the home had reached a point where Shirley decided to move back to Lillooet to live with her grandmother.

[13] Shirley stayed with her grandmother for about three years. By this time, her mother and step-father had moved to Logan Lake. She decided to try living with them again, but this arrangement only lasted about a year because her step-father's excessive alcohol consumption, and the problems it created, were still present in the home. At the age of about 16, Shirley decided to move to Victoria with another family. While there, she finished her last two years of high school, graduating in 1974. Following graduation, she returned to live with her mother for about six months before moving out on her own permanently.

[14] Shirley had no relationship with her biological father, Al, during her formative years. She only learned of his identity in her late teens or early 20s. Her mother heard a rumor that Al had died, which she accepted as true and shared with Shirley.

Shirley accepted what her mother said and held the honest belief that her biological father was dead.

[15] Shirley's relationship with George, her step-father, was initially good, but his drinking problem caused their relationship to deteriorate substantially by the time Shirley was ten or 11 years old. Shirley did not view George as a father figure while she was growing up; rather, she viewed him as a step-father. She explained the distinction by testifying that her step-father never made her feel special, important or that she mattered, like a father would.

[16] In addition to the alcohol and violence issues in her mother's home, her constant moves and lack of a father figure, Shirley had additional challenges in her upbringing, including difficult financial circumstances and a significant physical disability. Financially, their family was impoverished. They got by, but they lacked resources for anything over their basic needs, such as extracurricular activities, vacations and the like. Physically, Shirley acquired a parasite in her left eye and suffered the trauma of having this eye surgically removed when she was six years old. She continues to wear a prosthesis, but it needs to be replaced every five years. Shirley is very stoic about her disability and has clearly worked hard to overcome the challenges it creates in her everyday life.

[17] Despite the various and difficult challenges of her childhood, Shirley graduated from high school in 1974 on time. She immediately obtained employment in order to support herself, first at a store in Merritt for a few months, then at a gas station for about a year, and then as a bartender for about another year before being laid off. In 1975, she met her future husband, Kenneth Walters, and moved to Lillooet to be with him. She obtained employment there as a teller at the Credit Union. Mr. Walters' work then took them to Cache Creek for a time and then to Kamloops. Shirley was able to work at the Credit Union in both of those locations.

[18] The two married in 1982 and ultimately had three children together. Two of Shirley's children, Stewart Walters ("Stewart") and Tracy Walters ("Tracy"), testified.

Overall, it is very apparent that they both enjoyed a loving upbringing and both continue to have a very good, close relationship with their mother.

[19] Sheldon Walters, their first child, was born in Kamloops in 1983. When he was about a year old, Mr. Walters' work took the family to Kitimat for about three years. Tracy was born during this time and Shirley left the paid workforce to work as a stay-at-home mother. In about 1987, Mr. Walters' work forced yet another move, this time to Williams Lake. It was here that their third child, Stewart, was born in 1989. The family stayed in Williams Lake for about seven years and Shirley remained working at home.

[20] Shirley and her husband separated in 1994. From that time on, she assumed sole care and responsibility for their children. She and the children soon moved back to Lillooet. As part of the divorce settlement, Shirley received the family's manufactured home, the home she continues to reside in today. The home is currently in a terrible state of disrepair.

[21] When her children were a bit older, in about 1998, Shirley re-entered the paid workforce. She began by taking some casual jobs until securing a full-time clerical job at the Friendship Centre in Lillooet. Shirley worked at the Friendship Centre from 1999 until 2012 when she was unfortunately laid off.

[22] Shirley is, and always has been, an industrious and hard-working person. When she was laid off from her employment in 2012, she was about 57 years old. She struggled financially, but nevertheless decided to improve her employment prospects by pursuing post-secondary education. She obtained a teacher's assistant certificate and has obtained employment again. Unfortunately, she continues to struggle financially. She works very hard just to make ends meet. She is now in her 60s and on her own. Despite her hard work, Shirley possesses minimal assets, has negligible savings, earns a very modest income, lives very frugally, does not go on vacations, and has no resources to repair the dilapidated home in which she lives. Her children help her to the extent they can, when they are able, but their help is modest and she remains in real financial need.

Al Soucie and His Family

[23] Al was 78 years old when he died. Although he left substantial assets, he came from very modest roots and worked hard to achieve the financial success he did. Born in Québec in 1935, Al left school after completing only grade two and immediately went to work in farmers' fields for $.25 a day. He lied about his age in order to obtain employment. He eventually moved to British Columbia in 1953 and worked hard to support himself in a few locations (like Prince George, Fraser Lake and Lillooet) and eventually obtained a job helping build a road in Stewart in 1959. He fell in love with the area and decided to make Stewart his home.

[24] Al opened up a restaurant in Stewart called "Soucie Corner Café", where he met his future wife, Barbara. Barbara had an infant child, Holly, from a previous relationship with John McNeil. Holly was born on December 17, 1955. Al and Barbara started living together in a marriage-like relationship in 1962.

[25] Holly's biological father died in a plane crash in 1965. She never knew him. Al and Barbara married in 1966. Although Al never legally adopted Holly, he treated her and raised her as his own daughter. Holly treated and viewed him as her father. They had a close relationship when Holly was growing up, despite some difficulties in her teenage years. They maintained a close, loving relationship in her adult years.

[26] In addition to raising Holly, Al and Barbara also raised their two sons – Roland and Daniel. Roland was born on June 7, 1963 and Daniel was born on May 30, 1965.

[27] Holly, Daniel and Roland all described a happy, close-knit home life, with the usual family's ups and downs. Stewart was a very small, isolated community. Al worked primarily as an equipment operator and took various jobs as they became available. These jobs, which included working in a mine, building roads on glaciers and various construction jobs, saw him living and working in camps, taking him away from home for weeks and sometimes months at a time. In the early 1970s, Al began subcontracting and then incorporated Soucie Construction Ltd ("Soucie Construction"). Financially, the family always had a roof over their heads and food to

eat, but they did not have a lot of money for any extras like vacations. All three of their children got part-time jobs when they were young.

[28] Like Holly, Roland and Daniel also had a close relationship with their father. During their formative years when he was working locally, they spent time with him while he was working, went fishing and played sports such as hockey. They, like Holly and Barbara, also had to endure long periods of separation from their father when he was away for work.

[29] When Roland graduated from high school in 1982, he began working at Soucie Construction. At that time, the business was very small, consisting mainly of his father and one piece of equipment. Soucie Construction did not generate much work for Roland at the time, so he took a few odd jobs outside the business as well. When Daniel graduated from high school (and Roland was 19 years old), Al gave his sons a choice. He asked them if they wanted to go away to college or stay in Stewart to see what the three of them could make of Soucie Construction. The brothers decided to stay.

[30] From that time on, Al, Roland and Daniel worked long hours growing the family business. Barbara contributed as well to its bookkeeping, communications and other tasks. Together they all built Soucie Construction (and later Stewart Bulk Terminal Ltd. as well) over a 30-year period into very successful companies. I will discuss these companies later in these reasons.

Contact Between Shirley and Al

[31] Shirley learned that Al was her biological father in her teens or early 20s. Her mother told her that Al had died and that if she wanted to learn more about him, she could speak to his friend, Noel Baker. I find that Shirley's belief that Al had died was honestly held. She had no reason to disbelieve her mother.

[32] Shirley took no steps to find information about Al for many years. In light of her belief that he had died, this is not surprising. It was not until 1990, when Shirley was in her mid-30s, that she decided she wanted to learn more about her biological

father. She called Mr. Baker to see if he could give her any information about him and was shocked and excited to learn that Al was alive. She wanted to call him right away, but Mr. Baker suggested that he contact Al first, give him Shirley's phone number and allow him to contact her. Shirley agreed.

[33] Within two or three days of her contact with Mr. Baker, Al called Shirley. They had a pleasant conversation in which he acknowledged that he was her biological father. There was no suggestion that he expressed shock, surprise or doubt about their biological relationship in this initial conversation.

[34] Soon after this call, in about March or April of 1990, Shirley met Roland, a person she correctly understood was Al and Barbara's oldest son. Shirley was living in Williams Lake at the time and Roland was passing through, so they arranged to meet. Their visit lasted for two or three hours. It was positive and friendly. Shirley met Al in person a short time later, in about June of 1990, when he, Barbara and one of their young grandsons was passing through Williams Lake.

[35] After their first in-person visit in 1990, Shirley wrote her father letters regularly, spoke to him on the phone occasionally and had other personal visits, upwards of 20 times, until their contact and communication stopped entirely in 1994.

[36] During their approximately four years of contact, Al stopped in to see Shirley in Williams Lake on several occasions and she went to Stewart once. Shirley took her young children to Stewart to visit with Al and his family in August of 1990. Holly was not there, but she met Daniel for the first time and saw Roland, Al and Barbara again. She had dinner with the family and Barbara drove her around town. Shirley enjoyed this visit and felt it went well in the sense that she liked being with her father, but perceived Barbara as unfriendly and unwelcoming toward her. She felt tension between Al and Barbara during her time with them and witnessed an argument between them. She thought it might be about her, but does not know this for sure.

[37] In addition to their visits, phone calls and letters, Al also gave Shirley some gifts during their four years of contact, including a necklace and earrings, $500.00 for a vacation and a card and some gifts for her children one Christmas.

[38] Shirley left Williams Lake with her children for Lillooet in about 1994. The last time Al called her was in 1994, shortly before she left for Lillooet. Shirley called him a few times once she had moved to Lillooet and gave him her new phone number. Shirley's contact with her father eventually diminished and ultimately stopped in about this time. There is controversy about why their relatively short-lived relationship ended.

[39] Shirley believes Al stopped contacting her because Barbara discouraged their relationship. She believes this not as a result of any overt act or statement by Barbara, but rather because she found Barbara was quite abrupt on the telephone whenever she called. She explained that near the end of their relationship, Al's communication dropped off. He would tell her that he would call her and then simply fail to call. He eventually just stopped calling.

[40] Shirley stopped calling Al as well. Other than sending Al a card of condolence after Barbara passed away in 2013, Shirley made no efforts to contact him after 1994. She explained that she stopped trying to communicate with him because during one of her last phone calls to him, Al answered the phone and asked who was calling. When she identified herself as "Shirley", he replied "Shirley who?" Shirley found this hard and hurtful. The call ended with Al telling Shirley that he would call her, but he never did. Shirley found this very painful and thought that perhaps her contact with her father was causing problems between him and his wife. She chose to stop calling.

[41] Al is not here to testify about why he stopped contacting Shirley. Based on the evidence that has been presented, I think the most reasonable inference that can be drawn for the estrangement between Shirley and Al in the 19 years before his death was that they both lost interest in pursuing the relationship. I reach this conclusion for a number of reasons.

[42] For Shirley's part, I accept that she felt (rightly or wrongly) that Barbara was not supportive of her involvement in Al's life. I accept that Shirley did not want to create problems for Al and she felt hurt by what she perceived to be his diminishing interest in her. However, I think that if Shirley felt Al was an important person in her life, she would have made further efforts to connect with him as time passed. She did not. I think she would have discussed Al with her children, but she did not. To the contrary, both Stewart and Tracy testified that Shirley said very little about Al. Stewart did not remember meeting Al and the first time he heard Shirley speak of him was when he was 15 or 16 years old, which would have been in about 2004 or 2005. He described hearing of Al as "a thought". Overall, he considered his mother's relationship with Al as "estranged". Similarly, Tracy testified that her mother told her very little about Al. She had a vague recollection of him from when she was very young, but until she was old enough to understand, she believed that George was her grandfather.

[43] For Al's part, although he is not here to explain his conduct, I think the most reasonable inference from the whole of the evidence is that he gradually lost interest in pursuing a relationship with Shirley. He seemed to believe, at least in later years, that Shirley may not even be his child. Al never kept Shirley's existence a secret. In their first few years getting to know one another, Al made real efforts to connect with Shirley. He visited her several times in her home, gave her gifts, called her, and welcomed her into his home. Unlike another possible biological child he discovered in and around the same time, Richard Bomford ("Richard"), with whom he maintained contact, Al seems to have simply lost interest in pursuing a relationship with Shirley.

[44] The evidence of Holly, Daniel and Roland supports this inference. They testified that their father did not discuss Shirley after their initial visits. The evidence of Mr. White, Al's estate planning lawyer, also supports this inference. I will discuss this evidence in more detail further in these reasons, but in short, Al told Mr. White in 2013 that there were other "ideas" out there (a reference to Shirley and Richard

being his biological children) but that he had not heard about that for a very long time and did not believe they were actually his children.

[45] Al discovered that he may have another biological child, Richard, about a year after he met Shirley. Richard, who was adopted, met his birth mother on his 35th birthday, in 1992. Through her, he tracked down the person believed to be his birth father, Al. Like Shirley, Richard reached Al though Noel Baker. Once Al realized that Richard was not joking, the men started a relationship. They got along well and seemed to have things in common. They had visits in Vancouver roughly four times a year in the first several years of their relationship. This diminished to once or twice a year in the last several years of Al's life. They had phone contact over the years, also diminishing as time went on. They had no contact in Al's last year.

[46] Richard also had contact with members of Al's family, including Shirley, as well. Like Shirley, no one in Al's family discouraged Richard's relationship with Al. Also like Shirley, Richard found Barbara's manner on the phone to be abrupt. He felt she was upset. He discussed this with Al, as he was concerned about disrupting Al's family. Al denied there was any issue. Richard agreed that over time Barbara appeared more accepting. Shirley and Richard met in or about 1990 and have maintained a good relationship ever since.

[47] Both Richard and Shirley recalled Al telling them (separately) in the early 1990s that he was considering changing his will because of their existence. Neither pursued the topic or followed up on it. Neither was expecting anything of it, one way or the other.

[48] In summary then, this was a sad situation where it seems both Shirley and Al gradually lost interest in pursuing a relationship with the other. Shirley was the one who reached out to pursue a relationship. They both embraced the opportunity for about four years, but then they both stopped calling, perhaps for different reasons, but the result was that their relationship simply faded away. Shirley made one last effort, about 19 years later when she sent a condolence card to Al after Barbara passed away. The card, assuming it reached him, went unanswered.

Al's Businesses

[49] When Roland began working for his father at Soucie Construction in the early 1980s, the business was small. Barbara handled the books and continued to do so for the rest of her life. It consisted of Al and one piece of equipment. When Daniel joined the business a couple of years later, Al acquired a second piece of equipment. As I outlined earlier, the brothers chose to stay in Stewart to try and grow the business with their father.

[50] The growth of Soucie Construction (and later Stewart Bulk Terminals Ltd.) was gradual over the years as the company acquired more equipment for various contracts and expanded the scope of its work. Four of their family members – Al, Barbara, Roland and Daniel – worked long hours and invested their lives in growing the family businesses into the successful enterprises they became. As time went on, Roland and Daniel assumed more and more of the leadership role previously played by their father. In Al's later years, he was less involved in the physical aspects of the business but remained involved in decision-making. Roland and Daniel continue to run the businesses today. Soucie Construction now has a broad base of heavy construction work, including highway work, building glacial roads, rock quarrying and the like. Undoubtedly, the successes of the family businesses are attributable to the joint family effort of Al, Roland, Daniel and Barbara.

[51] By way of an Agreed Statement of Facts, the parties outlined Al's various companies, relevant interests held in them and relevant transactions. I will now outline those details.

[52] In 1994, Al acquired an interest in Stewart Bulk Terminals Ltd. ("Stewart Bulk Terminals"). He did so through a holding company – 466497 B.C. Ltd. ("497"), a corporation incorporated under the *Canada Business Corporations Act.* Stewart Bulk Terminals owns and operates a shipping terminal in Stewart. Its business involves shipping from a mine and is dependent on the mine continuing operations. Throughout most of its history, Stewart Bulk Terminals has contracted with one

mine. As with Soucie Construction, Roland and Daniel were involved in running Stewart Bulk Terminals since inception and continue to do so.

[53] At the time 497 acquired all of the shares in Stewart Bulk Terminals, each of Al and a company called GCRD Holdings Ltd. (“GCRD”) owned 100 class A common shares and 175 class B non-voting common shares in 497. The principal of GCRD was a man by the name of Jack Elsworth.

[54] Subsequently, and also in 1994, 497 issued 150 class C non-voting common shares as follows:

(a) 75 to Jake Danuser;
(b) 25 to George Dixon;
(c) 25 to David Dixon; and
(d) 25 to David Lane.

[55] In 1997, another company was incorporated – 542088 B.C. Ltd (“088”). Following the transfer of one share by the subscriber to Al, shareholdings in 088 were as follows:

(a) Al: 50 class A voting shares;
(b) Barbara: 50 class A voting shares;
(c) Daniel: 50 class A voting shares; and
(d) Roland: 50 class A voting shares.

[56] In 1998, a further 175 class C preferred shares in 088 were allotted to Al.

[57] In May 1998, Al transferred his 175 class B non-voting common shares in 497 to 088.

[58] In 1998, the share capital of Soucie Construction was altered as part of an estate freeze. Al and Barbara's shares were exchanged for class C preferred shares that were redeemable. One hundred new voting shares were then issued so that each of Al, Barbara, Daniel and Roland each held one-quarter (25) of the total 100 voting shares.

[59] In 2005, Jake Danuser and George Dixon transferred their class C non-voting common shares in 497 equally to GCRD and 088.

[60] Soucie Trucking Ltd. was incorporated in June 2012 and later changed its name to Portland Ventures Ltd.

Estate Planning

[61] Barbara was unfortunately diagnosed with cancer in late October 2012 and travelled to Kelowna for treatment. She stayed with Holly and her husband in nearby Lake Country. While there, she retained an experienced estate and trust lawyer, Geoffrey White, to do some estate planning for her. Mr. White was called to the bar in Ontario in 1993 and in British Columbia in 1997. He has his own law corporation based in Kelowna and is also associate counsel at Clark Wilson in Vancouver.

[62] Mr. White utilized a "multiple will strategy" for Barbara's estate plan. This involved drafting two wills, one exclusively for the shares she held in private companies and the other for her other assets that required the probate process. The primary advantage to this strategy was that it avoided probate taxes on the company value. Through these two wills, both executed on December 6, 2012, Barbara left all her assets directly to her three children, including her interests in the businesses to Roland and Daniel. She left nothing to her husband, Al.

