NOVA SCOTIA COURT OF APPEAL
Citation: *Gough v. Leslie Estate*, 2022 NSCA 25

Date: 20220329
Docket: CA 506392
Registry: Halifax

Between:

Shannon Yvette Gough

Appellant

v.

Megan Elizabeth Leslie, in her capacity as Executor of the Estate of Allan Charles Leslie

Respondent

Judge: The Honourable Justice Peter M. S. Bryson

Appeal Heard: January 19, 2022, in Halifax, Nova Scotia

Cases Considered: *R. v. Mian*, 2014 SCC 54; *Cock v. Cooke* (1866), L.R. 1 Pro. & Div. 241; *MacInnes v. MacInnes*, [1935] S.C.R. 200; *Turner Estate v. Bezanson* (1995), 143 N.S.R. (2d) 123; *Corlet v. Isle of Man Bank Ltd.*, [1937] 3 D.L.R. 163 (Alta. C.A.); *Corlet v. Isle of Man Bank Limited et al.*, [1937] 1 D.L.R. 768 (Alta. S.C.); *Easingwood v. Easingwood Estate*, 2013 BCCA 182; *Anderson v. Patton*, [1948] 2 D.L.R. 202 (Alta. S.C.A.D.); *Baird v. Baird*, [1990] 2 A.C. 548; *Imperial Group Pension Trust Ltd. v. Imperial Tobacco Ltd.*, [1991] 1 W.L.R. 589 (Ch. Div.); *Feltner v. The Queen in Right of Nova Scotia* (1972), 7 N.S.R. (2d) 549 (S.C.); *Cullen v. Attorney-General for Ireland* (1866), L.R. 1 H.L. 190; *Re Young*, [1951] Ch. 344; *Blackwell v. Blackwell*, [1929] A.C. 318; *McCormick v. Grogan* (1869), L.R. 4 H.L. 82; *Re Hardy*, [1952] 2 D.L.R. 768 (N.S.S.C.); *Re Armstrong* (1969), 7 D.L.R. (3d) 36 (N.S.S.C.); *MacCallum Estate*, 2022 NSSC 34; *Slawter v. Bellefontaine*, 2012 NSCA 48; *Murphy v. Wyatt*, [2011] EWCA Civ. 408; *Blackburn v. McCallum*

(1903), 33 S.C.R. 65; *Re Malcolm*, [1947] 4 D.L.R. 756 (Ont. H.C.); *Cook v. Nova Scotia* (1982), 53 N.S.R. (2d) 87 (S.C.);

Texts Considered: *Waters' Law of Trusts*, 5th ed (Toronto: Thomson Reuters, 2021);

Subject: Wills; Estates; Trusts; Secret Trusts

Summary: Appeal from decision that an Agreement between the deceased and beneficiaries of a Will executed simultaneously with the Agreement was a testamentary instrument and therefore revoked by a later Will. On appeal, question arose whether the Agreement might be construed as a secret trust and so not a testamentary instrument. Respondent argued secret trust issue should not be considered on appeal as it was not raised at first instance and was not in Notice of Appeal

Result: Appeal allowed. Respondent recognized Agreement created "trusts". Doctrine of secret trusts applied where beneficiary in Will previously agreed to hold property in trust for another. Respondent signed Agreement which provided that she would hold family house for benefit of appellant until defined "disposition date".

The parties asked the hearing judge to bifurcate proceeding so that if Agreement was found not to be testamentary, a second hearing would be held on the efficacy, if any, of the Agreement. Accordingly, no conclusion was expressed by the Court on whether the secret trust was properly constituted and thus enforceable, or whether it was enforceable on contract principles.

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Between:

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Appellant

v.

Megan Elizabeth Leslie, in her capacity as Executor of the Estate of Allan Charles Leslie

Respondent

Judges:	Wood C.J.N.S.; Bryson and Beaton JJ.A.
Appeal Heard:	January 19, 2022, in Halifax, Nova Scotia
Held:	Appeal allowed, per reasons for judgment of Bryson J.A.; Wood C.J.N.S. and Beaton J.A. concurring
Counsel:	Tanya Butler, for the appellant Benjamin Corkum, for the respondent

Reasons for judgment:

Introduction

[1] Shannon Gough appeals the decision of the Honourable Justice Joshua Arnold in which he found that an agreement between Ms. Gough, the respondent Megan Leslie, and Allan Leslie (now deceased) was a testamentary instrument, revoked by Mr. Leslie in a later Will (2021 NSSC 63).

[2] Shannon Gough and Allan Leslie lived in a common law relationship in a rural area of Halifax. Megan Leslie is Allan Leslie's daughter. In 2014, Mr. Leslie executed a Will appointing Megan Leslie executrix, gifting his home to Ms. Leslie and gifting RRSP and pension plan funds to Ms. Gough. On the same day, the three parties agreed in writing that after Mr. Leslie's death, Ms. Gough could reside in the home on certain terms. She would enjoy the income from Mr. Leslie's RRSP but the capital would go to Ms. Leslie upon Ms. Gough's death. More will be said about these arrangements later in this decision.

[3] In late November 2015, Mr. Leslie and Ms. Gough had a falling out. Although the parties differ concerning the significance of the disagreement, Mr. Leslie executed a new Will on December 8, 2015, in which he revoked "[…] all former wills and other Testamentary Dispositions made by me at any time heretofore and declare this only to be and contain my Last Will and Testament".

[4] The 2015 Will gifted all of the residue of Mr. Leslie's estate to Megan Leslie, including his residence. There is no mention of the 2014 Agreement or Ms. Gough in the 2015 Will.