[63] Barbara passed away on January 4, 2013. As of that date, the parties have agreed by way of an Agreed Statement of Facts that the shareholdings of the companies in which Barbara, Daniel and Roland held shares (prior to any gifts to Roland and Daniel in Barbara's secondary will) were as follows:

Soucie Construction

Shareholder		Class A Voting Common	Class C Voting Preferred
a.	Daniel Soucie	50	Nil
b.	Roland Soucie	50	Nil
c.	Al Joseph Soucie	50	220
d.	Barbara Soucie	50	86
	Total	**200**	**306**

088

Shareholder		Class A Voting Common	Class C Voting Preferred
a.	Daniel Soucie	50	Nil
b.	Roland Soucie	50	Nil
c.	Al Joseph Soucie	50	175
d.	Barbara Soucie	50	86
	Total	**200**	**175**

Portland Ventures Ltd.

Shareholder		Class A Voting Common
a.	Daniel Soucie	50
b.	Roland Soucie	nil
c.	Al Joseph Soucie	50
d.	Barbara Soucie	100
	Total	**200**

[64] As might be expected, Barbara's passing caused Al to reflect on his own estate planning needs, so he too retained Mr. White for that purpose.

[65] During Al's first phone call with Mr. White on February 12, 2013, Al told Mr. White that upon his death he wanted his sons, Roland and Daniel, to receive all of the company interests, which he identified as two numbered companies, Soucie Construction and Portland Ventures and the real estate. He told Mr. White that his daughter, Holly, was to get the cash, which he identified as the bank accounts, the investment accounts and any insurance.

[66] Mr. White then gave Al some preliminary advice about his options. He suggested that Al might consider the multiple will strategy, as had been done for Barbara, but also suggested that Al might consider an alter ego trust as another method of dealing with his affairs. Mr. White explained to Al that unlike a will where he would continue to own his assets until the date of his death, such a trust would transfer the ownership of the assets and the trust would own them for the rest of his lifetime as its trustee. He explained that Al would be the only person who would control and benefit from the trust, but upon death, the trust would distribute the assets thereby avoiding the probate process.

[67] Following this first telephone call, Mr. White's staff began the process of gathering information. To do so, they sent Al a standard questionnaire for him to fill out. He did so and their first meeting was set up for June 12, 2013. Al travelled to Kelowna to meet with Mr. White in person that day. Holly took him to the meeting and he told her, in a general sense, what he was doing. Holly understood that he planned to leave the company and its assets to Roland and Daniel and the cash accounts to her. Al also told Holly about the trust, referring to it as a "tidy" way to deal with his estate after he was gone.

[68] At their June 12, 2013 meeting, Mr. White told Al that they were going to discuss his family, his assets and his goals, and that he would give Al a range of recommendations for him to consider and hopefully come to some decisions.

[69] With regard to his family, Al told Mr. White that his wife had passed away, that he had two sons, Roland and Daniel, and a step-daughter, Holly, who was Barbara's biological child but whom he believed he had adopted. He also discussed his two brothers and, of course, his grandchildren. When asked about other biological children, Al told Mr. White that there were some other "ideas that there might be others, but he hadn't heard about that for years". Al identified Richard and Shirley as those "ideas". To Mr. White, he denied that they were his children.

[70] With regard to his assets, Al told Mr. White that he owned some real estate in Stewart – a couple of lots where his house was and several other lots – and provided tax notices detailing those properties. He told Mr. White that he owned a vehicle, had two bank accounts at the Royal Bank, and a Sun Life Insurance policy. He told Mr. White that Barbara was still the named beneficiary of his RRIF, so Mr. White made a note that would need to be updated. Al identified the private companies in which he had an interest as well – Stewart Bulk Terminals (with a "structure around that"), Soucie Construction, and Portland Ventures.

[71] With regard to his goals, Al told Mr. White that he wanted "everything in Stewart" to go to Roland and Daniel and the "bank accounts" to go to Holly. Mr. White clarified with him that "everything in Stewart" meant the companies, the real

estate, a boat and a vehicle. He also clarified that the “bank accounts” included not only the bank accounts at the Royal Bank, but the RRIF and the insurance.

[72] With regard to estate planning options, Mr. White discussed who should be the trustees to manage things and Al determined it would be best to make sure that Roland and Daniel dealt with any company interests because they knew the companies, but that Holly would be able to deal with everything else. They then discussed powers of attorney. Mr. White explained that his estate plan only covers what happens upon his death, but that it was also necessary during his lifetime to appoint someone to be able to make financial decisions and other decisions for him if he became unable to make those decisions. Again, Al identified that with the companies it made sense that Roland and Daniel be given power of attorney because they knew the company business.

[73] The men then discussed the multiple will or trust options. Mr. White told him that based on what his goals were, he had two options that made sense. He could do the multiple will option that Barbara had done, which would save some probate fees on the companies, but would still involve a probate process for other things that he held in his name. However, he told Al that he recommended the second option, the alter ego trust. He advised Al this was the better option for him for a number of reasons. He explained that it would mean avoiding the probate process for all of his assets, would be more private, and would avoid potential challenges to any will by either Holly, Daniel or Roland if the value of their inheritances ended up being different or by other biological children not included in the will.

[74] Al expressed two concerns about challenges to any will. First, he was concerned that as between Roland, Daniel and Holly, the company value going to Roland and Daniel may be different than the personal value of the assets going to Holly, potentially exposing his estate to a wills variation challenge. Second, Al was concerned about a potential challenge from “those other ideas out there" (a reference to Richard and Shirley). Having his assets within a trust would keep them outside his estate and therefore outside the reach of any wills variation claim.

[75] Mr. White told Al that if he decided to settle a trust, it would mean that his assets would be owned by the trust throughout the rest of his life, but that he would be the trustee of the trust and would have full control over it. He explained tax aspects and requirements of the trust. He also explained that if Al decided to set up the trust, they would then look at each of his assets to determine the best way to have them be part of the trust.

[76] Al then decided to settle a trust, making it the main feature of his estate plan and now, the main issue in this lawsuit. He gave Mr. White instructions accordingly. With Al's decision made, Mr. White then discussed with him other features of the estate plan that involved the mechanics of making it all work, minimizing tax implications and difficulty.

[77] With respect to his properties in Stewart, Mr. White advised Al to consider continuing to hold the titles in his name, but to execute a bare trust agreement declaring that he holds the property on behalf of the Trust in order to avoid the provincial tax consequences of transferring title from his name to the Trust's name as trustee. As well, given Al's intention that these properties go to his sons, Mr. White recommended taking it one step further and adding Daniel as a joint tenant on each of the properties and having them both hold the properties as bare trustees for the Trust. He explained that this would allow Al's name, when he died, to be removed from title, with Daniel continuing to hold the property on behalf of the Trust. Daniel would then carry out the Trust instructions to have the properties go to him and Roland.

[78] With respect to the Royal Bank account in his name, Mr. White suggested that they do something similar – add Holly as a joint owner and have them both execute a bare trust agreement declaring that the two owned the account on behalf of the Trust. This way, when Al passed, Holly would take over legal control of the account as bare trustee for the Trust and carry out the Trust instructions, which would ultimately see her receive the funds at the end of the day. With respect to the

RRIF and the insurance, he suggested that Al change the designated beneficiary (still Barbara at the time) to Holly.

[79] Once Mr. White received those instructions, he began the process of drafting the necessary documents. Under cover of letter of September 27, 2013, he sent draft copies of some of those documents (the Will, Powers of Attorney, a Health Care Letter and the Trust Agreement) to Al for his review. In the letter, Mr. White's office also advised Al that they had prepared additional documents to accompany the Trust Agreement, including land transfer documents to transfer the properties in Stewart into joint tenancy with Daniel and documents to transfer the properties to the Trust upon his death or his instruction to do so. Al was asked to review the draft documents and contact Mr. White's office with any questions, concerns or changes before their scheduled signing appointment on October 18, 2013.

[80] Al travelled to Kelowna for this appointment. Again, Holly took her father to this meeting, but she remained outside while the men met. When Al first arrived, he was provided with the draft documents again for his review. After he did so, the men discussed again Al's overall estate planning goals. Al confirmed his previous instructions. Mr. White then explained how the documents he had prepared would enable his wishes to be carried out.

[81] Mr. White then took Al through the provisions of each document and Al confirmed to him that they captured what he wanted. In accordance with his usual practice, Mr. White started with the Will and went through each of its provisions, confirming that each accorded with his wishes. Again, Mr. White explained to Al that its provisions mirrored the distributions in the Trust and that Al's plan was that nothing would "be under the will" and "it's all under the trust". Mr. White explained to Al that the Will was "there as a back up" only and that its distribution was consistent with that of the Trust in the event that he obtained an asset in the future that was not in the Trust at the time of his death.

[82] After describing and going through the provisions of the Will, Mr. White took Al to the Trust Agreement. He explained that the document was the Trust, where his

assets would be placed, and that it was a lengthier document than the Will because the Trust not only had to deal with disposition upon his death, but what was to occur during Al's lifetime. Mr. White took Al through the provisions of the document, confirming that each accorded with his wishes. Al confirmed his intention to put everything in the Trust – that he wanted no assets outside the Trust. They went through Schedule "A", which identified his original contribution to the Trust, and Al confirmed that was what he wanted. Mr. White testified that Al appeared to be following him and understanding as he explained each of the provisions, the general workings of the Trust and other documents Mr. White prepared.

[83] By way of an Agreed Statement of Facts, the parties agree that Al signed the following documents in Mr. White's office on October 18, 2013:

a. The Will;

b. The Trust;

c. Bare Trust Agreement (Land);

d. Bare Trust Agreement (Investments);

e. Form A Transfers from Elphege George Joseph Soucie to Al Joseph Soucie and Daniel James Soucie as joint tenants for the following parcels of land:

    i. Lot A, District Lot 468, Cassiar District, Plan 12157, PID: 011-926-465, 110 5th Avenue;

f. Form A Transfers from Al Joseph Soucie to Al Joseph Soucie and Daniel James Soucie as joint tenants for the following parcels of land:

    i. Lot 17, Block 13, District Lot 468, Cassiar District, Plan 905, PID: 016-731-158, 111/113 4th Avenue;

    ii Lot 6, Block 13, District Lot 468, Cassiar District, [Plan 905], PID: 014-796-775, 112/116 5th Avenue;

    iii Lot 7, Block 13, District Lot 468, Cassiar District, Plan 905, PID: 014-796759, 112/116 5th Avenue;

    iv Lot 16, Block 13, District Lot 468, Cassiar District, Plan 905, PID: 016-731140, 111/113 4th Avenue;

g. Form A Transfers from Elphege Soucie to Al Joseph Soucie and Daniel James Soucie as joint tenants for the following parcels of land:

    i. Lot 4, Block 1, District Lot 468, Cassiar District, Plan 905, PID: 014-812258, 106/108 9th Avenue;

ii. Lot 3, Block 1, District Lot 468, Cassiar District, Plan 905, PID: 014-812240, 106/108 9th Avenue;

iii. Lot 4, Block 13, District Lot 468, Cassiar District, Plan 905, PID: 014-803984, 108/110 5th Avenue;

iv. Lot 5, Block 13, District Lot 468, Cassiar District, Plan 905, PID: 014-803968, 108/110 5th Avenue;

h. Form A Transfers from Elphege George Soucie to Al Joseph Soucie and Daniel James Soucie as joint tenants for the following parcels of land:

i. Block C of District Lot 6608, Cassiar District, PID: 017-378-028.

i. Form A Transfers from Al Joseph Soucie and Daniel James Soucie to Al Joseph Soucie in trust and Daniel James Soucie in trust for the following parcels of land:

i. Lot A, District Lot 468, Cassiar District, Plan 12157, PID: 011-926-465, 110 5th Avenue;

ii. Lot 7, Block 13, District Lot 468, Cassiar District, Plan 905, PID: 014-796759, 112/116 5th Avenue;

iii. Lot 8 Block 13 District Lot 468, Cassiar District Plan 905, PID: 014-796-783, 112/116 5th Avenue;

iv. Lot 6 Block 13 District Lot 468 Cassiar District Plan 905, PID: 014-796-775, 112/116 5th Avenue;

v. Lot 5, Block 13, District Lot 468, Cassiar District, Plan 905, PID: 014-803968, 108/110 5th Avenue;

vi. Lot 3, Block 1, District Lot 468, Cassiar District, Plan 905, POD: 014-812240, 106/108 9th Avenue;

vii. Lot 4, Block 13, District Lot 468, Cassiar District, Plan 905, PID: 014-803984, 108/110 5th Avenue;

viii. Lot 4, Block 1, District Lot 468, Cassiar District, Plan 905, PID: 014-812258, 106/108 9th Avenue;

ix. Lot 16, Block 13, District Lot 468, Cassiar District, Plan 905, PID: 016-731140, 111/113 4th Avenue;

x. Lot 17, Block 13, District Lot 468, Cassiar District, Plan 905, PID: 016-731158, 111/113 4th Avenue;

xi. Block C of District Lot 6608, Cassiar District, PID: 017-378-028.

j. Letter of Direction by Al Joseph Soucie to Geoffrey William White in respect of the Form A Transfers.

[84] The evidence reveals that Al also signed a Healthcare Letter and four Powers of Attorney that day as well.

[85] After Al executed all of the above documents, Mr. White invited Holly into his office. He reviewed the Bare Trust Agreement (Investments) with her and she signed it as well. Through this agreement, Holly and Al declared that they held any and all interest in all of Al's Royal Bank of Canada bank accounts and investments (including accounts No. 68883712 and No. 909513483) in trust for the trustee of the Trust.

[86] Al was given copies of all of the documents at the conclusion of the meeting. He was to take some follow-up steps directly with RBC, including changing the designated beneficiary of the RRIF to Holly and adding Holly's name to his account. He was also to make inquiries about the status of any Sun Life Insurance policy shares. The company's accountant was to be tasked with addressing best options to minimize tax consequences regarding the private companies.

[87] Again, the central feature of Al's estate plan was the Trust. Although I will be discussing particular provisions in the course of my analysis of the issues, I will pause here to outline the Trust's structure and some of its essential features and provisions.

[88] The Trust is a "alter ego trust" as defined by the terms of the *Income Tax Act,* R.S.C. 1985, c. 1 (5th Supp.) [*ITA*]. The terms of the Trust provide that Al was the settlor and the trustee. During his lifetime, all of the income generated by the Trust would be payable to him and the trustee also had discretion to allocate capital to Al. No one other than Al was entitled to any of the capital during his lifetime.

[89] The Trust Agreement is organized into seven parts, with four schedules ("A" through "D") attached.

[90] Part 1 of the Trust Agreement deals with creation of the Trust. It provides, in part:

> **1. CREATION OF THE TRUST**
>
> …
>
> **1.2 Settlement of Trust.** The Settlor has settled upon the Trustee, and the Trustee acknowledges that the Settlor has settled upon him, property described in Schedule "A".
>
> **1.3 Acceptance of the Trust.** The Trustee, by joining in the execution of this Trust Agreement, signifies the Trustee's acceptance of this Trust and the duties and obligations contained herein and declares that he holds the property described in Schedule "A" pursuant to this Trust Agreement.
>
> **1.4 Further Settlement.** Property or assets may be settled upon the Trust with the prior consent of the Trustee from any person, corporation, or trust.
>
> …

[91] Part 2 deals with interpretation and defines certain terms, including what is meant by "Trust Property":

> **2. INTERPRETATION**
>
> **2.1 Definition.** For the purposes of this Trust Agreement:
>
> …
>
> (k) "Trust Property" means:
>
> (i) the property originally contributed to the Trust as described in Schedule "A";
>
> (ii) all property hereafter paid or transferred to or otherwise vested in and accepted by the Trustee as additions to the Trust Property; and
>
> (iii) all money, investments, and other property from time to time representing the property originally contributed to the Trust and the said additions and accumulations or any part or parts thereof respectively.

[92] Since the original contribution to the Trust is to be found in Schedule "A", for convenience I will set it out here.

[93] Schedule "A" provides:

> **ORIGINAL CONTRIBUTION**
>
> $5.00
>
> Any all rights and beneficial interest in and to all property owned by Al, whether personal or real, tangible or intangible, including any interest Al owns

> in the Companies, the Stewart Properties, any bank account or investment account, and items of personal, domestic, and household use.

[94] A copy of a five dollar bill appears below the preceding paragraph.

[95] Parts 3 of the Trust Agreement deals with the purpose of the Trust, Part 4 outlines the powers, rights, duties and privileges of the Trustee and Part 5 covers the retirement, replacement and appointment of the Trustee. In this part, within the clause dealing with appointment of replacement trustee (clause 5.3), the term "the Companies" is defined. Clause 5.3 provides:

> **5.3** **Appointment of Replacement Trustee**. Upon the occurrence of any of the following events in respect of Al:
>
> (a) death;
>
> (b) being incapable of managing his affairs as evidence by a letter from a medical doctor confirming that; or
>
> (c) not willing to carry on as a Trustee hereunder;
>
> then **Holly**….shall be the Trustee of this Trust in the place of Al; provided that Al's son **Roland**… and Al's son **Daniel**…, or either one alone if the other is unwilling or unable to act or continue to act, shall be the Special Trustees of this Trust for all matters in connection with all securities of private companies or partnerships (which without limiting the generality of the foregoing, shall include shares, bonds, debentures, notes, receivable, book entries, amounts owing to the Trust, investments in and all other interests in private companies) the Trust may own legally or beneficially at the time of Al's death, including but not limited to:
>
> - **Soucie Construction Ltd**.;
> - **Portland Ventures Ltd.**;
> - **542088 B.C. Ltd.**;
> - **466497 B.C. Ltd.**;
> - **Stewart Bulk Terminals Ltd.**; and
> - **GCRD Holdings Ltd.**;
>
> (the "**Companies**");
>
> and any company which is a successor to any of the Companies or has amalgamated or as a result of any reorganization become a part thereof, and does not include any shares or other interest the Trust may own of a publicly traded company. The Special Trustees shall have all the same powers in respect of the Trust's interest in the Companies as are provided to the Trustee in respect of the Trust.

[96] Part 6 deals with trustee procedures and Part 7 covers general matters.

[97] I have already set out Schedule "A". Schedule "B" sets out the powers, rights and duties of the trustee, Schedule "C" the privileges of the trustee, and Schedule "D" sets out the division of Trust property upon Al's death.

[98] Schedule "D" organizes the Trust property to be divided into five categories: Articles, Investments, the Companies, the Stewart Properties, and the Residue. It provides, in part:

> **UPON THE DIVISION DATE, THE TRUSTEE SHALL:**
>
> ***Articles***
>
> 1. To the extent that the Trustee decides the following articles have not been distributed under Al's Will, divide any automobiles, boats and accessories the Trust may own at the time of Al's death between Al's sons **Roland** and **Daniel**, as they may decide.
> 2. Give any remaining items of personal, domestic, and household use or ornament which are held by the Trust (the "**Articles**") to such persons as the Trustee decides. Any items that are not distributed will become part of the residue of the Trust Property.
>
> …
>
> ***Investments***
>
> 4. Give any interest the Trust may have in any bank account or investment account (including but not limited to any GICs held with the Royal Bank of Canada) and all benefits payable in the event of Al's death under any insurance policies owned by the Trust to Al's daughter **Holly**… if she is then alive;…
>
> ***The Companies***
>
> 5. Equally divide any interest the Trust may own in the Companies (as defined in paragraph 5.3) (including but not limited to shares and shareholder loans) between Al's sons **Roland** and **Daniel**;…
>
> ***The Stewart Properties***
>
> 6. Equally divide any interest the Trust may own in lands and buildings located in Stewart, British Columbia, between Al's sons **Roland** and **Daniel**. As of the date of this Trust Agreement, such properties located in Stewart, British Columbia may include (but are not limited to) the following (for the sake of convenience, I will simply refer to their legal descriptions):
>
> - Lot 3, Block 1, District Lot 468, Cassiar District, Plan 905; PID: 014-812-240;
> - Lot 4, Block 1, District Lot 468, Cassiar District, Plan 905; PID: 014-812-258;

- Lot 5, Block 13, District Lot 468, Cassiar District, Plan 905; PID: 014-803-968;
- Lot 4, Block 13, District Lot 468, Cassiar District, Plan 905; PID: 014-803-984;
- Lot A, District Lot 468, Cassiar District, Plan 12157; PID: 011-926-465;
- Lot 16, Block 13, District Lot 468, Cassiar District, Plan 905, issued for industrial and storage purposes, Lease/Permit/Licence # 636010; PID: 016-731-140;
- Lot 17, Block 13, District Lot 468, Cassiar District, Plan 905; PID: 016-731-158;
- Lot 7, Block 13, District Lot 468, Cassiar District, Plan 905; PID: 014-796-759;
- Lot 6, Block 13, District Lot 468, Cassiar District; PID: 014-796-775;
- Lot 8, Block 13, District Lot 468, Cassiar District, Plan 905; PID: 014-796-783; and
- Block C of District Lot 6608, Cassiar District; PID: 017-378-028

(the "**Stewart Properties**");

…

Residue

7. Divide the residue of the Trust Property equally between Al's son, Roland and Al's son Daniel, if they are alive on the Division Date….

…

[99] The provisions in Schedule "D" all provide that if any of Holly, Roland or Daniel were not alive on the Division Date, then his/her issue would take his/her share per stirpes.

[100] The Will, in summary, provides for parallel appointments of Holly as the executor and Roland and Daniel as special trustees for the private companies and for distributions that parallels the distributions outlined in the Trust.

[101] By way of an Agreed Statement of Facts, the parties agree that on October 18, 2013, the shareholdings of the private companies (reflecting the effected transfers to Roland and Daniel as provided in Barbara's secondary will to her sons), were as follows:

Soucie Construction

Shareholder		Class A Voting Common	Class C Voting Preferred
a.	Daniel Soucie	75	43
b.	Roland Soucie	75	43
c.	Al Joseph Soucie	50	220
	Total	**200**	**306**

088

Shareholder		Class A Voting Common	Class C Voting Preferred
a.	Al Joseph Soucie	50	175
b.	Roland Soucie	75	nil
c.	Daniel Soucie	75	nil
	Total	**200**	**175**

497

Shareholder		Class A Voting Common	Class B non-voting participating	Class C non-voting participating
a.	Al Soucie	100	nil	nil
b.	GCRD	100	175	50
c.	088	nil	175	50
d.	David Dixon	nil	nil	25
e.	David Lane	nil	nil	25
	Total	**200**	**350**	**150**

Portland Ventures Ltd.

Shareholder		Class A Voting Common
a.	Daniel Soucie	75
b.	Roland Soucie	75
c.	Al Soucie	50
	Total	**200**

Stewart Bulk Terminals

Shareholder		Common shares
a.	497	20,000
	Total	**20,000**

[102] The parties also agree that on October 18, 2013, Al held leasehold interests in the following Crown land in Stewart:

a. PID: 016-731-b. PID: 016-731-140

[103] On October 18, 2013, Al did not personally own shares in Stewart Bulk Terminals or in GCRD.

[104] On October 18, 2013, Al did not sign a transfer document giving Daniel an interest in the parcel known and described as Lot 5 Block 13 DL 468 Cassiar District Plan 905, PID: 014-796-783, which was a parcel owned by Al in fee simple on that date.

[105] For the purposes of this trial, the parties have agreed that the value of Al's contested assets on October 18, 2013 were as follows:

Asset	**Approximate market value on October 18,2013**
Real Properties - tax assessed values 2013 (by PID)	
1. 014-812-240	$400
2. 014-812-258	$400
3. 014-796-759	$9,000
4. 014-796-775	$9,000
5. 014-796-783	$9,000
6. 014-803-984	$11,000
7. 014-803-968	$11,000
8. 011-926-465	$82,600
9. 017-378-028	$13,900
10. 016-731-158 (leasehold)	$14,000
11. 016-731-140 (leasehold)	$14,000
Real Properties Subtotal	$174,300
RBC Assets	
1. Personal Direct Account in the name of Al Soucie	$371,919
2. RRIF	$110,572
3. RBC Direct Investment Account	$41,860
RBC Assets Subtotal	$524,351
Corporate Assets - estimated values	**Range**

provided by Spence Valuation Group	**Low**	**High**
1. Soucie Construction Ltd.	$1,752,000	$1,806,000
2. 542088	$ 873,000	$ 918,000
3. 466497	$ 28,000	$ 30,000
4. Portland Ventures Ltd.	$ 100,000	$ 101,250
Corporate Assets Subtotal	$2,753,000 to	$2,866,500

Other Financial	
1. CPP Death Benefit	$2,500
2. WCB Pension (net)	$1,500
3. IOUC Death Benefit (net)	$2,000
4. Sun Life Investments	$31,075
Other Financial - subtotal	$37,075
Chattels	
1. Boat	$60,000
2. Car	$2,500
3. Other (household, etc)	Unknown
Chattels - subtotal	$62,500
Total approximate value	**$3,551,226 to $3,664,726**

[106] After leaving Mr. White's office on October 18, 2013, Al considered going directly to the Royal Bank to designate Holly the beneficiary of his RRIF and add her name to his bank account, but decided to do so at a later date, after his impending vacation. He decided on this course of action because October 18 was a Friday. He was tired after his meeting with Mr. White and told Holly so. They could have gone to the bank the following day on Saturday, but they had plans to travel to Kamloops to visit with Holly's son and his family before Al left on a pre-planned vacation out of the country with Mr. Baker that Monday. Al decided to keep his plans to visit his grandchildren and great-grandchildren in Kamloops and go to the bank when he returned from vacation.

[107] After spending the weekend with family, Holly took her father to the Kamloops airport on Monday October 21, 2013 to catch the first of his flights. He tragically and

unexpected passed away late that night or early the next morning in Richmond, on route to his vacation destination.

[108] Shirley learned of Al's death from Noel Baker's daughter, Linda, within about a month of Al's death. She received no communication from Roland, Daniel or Holly in this regard.

Post-Death Events

[109] Following Al's unexpected death, Holly, Roland and Daniel took steps to deal with Al's assets. They all candidly acknowledge that they had no real understanding of what was Trust property and what was estate property and/or the law in this area. They relied mostly on lawyers and their own judgment. The offices of three lawyers were involved – Mr. White out of Kelowna, Don Brown out of Terrace and Josephine Nadel, Q.C. out of Vancouver.

[110] Mr. White's office was notified of Al's death a few days after he died. As so little time had passed since Al had executed his estate planning documents, Mr. White had not yet been able to complete the registrations of the transfers to add Daniel as a joint tenant or have Daniel execute the Bare Trust Agreement (Land). Mr. White had contact with Holly primarily to make arrangements to complete the registrations and then take the subsequent steps to help the Trust distribution.

[111] Specifically, in relation to the RBC bank accounts, Mr. White advised Holly that as Al had declared the accounts to be in bare trust, his opinion was that Al was holding the accounts on behalf of the Trust at the time of his death. He advised Holly that she had two options:

(i) go to court and seek a declaration based on the Trust agreement that Al was holding the funds as bare trustee and then seek an order that RBC distribute the funds to the new trustee of the Trust (her), or

(ii) proceed as Al's legal representative as executor under the Will, using the probate process, and use that authority to instruct the bank to pay the account proceeds into the Trust to be dealt with under the terms of the Trust.

[112] Mr. White advised Holly of the pros and cons of these options and she chose the second option as the less expensive, faster and more convenient of the two.

[113] Mr. White handled the probate process. As part of her probate application, Mr. White prepared two affidavits for Holly, both of which were executed on January 16, 2014 and filed in the Kelowna Court Registry on January 28, 2014.

[114] To her first affidavit, Holly attached a copy of the Will as Exhibit "A" and a Statement of the Estate's Assets, Liabilities and Distribution as Exhibit "B".

[115] In Exhibit "B", Holly identified only one parcel of real property – Lot 8 Block 13, CL 468 Cassiar District Plan 905, PID: 014-796-783 (with a value of $9,000.00) as an asset of the estate. Other than personal effects, such as household furnishings and clothing (with a value of zero), she identified only monies on deposit with the Royal Bank of Canada as Al's only personal property in the estate. She specifically identified Account No. 5440-7086317 (with a value of $371,977.69) and RRIF Account No. 529971749 (with a value of $110,572.25). Next to these two accounts was placed an asterisk, directing the reader to the following information immediately below:

> *Note: accounts were subject to a Declaration of Trust in favour of the Al Joseph Soucie Trust, dated October 18, 2013, but are being declared herein for probate purposes.

[116] In the body of her first affidavit, Holly explained why she did not identify Al's interests in the various private companies as assets remaining in the estate. She deposed:

> 8) Paragraph 3 of the Will mentions interests in certain private companies. All of these interests were transferred to the Al Joseph Soucie Trust and are not part of the estate.

[117] Holly also explained in the body of her first affidavit why she identified only one of the 11 properties identified in the Will as an asset remaining in the estate. She deposed:

> 9) In the Deceased's Will, he lists the following properties that he owned at the time of executing his Will:
>
> a) Lot 3 Block 1 District Lot 468 Cassiar District Plan 905;
>
> b) Lot 4 Block 1 District Lot 468 Cassiar District Plan 905;
>
> c) Lot 5 Block 13 District Lot 468 Cassiar District Plan 905;
>
> d) Lot 4 Block 13 District Lot 468 Cassiar District Plan 905;
>
> e) Lot A District Lot 468 Cassiar District Plan 12157;
>
> f) Lot 16 Block 13 District Lot 468 Cassiar District Plan 905;
>
> g) Lot 17 Block 13 District Lot 468 Cassiar District Plan 905;
>
> h) Lot 7 Block 13 District Lot 468 Cassiar District Plan 905;
>
> i) Lot 6 Block 13 District Lot 468 Cassiar District Plan 905;
>
> j) Lot 8 Block 13 District Lot 468 Cassiar District Plan 905;
>
> k) Block C of District Lot 6608 Cassiar District;
>
> Of these properties, the only property remaining in the Deceased's estate is Lot 8 Block 13 District Lot 468 Cassiar District Plan 905. The other properties were transferred to the Al Joseph Soucie Trust (as mentioned at paragraph 8(b) of the Will).

[118] Mr. White explained why this particular piece of property, Lot 8, was singled out and dealt with in this fashion. He explained that at the time Al signed all Form As relating to the properties in which Daniel was to be added as a joint tenant, his office missed preparing the Form A for Lot 8. Although Lot 8 was identified in the Trust (and the Bare Trust Agreement (Land)) as Trust property, his office simply overlooked preparing a Form A transfer document in relation to it.

[119] In Holly's second affidavit, she addressed the notice requirements under s. 112 of the *Estate Administration Act*, R.S.B.C. 1996, c. 122 (since repealed, but applicable here due to the date of Al's death). Holly deposed that she was applying for probate of the Will and that she had caused to be mailed a notice, along with a copy of the Will, to each of Roland and Daniel, as the only beneficiaries. She further deposed:

> 3) To the best of my knowledge the only people who would be entitled to share in the estate on an intestacy or partial intestacy are the applicant; Roland Lawrence Soucie, and Daniel James Soucie, described in paragraph 2 above.
>
> 4) To the best of my knowledge the only people entitled to apply under the Wills Variation Act with respect to the will are the applicant; Roland Lawrence Soucie, and Daniel James Soucie, described in paragraph 2 above.
>
> …
>
> 7) To the best of my knowledge there are no other people entitled to share in the estate.

[120] Why Holly did not provide notice to Shirley was an area of controversy.

[121] Before Holly applied for probate, she and Mr. White discussed sending a notice to Shirley. Mr. White explained to Holly that she had an obligation to send the notice out to anyone who would be a person that could challenge the Will under the *WVA* or as an intestacy, which would include any of Al's children, which includes biological children. With respect to Shirley and Richard, Mr. White told Holly what Al told him – that there were "these ideas" of other children, but that Al denied it. Mr. White also told Holly there was no other evidence supporting the idea that Shirley or Richard were his children.

[122] In the end, Mr. White advised Holly that the decision was hers. He told her that she could decide not to serve them and depose to the "best of her belief", but advised that the cautious route would be to serve them. He explained that if she did not provide them with notice there was a very real possibility that if it turned out they were Al's biological children they would be able to "come back and say that they should have been served".

[123] Other than in relation to her mother's will, Holly had never been an executor of a will before. She had never settled a trust and had never been a trustee. After receiving Mr. White's advice, she discussed the matter of providing notice to Shirley with her brothers. Holly testified, and I accept, that she simply did not know if Shirley was entitled to notice. Holly did not have a lot of information. Before this lawsuit, she had never met Shirley. She was aware that Shirley had visited with the family in

Stewart in 1990, but could not recall any further discussions about Shirley after this, except when Al was doing his estate planning in 2013 and he told Holly there was no proof that Shirley was his child. Mr. White had told her Al denied Shirley was his biological child.

[124] Given the information she had, she and her brothers felt that their father would not have wanted Shirley to have notice. Holly instructed Mr. White not to include Shirley in those entitled to notice and that, to the best of her knowledge, the only children of Al were herself, Roland and Daniel.

[125] Although I think now, with the benefit of hindsight (and receipt of the DNA confirmation about Shirley's parentage), Holly would have made a different decision, I see nothing nefarious in the decision she made at the time.

[126] In the end, Shirley did not receive notice of the application for probate. A grant of probate was issued on February 20, 2014.

[127] On February 26, 2014, Mr. White wrote to RBC, enclosing a notarized copy of the Grant of Letters Probate of the Will and a Declaration of Transmission for Estates signed by Holly as the Executor of the Will, directing RBC to payout the funds held in the bank account and the RRIF account. The Declaration of Transmission form, prepared by RBC, was filled out by Mr. White's office and Holly's signature was taken by a paralegal in Mr. White's office. The form directed RBC to payout the deposit account and the RRIF account and issue a draft "to the Estate of Al Joseph Soucie". Mr. White's letter asked that the proceeds be made payable to his law corporation, "in Trust for the Estate of Al Joseph Soucie".

[128] Mr. White was asked why he requested the draft be payable to the estate rather than the Trust. He explained that he advised Holly of the two options – go to court to seek a declaration that the funds were trust assets under the Trust and seek an order that RBC release the funds or have Holly appointed Al's legal representative and use that authority to compel the RBC to transfer the legal interest in the funds over to the estate. Mr. White held the view that the estate then became

the bare trustee holding the funds on behalf of the Trust and Holly, as the executrix, was the legal representative to do that. From his perspective, RBC did not need to know anything about the underlying bare trust arrangement. All it needed to know was that the person asking it to release the funds had the legal authority to do so.

[129] A representative of RBC wrote to Mr. White in response to his February 26, 2014 letter on April 3, 2014. The representative identified an issue regarding Holly's Declaration of Transmission seeking to have both the deposit account and the RRIF paid out to the estate. He or she correctly pointed out that although the RRIF no longer had a beneficiary designated under the plan (Barbara had been the designated beneficiary but since she predeceased Al, there was no longer a beneficiary), but the Will did contain an express designation of beneficiary – Holly. The representative wrote that if Holly, as executor, wished to proceed with her direction to settle the RRIF and have the proceeds credited to an estate bank account, she would have to provide a renunciation, in her capacity as designated beneficiary. He asked Mr. White to advise the RBC how Holly wished to proceed.

[130] Mr. White was acting for Holly at the time, but had her deal directly with the bank on some matters. Mr. White testified that the bank's letter of April 3, 2014 reminded him that the Will designated Holly as the beneficiary of the RRIF, which allowed him to tell the bank that the designation in the Will still stands, that Holly was not renouncing as designated beneficiary, and that the RRIF proceeds should be paid directly to her. Mr. White did not prepare a renunciation of this designation for Holly and, to his knowledge, Holly never signed one.

[131] Holly testified that she has no recollection of signing or providing any renunciation form and her actions support the conclusion that she did not provide any such renunciation. In response to the bank representative's letter to Mr. White asking about the renunciation, she emailed the bank representative on April 15, 2014. She identified herself not only as the executrix and trustee of her father's estate, but as the designated beneficiary of the RRIF proceeds. She wrote, in part:

> Dear Ms. Brunet:

> Re: Transfer of RRIF proceeds to the beneficiary (Estate of Al Soucie to Holly McNeil-Hay)
>
> As the executrix/trustee of my father's estate, and also the designated beneficiary, I direct you to transfer the full amount of his RRIF into my RBC bank account. This is in response to your letter to my lawyer, Geoffrey W. White Law Corporation, and following my lawyer's recommendation that I deal directly with you on this matter.

[132] Although no bank representative testified, I can reasonably infer that a representative received and accepted Holly's instructions because RBC transferred the RRIF funds into Holly's RBC account two days later, on April 17, 2014.

[133] Holly was asked in cross-examination about certain banking record entries that show RBC deposited the RRIF funds into Al's estate account on April 7, 2014 before transferring the funds into Holly's account on April 17. Holly did not know why the bank did this. No bank representative was called to testify.

[134] Mr. White also dealt with the Form A transfers for the properties that Al had signed before his death. By way of Agreed Statement of Facts, the parties agree that Form A transfers for the following parcels were registered with the Land Title Office on January 22, 2014, each registering Daniel and Al as joint tenants:

> PID: 011-926-465
> PID: 014-796-759
> PID: 014-796-775
> PID: 014-803-968
> PID: 014-803-984
> PID: 014-812-240
> PID: 014-812-258
> PID: 017-378-028

[135] They also agree that subsequently, the parcels identified as PID: 014-796-775 and PID: 014-796-759 were transferred to Daniel as a surviving joint tenant on or about May 13, 2014. The parcel described as PID: 014-796-783 was transferred to Holly in her capacity as the executrix of the estate of Al on March 6, 2014.

[136] All three of these parcels (PID: 014-796-775; PID: 014-796-759; and PID: 014-796-783) have been subsequently sold to third parties.

[137] The following six parcels remain registered today, in the name of Al and Daniel, as joint tenants:

PID: 014-926-465
PID: 014-803-968
PID: 014-803-984
PID: 014-812-240
PID: 014-812-258
PID: 017-378-028

and the plaintiff has registered Certificates of Pending Litigation on all six of these parcels.

[138] The parties also agree that although Al signed Form A transfers on October 18, 2013 in relation to the following two parcels:

PID: 016-731-158
PID: 016-731-140

these Form A transfers were never registered following his death. They were not registered because Al did not in fact own these titles in fee simple. Rather, he only held a leasehold interest in these parcels both at the date that he signed the transfer documents, and on the date he died.

[139] The parties also agree that following Al's death, in or about April of 2014, all interest in Al's corporate shares was transferred to Daniel and Roland. These transfers were prepared and executed by two different law firms, which I will discuss shortly.

[140] The parties also agree that since Al's death, 497 has re-purchased the shares of GCRD, David Dixon and David Lane.

[141] They also agree that in or about April 2014, Roland and Daniel undertook a substantial corporate share restructuring of Soucie Construction, 088, and Portland Ventures, including shares formerly owned by Al.

[142] Turning now to the share transfers following Al's death.

[143] Don Brown, now retired, was a lawyer who was a partner at the law firm of Warner Bandstra Brown in Terrace. In 2014, his law firm was the registered and records office for three of the companies involved in this case: Soucie Construction, 088 and Portland Ventures Ltd. His evidence was tendered, by agreement, in the form of an affidavit.

[144] Mr. Brown deposed that he believes he was provided with a copy of the Will by Roland and was asked to prepare documentation necessary to transfer shares in accordance with it. Once Mr. Brown had an opportunity to review the Will, he was uncertain about what the term "special trustees" in the Will meant in relation to Daniel and Roland and the corporate shares. He thought it would be prudent to contact Mr. White, the lawyer who drafted the Will to ask what the term meant.

[145] Although Mr. Brown deposed that he called Mr. White's office with this inquiry on March 6, 2016, I am satisfied this is a typographical error and that he actually called Mr. White's office on March 6, 2014. The correct year becomes clear in reviewing the correspondence exhibited to his affidavit. In any event, Mr. Brown was unable to reach Mr. White, but did speak with his paralegal, Mr. Rahn. He took notes of this conversation and his notes reveal that Mr. Rahn "confirmed the will was drafted appointing special Trustees for companies so the shares would pass outside of the Estate. They have probate of Al Soucie's will and did not disclose companies as asset". From this, Mr. Brown deposed that he assumed the use of the language "special trustee" was used to facilitate the passing of the shares outside of the estate. Mr. Brown recalls no discussion with Mr. Rahn about any trust instrument executed by Al and left the conversation under the impression that there were no unusual steps necessary to be taken by him in order to prepare the transfer of

shares in any other way, or to anyone else other than the beneficiaries named in the Will, Roland and Daniel.

[146] As a result, Mr. Brown prepared the share transfer documents for these three companies in the “usual way”, which he explained means in “the usual fashion that one might transfer shares to beneficiaries of a Will”. He prepared the share transfer documents for signing by Daniel and Roland as special trustees and had each of them sign the share transfer documents as such. When Mr. Brown met with Roland and Daniel to execute the transfer documents on April 10, 2014, neither mentioned anything about a trust.

[147] On April 14, 2014, Mr. Brown followed up his meeting with Roland and Daniel with three identical letters, one for each of the three companies, confirming what occurred. He wrote:

> Dear Sirs:
>
> **RE: Estate of Al Joseph Soucie - Transmission of Shares**
>
> After reviewing the Will of Al Joseph Soucie, I contacted Geoffrey White’s office to discuss your appointment as Special Trustees for all matters in connection with Portland Ventures Ltd. [0542088 BC Ltd. and Soucie Construction Ltd]. I was advised that you were appointed as Special Trustees so you could transfer the shares to yourselves as beneficiaries under the Will without including the company in the probate process.
>
> After my discussion with Geoffrey White’s office we prepared a Declaration of Transmission, and the corporate documentation required to transmit the shares to you as Special Trustees of the Will and then to Dan and Roland as beneficiaries.
>
> I met with you on April 10, 2014 at which time you reviewed and signed the Declaration of Transmission and all corporate documentation to complete the transfer of shares pursuant to the Will.
>
> We have forwarded copies of the documentation to your account Curtis Billey and enclose a copy of our letter to him for your records. Also enclosed is a copy of the updated Central Securities Register for your records.
>
> As it appears the transfer of shares is concluded we enclose our statement of account and thank you for your instructions.
>
> If you have any questions please contact me.

[148] Josephine Nadel, Q.C., is an experienced lawyer and shareholder of Owen Bird Law Corporation. Her main areas of practice are corporate law, business law,

and trusts, estates and succession law. In October 2013, her firm was the registered records office for Stewart Bulk Terminals and 497.

[149] Ms. Nadel learned of Al's death in early December 2013. She received a copy of the Will, the death certificate, and wills notice search from Mr. White's office on January 29, 2014. Unaware of the Trust, Ms. Nadel proceeded on the understanding that Al's shares would be dealt with through the authorized signatories or executors for his estate. She then prepared various corporate documents for 497 to effect various director and officer changes and as effect the transmission of shares held by Al into his estate pursuant to the terms of the Will. Roland and Daniel (and Jack Elsworth) signed the necessary documents, in her office, on January 30, 2014. These documents involved a two-step transaction: a resolution issuing the shares of Al into the name of the special trustees of the Will, and then a second resolution transferring the special trustees' shares to the beneficiaries of the Will.

[150] Neither Roland nor Daniel told Ms. Nadel about the Trust. I find there was nothing untoward in their failure to do so. They both candidly acknowledge that they did not understand the difference between Trust and estate property or the workings of these instruments.

[151] The day following the execution of these documents, Mr. White's office contacted Ms. Nadel's office to advise that Mr. White believed the shares should transfer under the Trust, not under the Will. As Ms. Nadel had no prior notice or record of the shares being owned or held by the Trust and the Central Security Register did not reflect such a thing, she prudently determined that further inquiry was required.

[152] As part of her further inquiries, Ms. Nadel obtained and considered a copy of the Trust and communicated with Mr. White. In the end result, although she was taking instructions from Mr. White and accepted his assessment, she also satisfied herself that there was sufficient documentation in the Trust deed to document the intent to transfer the shares to the Trust prior to Al's death.

[153] So satisfied, Ms. Nadel took steps to cancel the previous transfer of shares under the Will and prepare new documentation to effect the share transfers under the Trust. She then wrote to Daniel and Roland on April 2, 2014 to advise them that having learned about the Trust, they and Mr. Elsworth would have to sign revised documentation, which she enclosed.

[154] In short, new documents were prepared and signed to effect three transactions – first transferring the shares from Al personally to Al as trustee of the Trust, then transferring them from Al as trustee of the Trust to Roland and Daniel as the successor trustees of the Trust, and then finally transferring them from Roland and Daniel as successor trustees of the Trust, to Roland and Daniel as beneficiaries.

[155] In order to effect this last transfer (from the successor trustees of the Trust to the beneficiaries), Ms. Nadel prepared a document entitled “Instrument of Transfer of Shares”. She explained that such a document was not utilized to effect the first two transactions because Al had died. She was satisfied to rely upon the wording of the Trust deed in lieu of an instrument of transfer.

[156] Pursuant to these transactions, Ms. Nadel’s office prepared a revised Central Security Register reflecting the share transfers, cancellation of share certificates, and issuance of share certificates. She confirmed that she would not have prepared the documents to affect the transfer of shares had she had any concerns that the transfers offended either the *Business Corporations Act*, S.B.C. 2002, c. 57 or the *Securities Transfer Act*, S.B.C. 2007, c. 10.

[157] By way of Agreed Statement of Facts, the parties agree that a T-3 Trust Income Tax and Information return for the period from October 18, 2013 to December 31, 2013 was filed on behalf of the Trust. In the return, the Trust elected not to have the provisions of subparagraph 104(4)(a)(ii.1) of the *Income Tax Act,* R.S.C. 1985, c.1 [*ITA*] apply. The effect of the election was that a rollover into the Trust under s. 73(1) was not available, and gains were reported in Al’s personal return.

[158] The parties also agree that an Income Tax and Benefit return was filed on behalf of Al to the date of his death. The amount of tax payable was $587,300.00. The source of the funds to pay the tax to the Receiver General came from Soucie Construction.

[159] Shirley did not learn that probate had been granted for Al's estate until her counsel, Ms. Lammers, learned of it near the end of October 2014.

[160] In response to Ms. Lammers' inquiry about the matter, Mr. White wrote to Ms. Lammers on November 3, 2014 and advised that the only asset of Al's estate was an interest in a parcel of land in Stewart with an approximate value of $9,000.00. This is a reference to Lot 8. Mr. White enclosed a copy of the Grant of Probate, the Statement of Assets, Liabilities and Distribution that was attached to Holly's affidavit in support of her probate application and excerpts from the Trust (including Schedule "A"). Mr. White further explained that although there were two RBC accounts listed in the Statement of Assets, Liabilities and Distribution,

> …these accounts were transferred to an Alter Ego Trust prior to the deceased's death. They are only listed because the Deceased died before the accounts were registered at the Royal Bank in the name of the trust. The Accounts were beneficially owned by the Trust and are not part of the estate.

[161] Mr. White testified that he made two mistakes in how he handled and characterized Lot 8. First, he mistakenly failed to prepare and have Al execute its Form A transfer form on October 18, 2013 with all of the others. Second, he compounded the error when he subsequently treated and described that lot as an asset of the estate. Mr. White explained that because Lot 8 was identified as Trust property in the Trust agreement, he should have characterized it as he did the RBC accounts – as part of the Trust, but because it lacked a transfer document, declaring it through the estate.

[162] Shirley commenced this lawsuit in November 2014. By this time, most of the disputed assets had been distributed to the defendants.

[163] This concludes my chronological findings of fact. I will make additional findings in the analysis portion of these reasons as the need arises.

ISSUES

[164] The plaintiff takes the position that the Trust is void for uncertainty, specifically that it is uncertain in subject matter and/or intention. She further argues that if the Trust is found to be certain in both subject matter and intention, that it still fails because the disputed assets were not properly constituted to the Trust in any event. In either case, the plaintiff submits that the disputed assets therefore fall into Al's estate and are available for re-distribution in the context of her *WVA* claim.

[165] For different reasons, the plaintiff also argues that certain of the disputed assets, the RRIF and the real properties, did not pass outside of Al's estate and are available for re-distribution.

[166] The plaintiff acknowledges that consideration of her *WVA* claim only becomes necessary if the court finds in her favour on the above issues.

[167] With respect to her *WVA* claim, the plaintiff takes the position that Al owed her a far greater moral obligation than he owed Roland and Daniel, and owed no moral obligation to Holly. Given the overall agreed value of the contested assets at the time the Will was executed, Shirley submits that the Will ought to be varied to provide her with an award of between 60% and 65%.

[168] The defendants take the position that the Trust is valid and properly constituted and that none of the disputed assets, for any of the reasons advanced by the plaintiff, fall into Al's estate. They submit that only those assets acquired after October 18, 2013 are estate assets. They total about $6,000.00 and are far less than the estate liabilities, rendering the plaintiff's *WVA* claim moot.

[169] If the court finds in favour of the plaintiff's position on issues relating to the validity of the Trust, the defendants take the position that the plaintiff should be entitled to only a very modest award under the *WVA,* reflecting Al's only very slight, if any, moral obligation to her.

[170] With that very brief overview of the issues, I turn now to consider the central issue in this trial, the validity of the Trust.

VALIDITY OF THE TRUST

[171] Trust law has its roots in ancient common law and equity, and has evolved over the centuries as it has been employed in a diverse range of situations. Due to this diversity the concept can be difficult to explain, but at its heart a trust is a type of relationship. In *Waters' Law of Trusts in Canada*, 4th ed., by Donovan W.M. Waters, Mark R. Gillen & Lionel D. Smith (Toronto: Carswell, 2012) at 3 [*Waters' Law of Trusts*], the following definition is put forward as "one of the best":

> A trust is the relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one, and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust.

[172] This is consistent with Professor Hudson's definition of a trust set out in *Equity and Trusts*, 8th ed., (New York: Routledge, 2014) at 47:

> The following definition of a trust is given in Thomas and Hudson's *The Law of Trusts*:
>
> > The essence of a trust is the imposition of an equitable obligation on a person who is the legal owner of property (a trustee) which requires that person to act in good conscience when dealing with that property in favour of any person (the beneficiary) who has a beneficial interest recognized by equity in the property. The trustee is said to 'hold the property on trust' for the beneficiary. There are four significant elements to the trust: that it is equitable, that it provides the beneficiary with rights in property, that it also imposes obligations on the trustee, and that those obligations are fiduciary in nature.
>
> Trusts are enforced by equity and therefore the beneficiary is said to have an 'equitable interest' in the trust property (sometimes this right in a beneficiary is referred to as a 'beneficial interest'), whereas the trustee will be treated by the common law as holding the 'legal title' in the trust property, thus enabling the trustee to deal with the trust property so as to achieve the objectives of the trust. In general terms we can observe that a trustee is the officer under a trust who is obliged to carry out the terms of the trust and who owes strict fiduciary duties of the utmost good faith to the beneficiaries.

[173] Despite this common core, there is significant variation in trust relationships. A trust may be created by the intention (express or implied) of a party, or it may arise by imposition of law. A trust may come into effect during the lifetime of the trust's creator (an "*inter vivos* trust"), or may arise as a result of the creator's death (a "testamentary trust"). A trust may be for the benefit of a particular individual or series of individuals, or it may be for the benefit of a specific purpose. It may be used in straightforward situations between unsophisticated individual people, or it may be employed in complex business relationships or as part of sophisticated wealth management strategies.

[174] The particular type of trust at issue in this case is referred to as an "alter ego trust". This type of trust is defined by its tax consequences. Under the *ITA*, individuals over the age of 65 are allowed to transfer assets to this special type of *inter vivos* trust, set up exclusively for that individual's own benefit in their lifetime. At creation, the same person is generally settlor, trustee, and beneficiary. In *Waters Law of Trusts*, an alter-ego trust is explained concisely at 633:

> An "alter-ego trust" allows a person of the age of 65 or over to settle property upon an *inter vivos* trust with the right to roll the property into the trust free of capital gains as long as the settlor is entitled to receive all of the income of the trust that arises before his or her death and as long as no person except the settlor may obtain the use of any of the income or capital of the trust before the settlor's death. This allows settlors to make *inter vivos* disposition of their property that might otherwise have been made under a will.

[175] As both parties point out, *inter vivos* trusts in general, and alter-ego trusts specifically, have been recognized as legitimate estate-planning tools. In *Mawdsley v. Meshen*, 2012 BCCA 91, Newbury J.A. described the legitimate "protective" functions of corporations and trusts, including alter ego trusts, in the estate planning context this way:

> [2] Corporations and trusts also serve "protective" functions in the realm of estate planning. For example, individuals wishing to "freeze" the value of their estates may "roll over" their existing shares to new corporations, or exchange their appreciating shares for fixed-value shares, on a tax-deferred basis. The future appreciation of the corporation may then accrue to the benefit of the next generation, either directly or through trusts. In recent years, the "*alter ego* trust" has also been recognized in the *Income Tax Act* as an estate planning tool. Provided the settlor is age 65 or older, he or she

> may 'roll' assets to a trust that is for his or her sole benefit during his or her lifetime and then for the benefit of his or her chosen beneficiaries. Such trusts have several advantages: they are used to minimize or eliminate probate fees; they permit the control and management of assets located in various jurisdictions to be centralized and to 'carry on' after the settlor's death without the need for court approvals or probate; they obviate the risk of asset diminution due to incapacity or diminished capacity on the part of the settlor; and where beneficial interests are subject to the exercise of the trustee's discretion, they offer some protection from spendthrift family members, their spouses and others claiming through them: see generally M. Elena Hoffstein, *Alter Ego Trusts/Joint Partner Trusts – Tips, Traps & Planning* (2004) Ont. Tax Conf., Cdn. Tax Foundation, 12A: 1-47 at 3-4; and D.W.M. Waters, M. Gillen and Lionel Smith, *Waters' Law of Trusts in Canada* (3rd ed.), 2005, chapter 13.

[176] The onus of proof as to the existence of a valid trust lies on the person asserting it: *TLC The Land Conservancy of British Columbia (Re)*, 2014 BCSC 97 at para. 186; (appeal allowed on other grounds 2014 BCCA 473). In this case at bar, there is no dispute that the onus lies upon the defendants to establish the validity of the Trust on a balance of probabilities.

[177] Where there is no issue of capacity (as is the case here), the creation of a valid trust has two requirements. The first – declaration of trust – requires three essential characteristics, known as the "three certainties": certainty of intention, certainty of subject matter of trust property, and certainty of object. The second – constitution of the trust – requires transfer of title to the trust property to the trustee: *Gicas Estate v. Gicas*, 2014 ONCA 490 at para. 1.

[178] With regard to the first, the "three certainties", the plaintiff submits the defendants have failed to establish both certainty of subject matter of trust property and certainty of intention.

Have the Defendants Established the Three Certainties?

Legal Principles

[179] The three certainties are described in *Waters' Law of Trusts* at 140 as follows:

> For a trust to come into existence, it must have three essential characteristics. As Lord Langdale M.R. remarked in *Knight v. Knight*, in words adopted by Barker J. in *Renehan v. Malone*, and considered fundamental in

> common law in Canada, (1) the language of the alleged settlor must be imperative; (2) the subject-matter or trust property must be certain; (3) the objects of the trust must be certain. This means that the alleged settlor, whether he is giving the property on the terms of a trust or is transferring property on trust in exchange for consideration, must employ language that clearly shows his intention that the recipient should hold on trust. No trust exists if the recipient is to take absolutely, but he is merely put under a moral obligation as to what is to be done with the property. If such imperative language exists, it must, second be shown that the settlor has so clearly described the property which is to be the subject to the trust, that it can be definitely ascertained. Third, the objects of the trust must be equally and clearly delineated. There must be no uncertainty as to whether a person is, in fact, a beneficiary. If any one of these three certainties does not exist, the trust fails to come into existence or, to put it differently, is void.

[180] Certainty of subject matter requires that for a trust to be valid, the property which is subject to the trust must be clearly identifiable. In addition, the respective shares in that property to which each beneficiary is entitled must also be clearly defined.

[181] This principle was articulated in Canada in *Re: Beardmore Trusts*, [1952] 1 D.L.R. 41 (Ont. H.C.) at 46:

> For these reasons I would hold that para. 15 of the agreement was void. I have arrived at the conclusion that it is also void in that the subject-matter of the trust is not described with sufficient exactness to permit that such matter be ascertained at the time the trust was created: 33 Halsbury, 2nd ed. 1939, p. 100; Scott on Trusts, 1939, s. 76, p. 438; *The Mussoorie Bank, Limited v. Raynor* (1882), 7 App. Cas. 321; *Sprange v. Barnard et al.* (1789), 2 Bro. C.C. 585. The words of description in the latter case are of some interest: "and at his death, the remaining part of what is left, that he does not want for his own wants and use". The Court held that no valid trust could be created in such vague words.

[182] Of note, certainty of subject matter refers to conceptual certainty, not practical ease of determining subject matter: *Waters' Law of Trusts* at 164. Whatever type of property is involved, it must be ascertained or ascertainable in order to be certain. The subject matter is ascertained when it is a fixed amount or specified piece of property. It is ascertainable if there is some method or formula by which the subject matter may be ascertained: *Oosterhoff on Trusts*, 9th ed., by A. Oosterhoff, R. Chambers and M. McInnes (Thomson Reuters, 2019) at 187.

[183] Certainty of intention requires that the settlor's intention to create a trust must also be established with certainty in order for a trust to be valid. The settlor must clearly intend the recipient to hold the property in trust. While a trust can be construed from conduct alone, words are generally necessary to show intention. However, there is "no need for any technical words or expressions for the creation of a trust": *Waters' Law of Trusts* at 141. Conversely, the use of the terms "trust" and "trustee" in the originating document are probative, but not determinative, of the intention to create a trust: *Angus v. Port Hope (Municipality),* 2017 ONCA 566 at para. 104.

[184] Evidence to determine the settlor's intention is not limited to the originating document. External evidence may be taken into account to resolve ambiguities, or "where the extrinsic evidence clearly demonstrates that the words of the document do not reflect the intention of the parties": *Waters' Law of Trusts* at 143. In fact, courts have characterized a search for certainty of intention that is limited to the document alone as a "vacuous inquiry": *Antle v. R.*, 2009 TCC 465 at para. 44 (aff'd 2010 FCA 280).

[185] In addition to certainty of subject matter and intention, an express trust also requires certainty of objects. The requirement of certainty of objects refers to the fact that the beneficiaries must be sufficiently described so as to facilitate performance of the trust: *Oosterhoff on Trusts* at 202. Certainty of objects is not at issue in this case. I agree that it has been established.

[186] Of note, these certainties are reflexive, meaning that although they are each considered one at a time, "consideration of the certainty of subject matter and certainty of objects may inform (reflect back on) the matter of certainty of intention": *Angus* at para. 95 and *Giles v. Westminster Savings Credit Union*, 2006 BCSC 141 at para. 240 (aff'd 2007 BCCA 411). In other words, because the certainties are reflexive, a lack of certainty as to subject matter can reinforce a conclusion that certainty of intention is not established: *Angus* at para. 118.

[187] The foregoing principles are not in dispute. Where the parties disagree, however, is with respect to the standard to be used to determine whether a particular certainty has been established.

[188] In summary, the plaintiff submits the standard is an objective one, where the court must determine what meaning a "reasonable person" would give to the words of the document in light of the surrounding circumstances, including the conduct of the parties, at the time. In this regard, she cites as authority *Antle v. R*., 2010 FCA 280; *Tozer v. Nova Scotia and Atcon Group Inc. et al.*, 2012 NBCA 57; *Elliott (Litigation Guardian of) v. Elliott Estate*, [2008] O.J. No. 4941 and others.

[189] The plaintiff also advocates for the court to employ a "much more rigorous and stringent interpretation of language" than it would employ in cases of contractual interpretation. She says the court must "approach the resolution of ambiguities in a trust instrument with a greater degree of caution and restraint, than it would a contract". For this proposition, she cites no authority directly on point, but rather seeks to contrast the more rigorous rules that constrain the creation of a trust with those that govern the creation of a contract and asks the court to extend that rigour to its interpretation of the language of the words themselves.

[190] The defendants take a different view. They submit that rather than compare and contrast the interpretation of trust principles with principles of contractual interpretation, the proper approach should be more closely aligned with the interpretation of a will. In the wills context, the approach is subjective and involves an analytical approach commonly described as the "armchair rule", where the court is to put itself in the position of the testator at the point in time when he made the will and, from that vantage point, construe the language in the instrument in light of the surrounding facts and circumstances known to him. Like in the wills context, the defendants say that if any issues arise as to the interpretation of the Trust, the appropriate approach is to attempt to determine the settlor's intentions and give effect to those intentions to the extent permitted by law. The court should not strive to find an interpretation that would defeat the settlor's intentions.

[191] The defendants further submit that, like construction of wills, if there is any ambiguity in a trust instrument, it should be interpreted in a manner consistent with the validity of the trust, where the natural meaning of the words permits. The court should not give effect to an interpretation that would result in the trust being found invalid.

[192] The plaintiff replies that the approach advocated by the defendants is correct, but only for interpreting a trust once a valid trust is established. In other words, she distinguishes between the correct interpretive approach in deciding how to understand and administer a trust once that trust is established (a more subjective, "armchair" approach), and deciding whether a trust exists in the first place (a stricter, objective approach).

[193] I think both approaches somewhat miss the mark. It is clear from the jurisprudence that, in addition to the non-controversial legal principles I have articulated earlier, the court's task here is to "construe the agreement against the background facts to determine objectively the 'aim' of the transaction": *Mohr v. C.J.A.* (1991), 40 E.T.R. 12 (B.C.C.A.). In doing so, I am to look at all of the circumstances, not just the words of the trust deed.

[194] The Federal Court of Appeal, citing *Mohr*, held this same view in *Antle* where Noel J.A., writing for a unanimous Court, held:

> [11] It would be a surprising result if courts were bound by the formal expression of the parties and could not look to the surrounding circumstances, including the conduct of the parties, in assessing whether the intent to settle a trust is present. Indeed, in *Fraser v. Minister of National Revenue* (1991), 91 D.T.C. 5123 (Fed. T.D.) at page 5128, Reed J. stated that both the written documents and the actions of the parties were to be considered in the determination of the intention of the parties:
>
> > ... in any event, intention is determined by all of the evidence, including the conduct of the parties and the terms of the written documentation which flowed between them, and not merely on the basis of one person's subjective view.
> >
> > On appeal, ((1995), 95 D.T.C. 5684 (Fed. C.A.)), this Court reiterated that a finding of whether or not a trust has been created was to be made on the facts of the case, as evidenced by both the documents and the actions of the parties.

> [12] A test that requires one to look at all of the circumstances, and not just the words of the trust deed, is an approach that appears to have been adopted by Canadian courts generally. In *Mohr v. CJ.A*. (1991), 40 E.T.R. 12, for instance the British Columbia Court of Appeal held that (p.13):
>
> > While the words "trust", "trustees", and 'trust deed' appear from time to time in the agreement, and there is an incomprehensible reference to "a liquidation trust provision in keeping with the current Trust Act of B.C.," those words and expressions are not determinative of the issue. The task of the Court is to construe the agreement against the background facts to determine "objectively the 'aim' of the transaction".
>
> [13] This approach was also followed by the Court of Queen's Bench of Alberta in *Canada Trust Co. v. Pricewaterhouse Ltd. et al*. (2001), 2001 ABQB 555 (CanLII), 288 A.R. 387, and in *McEachren v. Royal Bank* (1990), 1990 CanLII 2621 (AB QB), 24 A.C.W.S. (3d) 731, [1991] 2 W.W.R. 702. Finally, in *Air Canada v. M&L Travel Ltd.*, 1993 CanLII 33 (SCC), [1993] 3 S.C.R. 787, a case relied upon by the appellant, the Supreme Court refers to the words of the trust deed as "evidence of intention'' and then goes on to consider not only the words but also the actions of the parties (para. 30).
>
> [My emphasis]

[195] This approach was also taken by the New Brunswick Court of Appeal in *Tozer.*

[196] In *Tozer,* the motion judge used an objective standard, considering the whole of the documentary record, in determining that certainty of intention had not been established. On appeal, it was argued that the court should have applied a subjective standard and not considered documentation and events following the creation of the instrument. The Court of Appeal dismissed the appeal and found that the motion judge correctly concluded that the three certainties must be determined based upon an objective assessment of the evidence on a balance of probabilities: paras. 13-20.

[197] Moreover, the approach articulated in *Mohr* was re-affirmed by our Court of Appeal very recently in *Law Society of British Columbia v. Brito*, 2018 BCCA 407. In this case, the chambers judge determined that the first of the three certainties, certainty of intention, to create a trust had not been established. In doing so, she articulated the applicable legal principles as follows:

> [13] The task of the court is to construe the agreements against the background facts to determine "objectively the 'aim' of the transaction": *Mohr v. C.J.A*., [1991] B.C.J. No. 209 at para. 10; *Antel v. Canada*, 2010 FCA 280 (CanLII) at para. 12.

[198] The Court of Appeal dismissed the appeal. In dismissing the ground of appeal relating to sufficiency of reasons, the Court reproduced the judge's articulation of the law above. Then, in dismissing the ground of appeal relating to whether the judge made a palpable and overriding error as to whether a trust was created, the Court identified that it was to embark on "ascertaining objectively the parties' intentions from their letters and the promissory notes that form their agreement" (para. 27) and concluded that all of the evidence "overwhelmingly supports the judge's conclusion there was no trust" (para. 37).

[199] In the end, I am satisfied that my task is to construe the agreement against the background facts to determine "objectively the 'aim' of the transaction" in accordance with the non-controversial principles I have outlined earlier. In my view, a subjective "armchair" approach that strives to give effect to the intentions of the settlor cannot be used for determining whether the three certainties exist, particularly because intention of the settlor is one of the requirements to be assessed. As well, attempting to add to the well-established principles I have articulated a "much more rigorous and stringent interpretation of language than the court would apply in cases of contractual interpretation" as the plaintiff seeks, finds no support in the authorities and is, to my mind, so vague as to be unhelpful in any event.

[200] It is with all of these principles in mind that I turn to turn to my task – to consider whether the defendants have established the two certainties at issue.

Have the Defendants Established Certainty of Subject Matter?

Positions of the Parties

[201] As I outlined earlier, certainty of subject matter refers both to certainty of trust property and to certainty of the quantum of the beneficiaries' interests. Here, the plaintiff is challenging only the former – certainty of the property that comprises the Trust.

[202] Identifying it as her strongest argument, the plaintiff submits the court should find the defendants have failed to establish certainty of the property that comprises the trust for several reasons. She argues that each factor she identifies would, on its own, be sufficient to undermine certainty of subject matter, but taken together, should make the conclusion inevitable.

[203] First and foremost, the plaintiff argues:

> 59. In the simplest of terms, the description of property in Schedule "A" is uncertain because the ownership rights that the Deceased held, with respect to "everything" cannot possibly be ascertained conclusively for each and every item the Deceased "owned".

[204] On this point, the plaintiff emphasizes that "ownership" is a complex concept, and the "catch all phrase" purporting to settle "everything" the settlor owned into the trust is not easily determinable in law. Adding to the ambiguity in the language of Schedule "A", she says, is the conceptual impossibility of transferring "everything I own", *plus $5.00*.

[205] To emphasize this uncertainty, the plaintiff submits that definitions in the Trust document that ought to help clarify the subject matter of the trust actually muddy the waters even further.

[206] For example, Schedule "A" refers to "Companies", but does not indicate where this term is defined. The plaintiff points out there is only one location in the trust document that defines "Companies", located within clause 5.3. She says that the location of clause 5.3, under the heading "Retirement, Replacement and Appointment of Replacement Trustees", makes its connection to "Companies" in Schedule "A" uncertain, but even if one could find that connection, she argues the definition in 5.3 itself is uncertain in a few ways. First, she says the definition is capable of different meanings, depending on where the words setting out the definition begin and end. Second, she argues that the list identifies specific companies in which Al held no ownership interest at all. Third, she says the definition is inclusive of corporate assets that "might" be acquired in the future.

[207] The plaintiff identifies similar uncertainties with the definition of "Stewart Properties". "Stewart Properties" is referred to in Schedule "A", but defined in Schedule "D", where 11 properties are listed, but she submits that Al actually only owned eight of them. Two of the identified parcels were in fact owned by the Provincial Crown and leased by Al and one of the described parcels was apparently set out twice, with a typographical error in the description of one of the two, so did not describe a parcel that Al actually owned. As well, she argues the definition is vague as it is framed as "the properties… may include, but are not limited to…".

[208] The plaintiff also submits that "any bank account or investment account" is unascertainable. By not particularizing such accounts by location, account number, type of account, value or any other identifier, there is no certainty of subject matter.

[209] As further evidence of the overall uncertainty of subject matter, the plaintiff points to the fact that every person who dealt with Al's assets following his death seemed confused about what was Trust property and what was not. This includes the supposed beneficiaries of the Trust as well as the multiple lawyers and paralegals involved in different capacities with the administration of these assets. This, the plaintiff says, is strong objective evidence that the identity of the Trust's subject matter was unclear.

[210] The defendants submit that all the subject matter of the Trust is certain. They emphasize that the subject matter need only be conceptually certain, not procedurally or evidentiarily so.

[211] Overall, the defendants take the position that the subject matter of the Trust at its inception was, simply, all rights and beneficial interest in and to all property owned by Al on October 18, 2013. As the property he owned at that time is known, it is ascertainable. This, the defendants submit, is conceptually certain. The law does not require that the Trust Agreement specify each and every item of property contributed to the Trust, as the plaintiff argues. They say that everything Al owned was ascertainable at the time of the creation of the Trust and the plaintiff's insinuation that ownership must be immediately apparent to the objective stranger is

incorrect and not supported by any authority. They say the plaintiff is mistaking possible procedural difficulty for conceptual uncertainty.

[212] The defendants point out that if a description of assets encompassing all of the settlor's assets is void for uncertainty of subject matter, then testamentary trusts of residue would necessarily also be void for uncertainty of subject matter, which is not the case. While testamentary trusts and *inter vivos* trusts differ in the date that the trust becomes effective, they say the principle of certainty of subject matter is the same for both. While there may be logistical difficulties in determining the subject matter of a testamentary trust, there is conceptual certainty sufficient to satisfy the requirement for certainty of subject matter. The defendants quote *Waters' Law of Trusts* at 161:

> A specific share in residuary estate is also sufficiently definite. This is demonstrably so when the trust is testamentary, because the trust, like the will, takes effect from death, and though the executors have a period thereafter during which they may wind up the estate and ultimately be able to assess the value of the residue, nevertheless the share of residue is taken to be known at the date of death.

[213] Similarly, the defendants say that the certainty of subject matter in the case at hand should be taken to be known, despite procedural complications.

[214] Further, the defendants, for detailed reasons, deny any ambiguity or uncertainty arises from inclusion of certain identified assets and/or their definitions when considered in context and in light of the whole of the evidence. However, they say that even if there were different possible interpretations that could lead the court to find part of the Trust subject matter uncertain, it does not follow that the Trust would fail completely for uncertainty. Instead, they argue the uncertain portions can be severed and the Trust remains valid as a whole.

Analysis

[215] Again, certainty of subject matter refers to conceptual certainty, not whether it is too difficult to ascertain the subject matter. Whatever type of property is involved, it must be ascertained or ascertainable at the time the Trust was created.

[216] I am satisfied the defendants have established that the description of Trust property set out in Schedule "A" is conceptually certain.

[217] For ease of reference, I will reiterate here the relevant sections of the Trust Agreement that purport to set out the subject matter of the Trust:

> **1. CREATION OF THE TRUST**
>
> …
>
> **1.2 Settlement of Trust**. The Settlor has settled upon the Trustee, and the Trustee acknowledges that the Settlor has settled upon him, property described in Schedule "A".
>
> **1.3 Acceptance of the Trust**. The Trustee, by joining in the execution of this Trust Agreement, signifies the Trustee's acceptance of this Trust and the duties and obligations contained herein and declares that he holds the property described in Schedule "A" pursuant to this Trust Agreement.

[218] Schedule "A" provides:

> **ORIGINAL CONTRIBUTION**
>
> $5.00
>
> Any all rights and beneficial interest in and to all property owned by Al, whether personal or real, tangible or intangible, including any interest Al owns in the Companies, the Stewart Properties, any bank account or investment account, and items of personal, domestic, and household use.

[219] "Trust Property" is defined as:

> **2. INTERPRETATION**
>
> **2.1 Definition**. For the purposes of this Trust Agreement:
>
> …
>
> (k) ''Trust Property'' means:
>
> (i) the property originally contributed to the Trust as described in Schedule "A";
>
> (ii) all property hereafter paid or transferred to or otherwise vested in and accepted by the Trustee as additions to the Trust Property; and
>
> (iii) all money, investments, and other property from time to time representing the property originally contributed to the Trust and the said additions and

> accumulations or any part or parts thereof respectively.

[220] This means the subject matter of the Trust consisted of "all rights and beneficial interest in and to all property owned by Al" on October 18, 2013, inclusive of any interest Al held in the Companies, the Stewart Properties, any bank account or investment account, and items of personal, domestic, and household use. If Al later transferred other property into the Trust, then such property would later become Trust property under para. 2.1(k)(ii). If any Trust properties were sold in the future, then the proceeds would become Trust property pursuant to para. 2.1(k)(iii). In other words, any property that Al acquired after October 18, 2013 would not be Trust property unless he arranged to later contribute such property to the Trust.

[221] I agree with the position taken by the defendants that it is not a requirement of certainty of subject matter that the Trust agreement specify each and every item of property contributed to the Trust. The property must either be described with sufficient certainty in the trust instrument or there must be a formula or method for identifying it. External evidence may be used to identify trust property. For example, in *Pan v. Pan Estate*, 2011 BCSC 856, Kloegman J. found that the subject matter of a trust described as funds having "been deposited in an account at CIBC", "savings from my past earnings" and "my savings in Canada" was sufficiently ascertainable to be certain. The court reached this conclusion on the basis of external evidence. The settlor had only one account in Canada, it was held at CIBC, and the funds in that account could be traced back to her past earnings.

[222] This is not a case like *Re: Beardmore Trusts* where there was conceptual uncertainty of subject matter. In that case, the settlor attempted to create an *inter vivos* trust that consisted of a percentage of his estate at the time of his death. Certainty of subject matter failed because it was impossible, at the time the purported trust came into existence, to determine the eventual value of the settlor's estate.

[223] Nor is this case like the example provided by Professor Waters in *Waters' Law of Trusts* at 164 when he writes "No one can determine what is meant by a trust of $100 plus 'bulk of my estate', for instance; the trust will remain a trust of $100." The "bulk of my estate" is not ascertainable.

[224] In the case at hand, there is no dispute about what Al owned on October 18, 2013. If there were any dispute, what he owned is easily ascertainable through the use of extrinsic evidence. Although arguably unnecessary, what he owned was nevertheless particularized in the Trust agreement with sufficient clarity that it is ascertainable.

[225] The plaintiff argues that "everything Al owns" on October 18, 2013, which includes "items of domestic, personal or household use", is unascertainable, essentially, because a reasonable outsider would be unable to determine the ownership of such property on sight. While she does not identify any actual problems in ascertaining what Al owned on October 18, 2013, she poses a hypothetical problem of a stamp collection found in Al's house that he may simply possess for another, but not own. She then asks a hypothetical question about what would happen if two neighbours each claimed to be the owner of the collection and suggests that this demonstrates that the ownership status of this item would be unascertained (or unascertainable) on October 18, 2013.

[226] Again, certainty of subject matter refers to conceptual certainty, not whether it is too difficult to ascertain the subject matter. I agree with the defendants' position that ascertainable does not mean "whether a stranger can immediately determine, on sight, the ownership of property", as the plaintiff's submissions imply. There is no dispute about what Al owned on October 18, 2013, but even if there were, the court would be able, on the basis of evidence, to objectively determine any questions of ownership.

[227] I will address each of the plaintiff's additional arguments, identifying them in the same manner as the parties identified and addressed them in submissions.

The "$5.00" Issue

[228] The plaintiff says that Schedule "A", in which Al purports to transfer everything he owned *plus* $5.00, is conceptually impossible, adding to the uncertainty of Trust property in this case. I disagree.

[229] It is clear that, on its face, Schedule "A" identifies that all property owned by Al was to be settled in the Trust. The plaintiff's argument, while creative, does not objectively make this uncertain.

[230] In any event, and as the defendants point out, in order to make her argument, the plaintiff has reversed the order of the words, as though the words "$5.00" appeared after, rather than before, the rest of the description of the property. Mr. White explained that in drafting Schedule "A", the intended meaning was that the Trust property was $5.00 *and* "any all rights and beneficial interest in and to all property owned by Al…". On a plain reading, this makes sense in that the instant Al settled the $5.00, he then held that $5.00 pursuant to the Trust, rather than personally. In the next instant, the balance of his beneficial interest in his property is dealt with.

The "Companies" Definition Issue

[231] Schedule "A" includes "the Companies" in Al's original contribution to the Trust. As I outlined earlier, clause 5.3 contains a definition of "the Companies" – Soucie Construction Ltd., Portland Ventures Ltd.; 542088 B.C. Ltd., 466497 B.C. Ltd., Stewart Bulk Terminals Ltd., and GCRD Holdings Ltd.

[232] The plaintiff argues that there are at least five "substantial problems" with the description of the "Companies" in the Trust that create ambiguity. At paragraph 76 of her written submissions, she summarizes them as follows:

> a. Clause 5.3 was not intended for the purpose of identifying the subject matter of the Trust
>
> b. It is unclear where the words that define "Companies" in clause 5.3 start and end (which would import completely different meanings);
>
> c. The definition refers to assets that the Deceased "<u>may</u> own" as opposed to what he "<u>did</u> own"; and

d. The definition refers to specific corporate assets that the Deceased did not in fact own at all;

e. The definition is inclusive of corporate assets that "might" be acquired *in the future,* but that were not owned by the Deceased on the relevant date (October 18, 2013).

[233] Overall, she argues that some or all of the above allows for a series of different possible definitions of "the Companies" seen in Schedule "A". In this regard (and with respect to both the "Stewart Properties" definition arguments, discussed below), the plaintiff seeks to draw a parallel with *Romaniuk Estate (Re)* (1986), 74 A.R. 278 (Q.B.).

[234] In *Romaniuk*, one of the issues the court was required to determine was the validity of a handwritten document purporting to be the last will and testament of Ms. Romaniuk. Found to be valid, the court then turned to several issues arising out of construction of its terms, one of which involved the testatrix attempting to create a trust for her nieces and nephews. The relevant portions of the document read:

> The rest of the contents of the house and my personal belongings are to be available to my brothers to divide among Russell and Eugene and the rest sold as well as the house and the car.
>
> The money from the sale of my house, car and other property as well as the money from my bonds and bank accounts is to be divided into four equal portions and each put into trust to be given to each of Lisa and Ryan on their each reaching their 21st birthday.

[235] The court interpreted the first paragraph to mean that Ms. Romaniuk's brothers were to take from the balance of her household property and personal effects such items as were of interest to them, with the balance to be sold. The house and the car were to be sold as well. The court found the phrase "contents of the house" was found to mean property contained in the home and "my personal belongings" to mean any of her personal chattels, whether present in the home or not.

[236] With respect to the second paragraph, which attempted to set up a trust, the court found that "my house", "car" and "my bonds" were reasonably certain when considered in context, but that the phrases "other property" and "bank accounts"

were not. In concluding “other property” was uncertain, the court considered the entire document and found two reasonably possible alternatives for the meaning of this phrase – that it covered all property she had listed in the document and not specifically devised or that it included all of the other property of the deceased, whether listed in the document or otherwise. In concluding that “bank accounts” was uncertain, the court observed that Ms. Romaniuk had listed three bank accounts in her list of assets, but that the evidence revealed that she had, at the time of preparation of the document, at least four bank accounts. The account she had not listed had a large balance. As there was no way to distinguish between these alternatives, uncertainty was found.

[237] The case at bar does not pose the same problems as were found in *Romaniuk*. When properly considered in context, the terms are not vague, nor do they allow for possible alternative interpretations of their meanings.

[238] Schedule “A” is an inclusive definition of Al’s original contribution to the Trust and includes “the Companies”. Because the definition is inclusive, it was not, strictly speaking, necessary to include the word “Companies”. However, as with the inclusion of “Stewart Properties”, I am satisfied that its inclusion does not create any conceptual uncertainty of subject matter.

[239] The term “the Companies” appears first in clause 5.3 and then in Schedule “A”. When if first appears in clause 5.3, the term is defined to identify six companies. Because it is now defined, when it appears in Schedule “A”, there is no further need to identify the companies. That its definition occurs elsewhere in the document does not create any ambiguity or uncertainty.

[240] The other potential areas of ambiguity advocated by the plaintiff disappear when one considers the context of the terms. In each case, properly understood in its context, there is no ambiguity.

[241] The context in which the term is used in clause 5.3 and Schedule “A” are different. In clause 5.3, the term “the Companies” is used in the context of the

appointment of replacement trustees. The purpose of the clause is specific – to appoint replacement trustees with respect to the interests in those companies that "the Trust may own legally or beneficially at the time of Al's death", including but not limited to "the Companies" [emphasis added]. The clause does not, as the plaintiff asserts, refer to assets that Al may own legally or beneficially at the time of Al's death. Rather, it appoints Roland and Daniel, as special trustees, to manage whatever interest the Trust may have at the time of Al's death (or incapacity or unwillingness) in "the Companies" (which may include shareholder loans as well as shares). Clause 5.3 is not limited to Al's interests in the Companies as of the date he settled the Trust, but includes any interest that he might have added to the Trust in the future, before his death.

[242] Schedule "A" sets out Al's original contribution to the Trust. It refers to "all rights and beneficial interest in and to all property owned by Al…" and includes "any interest Al owns in the Companies…". In this context, the term "the Companies" refers to an interest that Al owns when he settled the Trust. This is distinct from what the Trust may own in the future for the purpose of appointing Roland and Daniel as replacement trustees in clause 5.3. In other words, it is important to distinguish the wording of clause 5.3, which deals with any interest the Trust may own legally or beneficially at the time of Al's death, from what Al owned at the time he settled the Trust in accordance with Schedule A. When that distinction is made, there is no ambiguity or uncertainty that arises from the inclusion of "the Companies" in Schedule "A".

The "Stewart Properties" Definition Issue

[243] Again, Schedule "A" is an inclusive definition of Al's original contribution and includes the "Stewart Properties". The "Stewart Properties" are defined elsewhere in the document, in Schedule "D", so there is no need of them to be defined in Schedule "A" as well. Failure to do so does not create any ambiguity.

[244] While, strictly speaking, it may have been unnecessary to expressly refer to the "Stewart Properties" in Schedule "A", I nevertheless find that their inclusion and particularization does not lead or contribute to uncertainty of subject matter.

[245] I am unable to find the clerical error referred to by the plaintiff in one of the legal descriptions, but even if there were a clerical error, this does not make the subject-matter conceptually uncertain: *Gicas Estate* at para. 58. That Al held only a leasehold interest in two of the listed properties, rather than a "fee simple" interest like the others does not create uncertainty either. The definition of "Stewart Properties" does not purport to limit the properties to those in which Al had to a fee simple interest, as the plaintiff's submissions suggest.

[246] Nor am I troubled by the use of the words "may own" preceding the list of properties in the clause within Schedule "D". Again, context is everything.

[247] Considered in the context in which the words appear (a clause dealing with distribution of trust property upon Al's death), the use of the words "may own" merely reflects the fact that the list of property identified as the "Stewart Properties" may no longer include, at the date of Al's death, all of the properties originally contributed to the Trust, as the Trust gave the trustee the power to buy and sell Trust property. Considered in context, these words do not suggest, as the plaintiff argues, that the subject matter of the original contribution is vague or somehow seeks to include speculative, future and unascertained properties.

Use of the Word "Decide" Issue

[248] The plaintiff submits that the Trust and the Will both purport to authorize the successor trustees to "decide" what constitutes Trust property, importing more uncertainty of subject matter. She highlights the definition of the word in clause 2.1(d) and the language used in clause 1 of Schedule "D" which reads:

> **UPON THE DIVISION DATE, THE TRUSTEE SHALL:**
>
> **Articles**
>
> 1. To the extent that the Trustee decides the following articles have not been distributed under Al's Will, divide any automobiles, boats and

> accessories the Trust may own at the time of Al's death between Al's sons Roland and Daniel, as they may decide.

[249] She also highlights some of the language used in the Will, found in clauses 8(a) and 9(a), which reads:

> **Distribution**
>
> …
>
> ***To Roland and Daniel***
>
> 8(a) To the extent that you decide that such gift has not been implemented under the Al Joseph Soucie Trust, equally divide any interest I may own in the Companies (including but not limited to any shareholder loans) between my sons Roland and Daniel;
>
> …
>
> ***Residue***
>
> 9(a) To the extent that you decide the following articles have not been distributed under the Al Joseph Soucie Trust, divide any automobiles, boats and accessories I may own at the time of my death between my sons Roland and Daniel, as they may decide.
>
> …

[250] The plaintiff argues that by granting the ability of a trustee to "decide" what constitutes Trust property creates uncertainty of subject matter because it is subject to the uncertain discretion of a third party. In other words, if the Trust property were certain, there would be no need for a term extending any discretion to a third party to determine what that property is.

[251] Use of the word "decide" in Schedule "D" was a drafting error, acknowledged by Mr. White. Despite the error, I am of the view that its use does not create or contribute to any uncertainty of subject matter. I do not view the use of the word as giving, or purporting to give, the trustees or executors the ability to somehow convert Trust property into estate assets. The word "decide" in this context, more properly means something akin to "determine" or "conclude".

[252] As the defendants point out, there is no similar language in respect of any of the other assets of the Trust. In any event, what automobiles, boats and accessories Al owned on October 18, 2013 is easy to ascertain, so this clause creates no

uncertainty about what automobiles, boats and accessories were in the Trust at inception.

[253] Regarding the language of the Will, once again, context is everything. The Will deals only with any interest Al owned at the time of his death. As the defendants correctly point out, the Will cannot dispose of a beneficial interest that Al disposed of *inter vivos*, such as his contributing the beneficial interest in his property to the Trust. Once the beneficial interest is held in trust, it may only be dealt with in accordance with the terms of the Trust. The Will may be used to deal with the legal interest for property in which Al owned legal title, the beneficial interest of which is held in trust.

[254] Mr. White explained, and I accept, that the Will was used as an estate planning tool, as a "back up" plan in the event that Al acquired assets after October 18, 2013 that he did not add to the Trust. In that event, the Will was designed to dispose of Al's non-Trust assets in the same manner as the Trust property. Viewed in this overall context, I think the words used in clauses 8 and 9 of the Will mean that if Roland and Daniel decide or determine that an asset is not part of the Trust (i.e. property acquired by Al after October 18, 2013 and not contributed to the Trust), then they are to dispose of it in accordance with the provisions of the Will.

[255] Accordingly, I conclude that the use of the word 'decide' in Schedule "D" and/or in the Will does not undermine certainty of subject matter.

Handling of the Assets after Al's Death

[256] The plaintiff submits that the manner in which Al's assets were handled after his death by all of the persons involved and the apparent confusion about the identity of Trust property is strong objective evidence to support a finding that the defendants have failed to establish certainty of subject matter. I disagree.

[257] The evidence the plaintiff points to is all true. It is true that each of Holly, Daniel and Roland had (and continue to have) no understanding about these complex legal topics. They relied on lawyers, but particularly in Daniel and Roland's case, did not understand or know enough to inform their lawyers (Mr. Brown and Ms.

Nadel) about the Trust. It is also true that Mr. White made a mistake in his correspondence to counsel in describing Lot 8 as an estate asset, that Mr. White's paralegal made mistakes in various steps referring to or dealing with assets as if they were estate assets, that Mr. Brown dealt with the share transfers he was dealing with as estate assets, that Ms. Nadel's paralegal expressed uncertainty, that the corporate accountant expressed uncertainty, and that Ms. Nadel initially prepared corporate and share transfer documentation as if the Will governed.

[258] In my view, however, none of this is relevant. The understandings, beliefs and/or subsequent conduct of the parties and witnesses do not assist me with my task in determining whether the subject matter of the Trust is certain. The parties have no legal training and no experience with these matters. Mr. Brown was completely unaware of the Trust. Ms. Nadel was initially unaware of the Trust. Mr. White's error and his paralegal's mistakes occurred after the fact. Such errors cannot, in my view, affect the validity of a trust.

Segregated Subject Matter Issue

[259] The plaintiff also submits that uncertainty arises because there has been no segregation of Trust property, "making it impossible to differentiate what assets formed part of the Trust assets on October 18, 2013, and what assets may have been acquired afterwards." She argues that a "hallmark" of "certain" subject matter is that it has been segregated from other property, so as to leave no doubt as to its character or identity.

[260] The difficulty with this submission is that it is an issue, as the defendants point out, that arises if the owner of property purports to transfer only some of his assets that fit a particular description to the Trust.

[261] The plaintiff seeks to draw a parallel with an English case, *Re: London Wine Co. (Shippers) Ltd*., [1986] PCC 121. In that case, purchasers of wine (unsecured creditors) from a bankrupt wine shipping company sought to receive their bottles of wine, arguing that the company was holding their wine on trust for them. They had paid for their cases of wine, but their cases had not been segregated or identified

separately from the overall mass of inventory of wine held by the company. In these circumstances, the Court declined to declare that the seller held any of the wine in trust for the purchasers. In this regard, Oliver J. held:

> I appreciate the point taken that the subject matter is part of a homogeneous mass so that specific identity is of as little as importance as it is, for instance, in the money. Nevertheless, as it seems to me, to create a trust it must be possible to ascertain with certainty not only what the interest of the beneficiary is to be but to what property it is to attach. I cannot see how, for instance, a farmer who declares himself to be a trust of two sheep (without identifying them) can be said to have created a perfect and complete trust…And it would seem to me to be immaterial that at the time he has a flock of sheep out of which he could satisfy the interest.

[262] The defendants brought to my attention an English Court of Appeal decision, *Hunter v. Moss*, [1994] 1 W.L.R. 452 (Eng. C.A.), that declined to follow *Re: London Wine Co*. This was a case where a 5% interest in a company was claimed to be subject to a trust. Although the specific shares that were subject to the trust were not segregated or identified from the rest, the subject matter of the trust was nevertheless found to be certain.

[263] In any event, whether one agrees with the conclusion in *Re: London Wine Co.* or not, I find that the particular issue it dealt with is not present in the case at bar. Unlike a few wine bottles from homogenous mass (or two sheep from the herd, to use Oliver J.'s example), Al did not purport to transfer only some of his assets that fit a particular description to the Trust. He transferred all of his assets.

[264] In the end, and for all of these reasons, I am satisfied the defendants have established certainty of subject matter.

Have the Defendants Established Certainty of Intention?

[265] The plaintiff submits that the Trust is void for uncertainty of intention. While she does not call into question the words used in the actual Trust document, she argues that the conduct of the settlor is inconsistent with the stated intention to establish a trust. The court, says the plaintiff, must look at the conduct of the settlor as well as the words of the document to determine the settlor's true intention.

[266] In this case, the plaintiff points to a long list of behaviour by Al that she submits demonstrates that he did not truly intend to create a trust. This behaviour breaks down, roughly, into two camps: failure to complete any transactions that would have clarified and confirmed the Trust; and execution of transactions that were inconsistent with his stated intention to transfer assets into the Trust.

[267] In the first camp, the plaintiff lists many possible actions that Al could have taken, but did not. For example, she observes that Al declined to use the provisions of the *Land Title Act,* R.S.B.C. 1996, c. 250, that would have permitted him to add the notation “in trust” on the title of the properties, which he transferred to Daniel in joint tenancy instead of in trust. In addition, Al declined to take any steps to transfer the corporate shares to himself in his capacity as trustee – he did not seek the authorization of directors to make that transfer, sign any share transfers to confirm the change of beneficial ownership, or advise the directors, shareholders and solicitors of the intended change in beneficial ownership.

[268] In the second camp, the plaintiff points to Al’s execution of other documentation on the same day as his execution of the Trust. She highlights that the Will purports to deal with the same assets that had supposedly just been contributed to the Trust, and that the Powers of Attorney extend the power to deal with assets that had ostensibly just been transferred to the Trust, despite the fact that the Trust contained analogous provisions dealing with the incapacity of a trustee.

[269] Taken all together, the plaintiff says that all of this behaviour demonstrates that either Al did not intend to create a Trust, or that he initially intended to but changed his mind before the Trust was created. In the plaintiff’s words, “[t]he conduct of the Deceased demonstrated the very opposite of an ‘imperative’ intention”.

[270] I have no difficulty concluding that certainty of intention has been established in this case.

[271] The primary evidence of certainty of intention is found in the Trust agreement itself. The Trust agreement is entitled “Al Joseph Soucie Trust”. It identifies Al as both the settlor and the trustee and identifies it as an “alter ego trust” as defined by the terms of the *ITA*. The language in the Recitals is imperative:

> **WHEREAS:**
>
> A. The Settlor wishes to establish a Trust and has entered into this Trust Agreement to witness the creation of the same, to establish its terms, and to define the rights and obligations of the Trustee

[272] As the defendants emphasize, there is no other evidence that controverts this clear statement of intention. In fact, there is a large body of evidence that supports this intention.

[273] Al received legal advice about his estate planning options. Mr. White had three meetings with Al, over a period of eight months. In the first, a telephone call in February of 2013, Mr. White discussed and explained the option of a trust to meet Al’s goals. In the second, an in-person meeting in Kelowna in June, Mr. White discussed the option again and Al gave him instructions that he wanted to settle a trust. Once Mr. White received those instructions, he drafted the documents and sent draft copies of some of them, including the Trust agreement, to Al on September 27, 2013 for his review. Their third meeting was also in person in Kelowna. There, Al reviewed all of the documents again before Mr. White took him through each provision, explaining the workings of the Trust and other documents. Al confirmed that the Trust, the provisions of the Trust agreement and other documents captured what he wanted. He confirmed his intention to put everything he owned in the Trust – that he wanted no assets outside the Trust.

[274] Not only did Al expressly convey his intention to create the Trust to Mr. White after receiving comprehensive legal advice from him (including on the day he executed all of the documents), Al expressly conveyed the same intention to Roland, Daniel, and Holly as well.

[275] In my view, the Powers of Attorney and Will do not contradict or undermine the existence of certainty of intention. Rather, I think these instruments can be best

characterized as prudent estate-planning practices: the Will was intended to deal with property that Al owned at the date of his death, and could deal with assets that Al might acquire after October 18, 2013 that he did not transfer into the Trust. Similarly, Al could have acquired future assets for which a power of attorney may be required. Or, a power of attorney could be used to deal with title to property held by Al in Trust. Al received comprehensive legal advice about these instruments and their purpose, as part of his overall estate plan, before signing them. I find they are not inconsistent with Al's intention to create a trust.

[276] I hold the same view with respect to the various other documents signed by Al on October 18, 2013.

[277] As the defendants have argued, the plaintiff's position regarding the real estate documents executed by Al fails to distinguish between legal and beneficial interests. Mr. White explained that these were part of his overall estate plan for Al. His practice, and his advice to Al, was to leave the title to real property in the name of the settlor, who is also trustee, without registering the Trust on title. His purpose in doing this was to minimize property transfer tax. He explained that if the Trust were registered on title initially, property transfer tax would be payable. It would be payable again, at a later date, if Al, as trustee, decided to distribute the real property back to himself, which the terms of the Trust permit. Mr. White's advice further contemplated that title would be held jointly with Daniel to facilitate the transfer of the bare title to the parcels on Al's death. A further declaration of trust, a Bare Trust Agreement (Land), was prepared for both Al and Daniel to sign to confirm that, although the title would be held in both their names, it was subject to the terms of the Trust. Al signed this document, further confirming his intention. Daniel did not have an opportunity to sign before Al's death, but his failure to do so is irrelevant as to whether Al intended to create a trust. None of this is inconsistent with Al's intention to create a trust.

[278] As the defendants point out at paragraph 36 of their written submissions, Mr. White also prepared a second set of transfers, which Al executed, transferring title to

the Trust to allow for a future transfer of title to the Trust if it later proved to be expedient. It would have been inappropriate for Al to sign a transfer tax return in respect of a future transfer because the value of the real property could change.

[279] Similarly, Al's decision to add Holly as a joint owner of his bank accounts does not have any bearing on whether Al intended to create a trust. Mr. White explained why he advised Al that it would be preferable for the accounts to remain personal, rather than register them in the Trust. He explained the point of making the account a joint one with Holly was to facilitate the transfer of the account to Holly on Al's death. Both Holly and Al signed a Bare Trust Agreement (Investments) confirming that although the accounts were in both their names, they would hold the accounts as bare trustees, subject to the terms of the Trust. Again, as with the real estate documents, these steps were not part of the settlement of the Trust. They were simply extra steps designed to facilitate title transfer after death without having to apply for probate. Whether all of these steps are prudent or necessary is irrelevant. What matters is whether they can be seen as in any way inconsistent with certainty of intention. In my view, none of this is inconsistent with Al's intention to create a trust.

[280] The plaintiff is correct to say that Al did not complete all of the steps contemplated in his estate plan, such as adding Holly's name to his bank accounts and changing the beneficiary designation of his RRIF with the bank. None of these transactions were required to settle the Trust, but in any event, I cannot infer that his failure to perform them reflects that Al had "doubts about the whole arrangement" or that it "puts the entire intention of the settlor in doubt", as the plaintiff argues. Rather, Al's failure to complete all of the steps he planned to take is explained by the fact that he died unexpectedly within four days of settling the Trust.

[281] Given the timing of his settling the Trust (a Friday), his weekend plans with his family, his flights on Monday, and his unexpected death that Monday night/early Tuesday morning, Al simply had very little time to fully enact all of the steps his estate plan contemplated. He planned to carry out the remaining steps when he

returned from his vacation, but fate intervened. His failure to carry out these steps, in these circumstances, cannot create any uncertainty about his intention to create the Trust.

[282] The plaintiff seeks to draw an analogy with *Dusanjh v. Appleton*, 2017 BCSC 340. In that case, the deceased was a sophisticated businessman who had experience in settling trusts and was in the process of settling a joint partner trust at the time of his death. His children argued that he created a trust when he caused a corporation to create and issue certain shares. Each of the three classes of preferred shares were named after one of his children and there was some references to the children as beneficiaries in the special rights and restrictions for the shares in the articles of the company. There was no explicit trust agreement. There was, however, a will leaving the shares to his children.

[283] In those circumstances, the court rejected the petitioner's position that the special rights and restrictions of these shares created a trust in and of themselves. Noting his experience as I have identified above, the court found it doubtful that the deceased would not have inserted express language to set up a trust if that is what he intended to do. The facts in the case at bar are very different than the facts of *Dusanjh* and I see no parallel to be drawn. In our case, Al used explicit and clear language to create a trust.

[284] In the end, and for all of these reasons, I find the defendants have established certainty of intention.

Have the Defendants Established Constitution of the Trust?

[285] Once the court is satisfied that a trust is valid – that is, once satisfied of the existence of the three certainties – it remains to be proven whether the trust is actually operative. One thing is necessary to make a trust operative: the trust property must be vested in the trustee. In other words, the trust must be properly constituted. An incompletely constituted trust is, strictly speaking, not a trust at all. As summarized in *Waters' Law of Trusts* at 179, "[i]t is the shell of a trust, but it is an inoperative shell which consequently has no legal significance".

[286] The “golden rule” of proper trust constitution is that, unless “the trustees or the trust beneficiaries give value in the sense of valuable consideration for the creation of the trust, the act creating the trust and the vesting of the property in the trustee or trustees should occur at the same time”: *Waters’ Law of Trusts* at 180.

[287] Which mode of giving was intended to transfer the property into the trust has real significance. In *Milroy v. Lord* (1862), 45 E.R. 1185, the Court of Appeal in Chancery held that a court cannot substitute one method of transfer for another. Lord Turner wrote at 1189-90:

> I take the law of this Court to be well settled, that, in order to render a voluntary settlement valid and effectual, the settler must have done everything which, according to the nature of the property comprised in the settlement, was necessary to be done in order to transfer the property and render the settlement binding upon him. He may of course do this by actually transferring the property to the persons for whom he intends to provide, and the provision will then be effectual, and it will be equally effectual if he transfers the property to a trustee for the purposes of the settlement, or declares that he himself holds it in trust for those purposes; and if the property be personal, the trust may, as I apprehend, be declared either in writing or by parol; but, in order to render the settlement binding, one or other of these modes must, as I understand the law of this Court, be resorted to, for there is no equity in this Court to perfect an imperfect gift. The cases I think go further to this extent, that if the settlement is intended to be effectuated by one of the modes to which I have referred, the Court will not give effect to it by applying another of those modes. If it is intended to take effect by transfer, the Court will not hold the intended transfer to operate as a declaration of trust, for then every imperfect instrument would be made effectual by being converted into a perfect trust.

[288] Because of this rule, the court must determine by which mode of transfer the settlor intended to constitute the trust. This determination will greatly impact the court’s analysis of whether the settlor did everything necessary in order to transfer the property and render the settlement binding.

[289] For example, for an *inter vivos* gift of chattel to be valid, there must be actual or constructive delivery of the subject matter, or gift by deed. As laid out in *Waters’ Law of Trusts* at 189:

> The only alternative to an actual or constructive delivery is an unambiguous statement under seal that the donor gives the chattel or chattels to the donee. Indeed, in this way the donor can state that he will give the property at a later

> date. This alternative to delivery, the gift by deed, takes its force from the common law, and it is the common law which requires that the donee must assent to the deed. Until the donee dissents, however, there is a presumption of assent, and title passes from the moment of the deed, only to be divested if and when dissent is made.

[290] Other steps may be required depending on the type of property being given to trust. For example, in the case of land, a deed of conveyance must be made to the trustees and title registered in their names. In the case of shares, statutory requirements may need to be met to effect a transfer.

[291] In contrast, these additional steps of transfer are unnecessary if the trust is constituted by declaration – that is, if the owner of the subject matter decides to simply declare herself a trustee of the property. *Waters' Law of Trusts* says the following regarding this mode of transfer at 184-185:

> Alternatively, the owner may decide to declare himself a trustee of the property. In this case title remains in his hands; no conveyance, delivery, assignment, or statutory transfer is required, but thereafter the owner is divested of title in equity in favour of his beneficiary. The owner has changed his hats, so to speak; he takes off the hat of owner, and puts on the hat of trustee, and Equity holds him to that change of hats. He can no longer claim to have a beneficial interest in that to which he still retains title.

[292] The plaintiff argues that Al intended to constitute the Trust, not through declaration, but through actual formal transfers or additional written declarations. A number of supporting documents, such as transfer documents and bare trust agreements, were prepared. She says that these documents would have been unnecessary had Al intended to transfer his property to himself in trust through a declaration. In other words, the plaintiff says that the preparation of a large number of documents demonstrates an intention to constitute assets to the Trust by way of actual formal transfers or by other declarations. Since these modes of transfer were incorrectly drafted, incorrectly executed or not completed before Al's death, she argues that the Trust was not properly constituted.

[293] The plaintiff further argues that even if the Trust agreement had been intended to constitute the Trust through declaration, the declaration was insufficient in both word and substance. Looking at the language of the document itself, the

plaintiff points out that the document calls itself a “Trust Agreement”, not a “Trust Declaration”. She argues that the document does not have a dispositive purpose, as would be the case with a declaration or an actual transfer. She also asserts that the language of the trust instrument is contradictory, and refers to the creation of the Trust in past and future tenses. For example, clause 1.2 states “The Settlor has settled upon the Trustee…”, whereas the preamble states “The Settlor wishes to establish a Trust” and “This Trust will be an alter-ego trust”. The plaintiff argues that this language demonstrates either that the document was not intended as a declaration; or, in the alternative, if it was a declaration it was an inadequate one.

[294] The plaintiff further submits that even if the wording in the document were adequate, the declaration alone is insufficient to automatically constitute the Trust. She says that automatic constitution is not absolute, and not does apply to all assets instantly. In this case, she argues that there were restrictions or conditions on the transfer of some of the assets. For example, all of the relevant corporations had provisions in their Articles requiring prior approval of directors before shares could be transferred. 497, in particular, has a provision that the plaintiff says prohibits the transfer of shares to a trust. She submits that this is further evidence that the Trust document could not have been a declaration that automatically constituted the Trust.

[295] Finally, the plaintiff argues that the series of post-death transactions undertaken by Holly, Daniel and Roland demonstrate that the various assets were, in fact, assets of the estate and were not properly constituted to the Trust. She submits that Holly’s application for probate and collection of the financial assets in an estate bank account, Roland and Daniel’s use of the either the Will or the Trust to transfer corporate shares to themselves, and Daniel’s registration of his name on title to real properties as a surviving tenant, are all transactions that were done in the same manner as “assets might pass through an estate”. Although she suggests three potential inferences to be drawn from any or all of these transactions, she primarily asks the court to infer that these transactions were conducted in this manner is because the assets were assets of the estate and not properly constituted to the Trust.

[296] I am unable to agree with the positions taken by the plaintiff.

[297] On October 18, 2013, Al held title (or in the case of the RRIF, the beneficial interest) in the Trust property. The Trust was automatically constituted when he signed the Trust agreement. In other words, I find that the Trust was constituted by declaration, and that the evidence is more than sufficient to demonstrate Al's intent regarding this method of transfer.

[298] There is no ambiguity in the language of the document – Al was very clear that he was transferring his property to himself, in trust. In my view, nothing turns on whether the document is referred to as a "trust agreement", a "trust deed", or a "trust declaration". As the defendants point out, there is really no requirement that the word "trust" even appear, as long as the intent is to establish a trust.

[299] Similarly, nothing turns on differences in tense found within the document. Those differences are explained by the location of the language: the preamble is written from Al's perspective before he signs the document; the body of the document is written from the perspective of someone reading the document after it has been signed.

[300] Overall, I conclude that the language in the document is sufficiently clear and comprehensive to indicate Al's declaration.

[301] When a trust is created by the mode of declaration of trust, nothing further needs to be done with the title to the trust properties. As the defendants submit, this point has been made in legal texts and in the case authorities. For example, in *Equity and Trusts*, Professor Hudson wrote:

> These dicta [in *Milroy v. Lord*, (1862) 45 ER 1184] constitute the clearest statement of a comparatively straightforward principle that there can be no trust before legal title to the trust fund is transferred to the trustee. It should be remembered, however, that where the settlor intends to make herself sole trustee of the property, it is enough that she effects a valid declaration of trust because there is no need to transfer the legal title to another person. Therefore, if A wishes to create a trust such that she is herself trustee for the benefit of her children over property of which she is already the absolute owner, it is sufficient for her to declare herself trustee of that property and to

> declare that she holds it on trust for her children from that time forward because all title in the property is already vested in her.

[302] In *Elliott (Litigation Guardian of),* Lauwers J. applied this principle to a case where parents wanted to provide for one of their children (Barbara), who suffered from a disability, so they entered into an agreement with their other children that they each would contribute to a fund for Barbara from their own inheritances. There was also evidence that the parents also intended for certain GICs to be held for Barbara, but no formal trust documentation was done. After both parents died, the GICs matured and the proceeds were deposited (incorrectly) into the estate bank account. About a year later, a separate GIC account was opened with $50,000.00, representing the value of the previous GICs.

[303] In these circumstances, the court found the three certainties had been established and that the trust was duly constituted. With respect to constitution, Lauwers J. held:

> [37] An express trust must be duly constituted. Constitution may take place in various forms, but the method applicable to this case is by declaration of one's self as trustee, which is sometimes also referred to as automatic constitution. This type of constitution occurs when the settlor and the trustee are the same person. The settlor effectively declares himself or herself to be the trustee of a trust for someone else. Since the settlor is already the owner of the trust property, no physical transfer is necessary as title is already vested in the owner. Such declaration means that the owner is thereafter divested of title in equity in favour of the beneficiary: *Waters*, *supra*, at 172.

[304] I also observe that the application judge in this case had no concern that the GIC funds found to be subject to the trust had been incorrectly initially deposited into the estate account.

[305] I disagree with the plaintiff's general submission on this topic that "it is not possible to transfer assets twice – first by declaration in the trust, and then again by way of formal documents" (plaintiff's written submissions, para. 140). Rather, I agree with the defendants' articulation of the law and its application at para. 156 of their written submissions:

> [156] …When a settlor constitutes a trust by way of declaration of trust, the settlor is not transferring title to anything. The settlor already owns the property. From the moment of the declaration, it is binding on the settlor's conscience, and the legal title is separated from the beneficial interest. The settlor or a trustee may at a later time register title to the property in the trust, whether by way of a transfer in the Land Title Office in the case of real property, registration of the trust in the central securities registers in the case of shares, or changing the name of the banking or investment accounts to reflect that it is held in trust. Registering property in a trust may be useful in some circumstances, including transfer of property to successor trustees, but it is not a precondition for constituting a trust.

[306] The plaintiff makes specific arguments (see paras. 135-142 of her written submissions) in favour of her position that Al did not intend to contribute assets to the Trust by declaration. Respectfully, as the defendants submit, I think these arguments confuse the requirement to settle and constitute the Trust with documents intended to facilitate changes of title, particularly after Al's death.

[307] The plaintiff says that the preparation and execution of various documents, including the two Bare Trust Agreements and the various Form A transfers, support the notion that the transfer of "legal and beneficial interest were intended to occur in a way other than by the Trust instrument itself". I disagree.

[308] Mr. White explained why he prepared the additional documents he did. Rather than assisting the plaintiff's argument that these additional documents reflect that Al was contemplating that he had to take further steps to constitute the Trust, I think Mr. White's evidence is actually consistent with the view that Al considered that he had contributed his assets to the Trust upon executing the Trust agreement.

[309] With respect to the real property, Mr. White explained that he found it preferable not to register the Trust on title in the Land Title Office. The plaintiff concedes that registration is not mandatory and a declaration of trust is sufficient without any registration: *Smith v. Graham*, 2009 BCCA 192. On signing the Trust, Al separated title from the beneficial interest, which is sufficient for his real property to be impressed by a trust.

[310] Mr. White prepared two sets of Form A transfers, one transferring title into a jointure with Daniel, and the other transferring title from Al and Daniel to themselves "in trust". He prepared the Bare Trust Agreement (Land) for both Al and Daniel to confirm that they were holding the title to their beneficial interest as bare trustees. Al signed it, but he died before Daniel could sign.

[311] As the defendants submit at paragraph 168 of their written submissions, the Form A transfers into a joint tenancy between Al and Daniel do not affect the beneficial interest in the real properties. Al had already divested himself of the beneficial interest when he executed the Trust agreement and the transfer affected title only. As Mr. White explained, the purpose of the transfer was to facilitate transfer of title after Al's death. Because the beneficial interest was in the Trust, Al could not convey a greater interest than what he had in the property at the time of the transfer. As further confirmation that Al intended that the real properties are part of the Trust, Al signed transfer documents from himself and Daniel to himself and Daniel "in trust". These transfers would allow a future trustee to register the real properties in trust.

[312] I reach the same conclusion with respect to the RBC bank and investment accounts. Like the real property, these fall within the property initially constituted to the Trust by declaration. Nothing further needed to be done.

[313] Mr. White's advice to Al not to have the Trust registered on the bank accounts was a practical one and has no bearing on whether the accounts were constituted to the Trust. They were. Mr. White testified that, based on his experience and for reasons he explained, he found it easier to deal with financial institutions when an account is personal, rather than a trust account. This provides a reasonable explanation why the Trust was not registered on the bank accounts.

[314] Mr. White also explained why he prepared the additional documents pertaining to the accounts. As part of Al's overall estate plan, Al was going to change the bank accounts into joint accounts with Holly. This was Holly's understanding as well. Contemplating that the accounts would be joint accounts, both Holly and Al

signed the Bare Trust Agreement (Investments), recognizing that they would hold title in accordance with the terms of the Trust. The purpose for putting the accounts in joint names was to allow Holly to access funds upon Al's death, without a grant of probate. Although Al's unexpected death days later interfered with execution of this plan, Al's decision to change the accounts into joint accounts has no bearing on whether the accounts were held in trust. Although unnecessary to transfer the beneficial interest in the accounts to the Trust, the Bare Trust Agreement (Investments) further confirms that Al intended that these accounts are part of the Trust.

[315] As with the real properties and the bank/investment accounts, Al's shares in private companies also fall within the property initially constituted to the Trust by declaration.

[316] The plaintiff suggests that automatic constitution is not absolute and that constitution cannot take place until certain "preconditions" are met. She suggests that such preconditions include compliance with the companies' Articles, as well as registration of the fact that the settlor trustee holds the shares in trust in the Central Securities Registries of the companies. Since neither of these "preconditions" were met in this case, the plaintiff argues that the shares were not properly constituted to the Trust.

[317] With respect to compliance with the companies' Articles, the plaintiff points specifically to clause 2.7 of 497's Articles, which provides:

> Except as required by law, statute or these Articles, no Person shall be recognized by the Company as holding any share upon any trust and the Company shall not be bound by or compelled in any way to recognize (even when having notice thereof) any equitable, contingent, future or partial interest in any share or in any fractional part of a share or (except only as by law, statute or these Articles provided or as ordered by a court of competent jurisdiction any other rights in respect of any share except for the absolute right of legal ownership in respect of its Registered Holder.

[318] She has provided no authority concerning the interpretation of this clause, a clause that Ms. Nadel identified as a standard one, but argues that it should be interpreted to mean that it "expressly prohibits the transfer of shares to a trust", so

that only the contingent approval of the directors could have made “automatic constitution” of Al’s shares in the company possible. Failure to obtain this approval means, she argues, that Al’s shares in these companies were not properly constituted to the Trust.

[319] I think this argument misconstrues the purpose and effect of that clause. This precise clause was recently considered in *J.L. v. B.L.*, 2015 BCSC 2052 and Justice Warren concluded that it did not prevent the registered owner of shares from holding shares in trust for another person.

[320] *J.L. v. B.L.* was a family law proceeding where one of the disputes involved whether certain shares in a company, registered in the respondent’s name, were family assets. The respondent claimed that he held the shares in trust for his parents. The claimant denied that the parents had a beneficial interest in the shares and argued that the respondent owned them both legally and beneficially. One of the claimant’s arguments was based on the same clause in that company’s Articles. Similar to Shirley’s argument here, the claimant argued that the clause prevented a registered owner of shares from holding them in trust. Justice Warren rejected that argument. She held:

> [122] Finally, the claimant submitted that clause 2.9 of T.H. Ltd.'s Articles of Incorporation supports the conclusion that the respondent does not hold the shares in trust. That clause is headed "Recognition of Trusts". It provides that "[e]xcept as required by law or statute or these Articles, no person will be recognized by the Company as holding any share upon any trust, and the Company is not bound by or compelled in any way to recognize … any equitable, contingent, future or partial interest in any share … or … any other rights in respect of any share except an absolute right to the entirety thereof in the shareholder". No authority was provided to me concerning the interpretation of this clause. In my view, its plain meaning is simply that the company is not bound to recognize or deal with anyone other than the registered owner of the shares. Thus, the company is not bound to recognize G.L.'s and L.L.'s interest. However, this clause does not prevent a registered owner from holding shares in trust for someone else, and it has no application in determining the respective interests in the shares as between a registered owner and someone claiming a beneficial interest.

[321] I agree with this analysis and reach the same conclusion here.

[322] I similarly disagree with the plaintiff's submission that registration of the fact that the settlor trustee holds the shares in trust in the Central Securities Registries of the companies was a requirement. Again, she does not cite any authority for this proposition. I agree with the defendants that it is a submission that confuses constitution of the Trust by the separation of title from the beneficial interest and registration of the fact that the settlor trustee holds the shares in trust in the Central Securities Registries of the relevant companies. Such registration has no bearing on whether Al's shares were constituted to the Trust. They were.

[323] I further disagree with the plaintiff's submission that the court ought to infer from Holly, Daniel and Roland's handling of the assets after their father's death that those assets were not constituted to the Trust. The argument that the Trust was somehow not properly constituted or invalidated because of decisions made or documents signed by Holly, Roland and Daniel after Al's death is not supported by any authority, but it also fails to recognize the distinction between legal title and beneficial interest.

[324] As the defendants correctly observe at paragraph 226 of their written submissions, once Al contributed his property to the Trust, he separated legal title from beneficial interest. Subsequent dealings by the executor and special trustees with the title does not affect the beneficial interest in the property. They also correctly observe that there is nothing inconsistent with an application to probate a will in order to deal with legal title to certain property with the beneficial interest of that same property being subject to the trust. The Will was probated, and title to one parcel of real property and the bank accounts were dealt with using the grant of probate, but that does not affect the fact that the beneficial interests were held in trust. Similarly, there is nothing inconsistent about transmitting title to shares on the Central Securities Register to an executor or trustee of the will, with the beneficial interest being subject to a trust.

[325] On the issue of shares, I am further unable to agree with the plaintiff's characterization of the handling of their transfer after Al's death. Mr. Brown handled

the transfers in respect of Portland Ventures, 088 and Soucie Construction. While it is true that he had Roland and Daniel sign declarations of transmission in relation to Al's shares in these companies into the their names, as special trustees of the Will, I find that nothing turns on this. Mr. Brown was unaware of the Trust. There was clearly a breakdown in communication between Mr. Brown and Mr. White's office here, but their miscommunication cannot affect whether the shares were part of the original contribution to the Trust. In any event, I agree with the defendants' position that a careful reading of the declarations of transmission shows that they are not inconsistent with a transfer of legal title only.

[326] Ms. Nadel, Q.C. handled the transfers in respect of 497. Initially unaware of the Trust, she first prepared documentation in contemplation that the shares would pass under the Will. However, once she received notice of the Trust, she prepared new documents to reflect that the shares were transferred into the Trust. Rather than supporting the notion that her handling of this matter reflects that the "whole status of the shares as Trust vs. estate assets was in doubt", as the plaintiff submits, I find that her handling of this matter shows that she is a very careful, conscientious and thorough lawyer. Similarly, I am unable to accept the plaintiff's position that the directors merely passed "a resolution to effectively transfer shares from a dead person to another person retroactively to a date before the shareholder's death", as the plaintiff submits. Rather, the directors recognized that the shares were subject to the Trust and the Central Securities Register was amended accordingly, as they are allowed to do.

[327] In the end, and for all of these reasons, I find the defendants have established constitution of the Trust. The Trust is valid.

[328] I turn now to consider the plaintiff's two final arguments in relation to the real properties and the RRIF.

THE REAL PROPERTIES AND THE RRIF

[329] The plaintiff argues that the real properties transferred to Daniel in joint tenancy were transferred to him on a resulting trust basis only, and are in fact assets

of the estate. She submits that the court must ask whether the properties transferred to Daniel as a surviving tenant, outside of the estate, or whether the properties form part of the estate.

[330] The plaintiff submits that this question engages the principles of the presumption of advancement, set out in *Pecore v. Pecore*, 2007 SCC 17 at para. 24:

> [24] The presumption of resulting trust is a rebuttable presumption of law and general rule that applies to gratuitous transfers. When a transfer is challenged, the presumption allocates the legal burden of proof. Thus, where a transfer is made for no consideration, the onus is placed on the transferee to demonstrate that a gift was intended: see *Waters' Law of Trusts*, at p. 375, and E. E. Gillese and M. Milczynski, *The Law of Trusts* (2nd ed. 2005), at p. 110. This is so because equity presumes bargains, not gifts.

[331] The plaintiff says that the transfers here were made for no consideration, therefore the burden falls to Daniel to demonstrate that the real properties were an outright gift to him. He cannot meet this onus because the evidence overwhelmingly establishes that Al did not intend to make an outright gift of the properties to Daniel. There was no deed of gift, and Daniel had no idea about the transfer being made. Daniel's own evidence was that he did not expect to keep the property for himself as an outright gift. The plaintiff submits that, Daniel having failed to meet this burden, I must find that the properties are assets of the estate.

[332] I decline to do so. In my view, the doctrine of resulting trust with respect to a gratuitous transfer of property has no application where, as here, the property is declared to be held on an express trust: *Elsen v. Elsen*, 2011 BCCA 314 at paras. 13-23.

[333] I have found that the Trust is a valid express trust (i.e. the three certainties have been met and the trust property has vested in the trustee). With this argument, the plaintiff is attempting to "reverse a valid express trust" in the same manner as was rejected in *Elsen*. I have found that although Daniel holds titles to the real properties as a trustee, he holds them pursuant to the terms of the Trust, for the benefit of himself and Roland as beneficiaries. The plaintiff's argument here has no application.

[334] The plaintiff submits that the RRIF is an asset that is "incapable of transferring to a trust" because it is "a trust in and of itself". Because of this, she argues that it is a "separate asset that needs to be assessed independently of the assets which the defendants claim are Trust assets". In other words, she says that regardless of the court's determinations on the validity of the Trust, the court must still consider whether the RRIF is an estate asset or whether it passed to Holly outside of the estate to her as a designated beneficiary.

[335] The plaintiff concedes that a RRIF does not pass to the deceased's estate if there is a designated beneficiary; that a deceased can designate a beneficiary under their will; and that Holly was designated as the beneficiary of the RRIF under Al's will. However, the plaintiff submits that Holly disclaimed, or refused, the gift of the RRIF, meaning that the gift failed and the funds of the registered plan must revert to Al's estate. The plaintiff submits that the onus is on Holly to prove she did not disclaim the RRIF.

[336] The principles of disclaimer were laid out in *Montreal Trust Co. v. Matthews*, [1979] 3 W.W.R. 621 (B.C. S.C.) at 627:

> [A] disclaimer is a refusal to accept an interest which has been bequeathed to the disclaiming party. The effect is to void the gift ab initio. Where an interest is disclaimed, it is as if it had never been acquired by the disclaiming party. Gifts which fail, or are undisposed of are captured by the residuary gifts or, if the residuary fails, an intestacy results. Where a residuary gift fails, there is a resulting trust in favour of the next of kin of the deceased: *Re Stewart* (1964), 47 W.W.R. 500 at 502 and 504 (B.C.); *Re Metcalfe*, [1972] 3 O.R. 598 at 600 and 602, 29 D.L.R. (3d) 60; 39 Hals. (3d) 946.
>
> A disclaimer can be made by deed, writing, under hand only, or even as a result of contract, as any document is admissible so that evidence of the disclaimer is available. A disclaimer may even be evidenced by conduct: A. R. Mellows, The Law of Succession, 3rd ed., p. 508; *Re Metcalfe*, supra, at p. 600.
>
> A disclaimer, once made, is retroactive to the date of death of the deceased. A beneficiary who disclaims is refusing to acquire the property of another, and the disclaimer operates so that in effect the property is never acquired: *Re Metcalfe*, supra, at pp. 600 and 602.

[337] While Holly testified that she did not disclaim any gifts, the plaintiff argues that the evidence suggests she did disclaim the RRIF. The plaintiff lists the following facts in support of this conclusion:

- Holly applied for a grant of probate for the estate on February 12, 2014. The two affidavits on which she relied to obtain the grant both listed the RRIF account in a "Statement of Assets, Liabilities & Distribution";
- The RRIF funds were subject to probate tax;
- Mr. White wrote to RBC and provided them a signed Declaration of Transmission form, executed by Holly. The declaration form listed the RRIF funds as an asset of Al's estate;
- RBC wrote to Mr. White's office on April 3, 2014, pointing out that the Will at clause 7(a) designated Holly as the beneficiary of the RRIF. RBC advised Mr. White that if they were to deposit the RRIF funds into the bank account set up in the name of the "Estate of Al Joseph Soucie", then they would require a renunciation form from Holly; and
- Four days later, on April 7, 2014, RBC deposited the funds into the estate bank account.

[338] The plaintiff urges me to draw the conclusion that the reason that RBC paid the RRIF funds into the estate bank account was because Holly had done just what RBC requested, and signed a renunciation form. If she had not done so, the plaintiff submits that RBC would have paid the funds directly to Holly as the designated beneficiary.

[339] Further, the plaintiff submits that if the RRIF passed outside of either the estate or the Trust, it would not have been necessary to list it in the Statement of Assets of the estate. It also would not have been necessary to pay probate tax on the funds. For all of these reasons, the plaintiff argues that I ought to conclude Holly disclaimed the RRIF and it, therefore, passed to Al's estate.

[340] First, I do not accept the plaintiff's initial position that a RRIF, by its very nature, is incapable of being transferred into a trust. To the contrary, it is permissible to contribute an equitable interest to a trust. *Waters, Law of Trusts* makes this point at 185:

> If the property to be settled is an existing trust interest, there is yet another way in which the trust may be employed. It is clear, of course, that the owner may himself have legal title to the land, chattel, or chose in action, but it is possible that he is himself a beneficiary under a trust, the property of which is the land, chattel, or chose in action. In this situation he will have an equitable interest only, and it is that which he wishes to put into another's hands. Again, as with legal interests, that equitable property may either be handed over to the other, or a trust may be employed.

[341] The plaintiff, in oral submissions, conceded that on the face of it, Al's designation of Holly as the beneficiary of his RRIF in the Will has the effect of rendering the proceeds of the RRIF payable to Holly on his death without passing through Al's estate (see: s. 51(1) and (2) of the *Law and Equity Act*, R.S.B.C. 1996, c. 253; *Gallagher v. Hunt*, 2005 BCSC 415 at paras. 21-22).

[342] With this appropriate concession, the plaintiff's only remaining argument in favour of the RRIF funds passing through the estate lies in whether Holly, as beneficiary of the RRIF under the Will, disclaimed the RRIF.

[343] I am satisfied that Holly did not disclaim the RRIF and that its proceeds passed to her outside the estate. The only evidence on this topic was from Holly and Mr. White. Mr. White testified that he was not aware of any signed disclaimer. Holly testified that she has no recollection of signing or providing any renunciation/disclaimer form, and had no record of one. Her actions (her email to the bank on April 15, 2014 where she identifies herself as not only as the executrix and trustee of her father's estate, but as the designated beneficiary of the RRIF proceeds) are consistent with, and support a finding that Holly did not disclaim the RRIF. Had she done so, she would not have identified herself in the manner she did or sent the instructions she did to the bank. I am supported in this finding by common sense. Holly's goal was to effect her father's wishes and have the RRIF

funds transferred to her. It would have been completely against Holly's interests to disclaim her father's gift in these circumstances.

[344] Holly is unable to explain the bank record that seems to show the bank had earlier deposited the RRIF funds into the estate account before transferring them into her account. I could reasonably infer the bank made an error or thought the funds were to go to the estate account. I cannot reasonably infer from this record that Holly disclaimed the RRIF. I am confident that had the bank received and acted on a signed renunciation from Holly, that such a critical document would have been produced and a bank representative called to testify.

[345] In all, I find that Holly did not disclaim the gift, and the RRIF passed to her as the designated beneficiary, outside the estate.

CONCLUSION

[346] In the end result, because Al contributed all of his property to the Trust on October 18, 2013 and died only four days later, there are no significant assets in the estate. As counsel have agreed, the only assets acquired after October 18, 2013 are:

- CPP Death Benefit: $2,500.00
- WCB Pension (net): $2,028.00
- IOUC Death Benefit (net): $1,500.00

[347] The estate liabilities, including the tax liability, significantly exceed this amount. Accordingly, the plaintiff's *WVA* claim is moot and her claim must be dismissed.

[348] I am indebted to counsel for their presentation of this case and thorough arguments. If they are unable to agree, the parties may provide written submissions on the issue of costs, on a timetable of their choosing incorporating a deadline of not more than four months from today's date.

DONEGAN J.