[5] On April 25, 2018, Mr. Leslie signed a codicil to his 2015 Will specifically gifting a Registered Retirement Income Fund to Ms. Gough and the residue of his Estate to Ms. Leslie.

[6] Following Mr. Leslie's death, Ms. Gough has remained at the home. Ms. Gough considers that she is entitled to possession of the house on the terms of the 2014 Agreement, which she insists survived the 2015 Will and 2018 codicil signed by Mr. Leslie.

[7] Ms. Leslie brought a "Contentious Matters" Application under the *Probate Act* for determination of whether the Agreement was testamentary and so revoked

by the 2015 Will. If the Agreement was found not to be testamentary, a subsequent hearing was scheduled to determine the effect of the Agreement on the Estate. Because the Agreement was found to be testamentary, the later hearing was cancelled.

[8] As we shall see, this well-intended attempt at economy faltered on an attenuated record, unsupported by appropriate jurisprudence.

[9] For the first time, in her factum and oral submissions, Ms. Gough argued that the same outcome achieved by the Agreement could have been effected by a spousal or secret trust. A secret trust may arise when a beneficiary under a will has previously agreed to hold the willed property for the benefit of someone else. The Court invited oral submissions on whether the Agreement could be construed as a secret trust. The Court also requested supplementary written submissions. Ms. Leslie says we should not consider the secret trust argument because it was not raised at first instance. This objection will be addressed before the merits are considered.

[10] Additionally, of his own accord, the judge questioned the enforceability of the Agreement because it appeared to offend the principle against repugnant gifts by qualifying the absolute gift of the house to Ms. Leslie in the 2014 Will.

[11] For reasons which follow, the appeal should be allowed. The Agreement was not a testamentary instrument but an agreement that created a secret trust which did not offend the repugnancy principle. No conclusion is expressed on whether the trust was properly constituted and thus enforceable.

Should this Court entertain the secret trust argument?

[12] In her supplementary written submissions, Ms. Leslie makes a preliminary objection that the Court ought not to consider the doctrine of secret trusts. She says secret trusts were not raised by Ms. Gough:

> This Court, and no one else, raised the issue of the doctrine of secret trust […]

[13] The Court is admonished that it:

> […] cannot intervene on behalf of one of the parties.

[14] Ms. Leslie refers to *R. v. Mian*, 2014 SCC 54 at ¶38, which cautions against the court raising new issues on appeal. However, the Supreme Court recognized that issues arising from those framed by parties are not necessarily new:

> [35] In summary, an appellate court will be found to have raised a new issue when the issue was not raised by the parties, ***cannot reasonably be said to stem from the issues as framed by the parties***, and therefore would require that the parties be given notice of the issue in order to make informed submissions. ***Issues that form the backdrop of appellate litigation will typically not be "new issues" under this definition.*** Exercising the jurisdiction to ask questions during the oral hearing will not constitute raising a new issue, unless, in doing so, the appellate court provides a new basis for reviewing the decision under appeal for error.
>
> [Emphasis added]

[15] In this case, the parties chose to bifurcate the proceeding and confine the question for the judge below to the issue of whether the Agreement was a "testamentary instrument". In her pre-hearing submissions to the judge, Ms. Leslie acknowledged that the Agreement contained trusts:

> The agreement is inconsistent with the 2014 will. Regardless, relying on the guiding principle of *Robertson v. Smith & Lawrence*, it is evidence that the gifts being made in the 2014 will ***and the trusts being contemplated in the agreement*** were reliant on the testator's death.
>
> [Emphasis added]

[16] It is true that Ms. Gough does not use the words "secret trust" in her Notice of Appeal but she does say the judge erred "[…] in failing to consider that a beneficiary designation need not be made by will and was in fact not made by will in this case".

[17] One cannot ask a legal question such as "Is this a testamentary instrument?" but then frustrate the correct reply by avoiding the legal analysis by which that reply can be given. The Agreement imposing obligations on the parties was squarely before the court, and the legal character of those obligations is central to answering the question whether the Agreement was testamentary. Although Ms. Leslie generically complains that the Court has an insufficient record to consider whether the Agreement creates a secret trust, she does not say what is missing. This was Ms. Leslie's application. She put the testamentary instrument question to the court. She led evidence on that issue. The parties were given an opportunity to provide supplementary submissions to this Court and have done so.

[18] Even if secret trusts were a "new" issue, the Court may have a duty to raise it if an injustice could result (*Mian*, at ¶43). Because the secret trust point decides the testamentary instrument question posed, it would be unjust to ignore it, provided the parties have an opportunity to address it. As the Supreme Court said in *Mian*, subject to procedural fairness:

> [40] […] courts also have the role of ensuring that justice is done. As Lord Denning explained in the context of trial judges in the United Kingdom: ". . . a judge is not a mere umpire to answer the question 'How's that?' His object above all is to find out the truth, and to do justice according to law . . ." (*Jones v. National Coal Board*, [1957] 2 All E.R. 155 (C.A.), at p. 159 (emphasis added)). This proposition is no less true of appellate judges. Meaningful appellate review assesses the correctness of a lower court decision, both on errors of law and palpable overriding errors of fact (see *R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, at paras. 25 and 28; and *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 1 and 4). I accept the submission of the intervener the Attorney General of Alberta that "for 'justice in fact to be done,' judges must sometimes 'intervene in the adversarial debate'" (I.F., at para. 16, citing *Brouillard*, at p. 44).
>
> [Original emphasis]

[19] Whether the Agreement creates a secret trust is not a new issue, but arises from the testamentary instrument question posed by Ms. Leslie. Alternatively, ignoring the issue could result in an injustice. Having received supplementary submissions, the issue should be addressed by the Court.

Is the Agreement a testamentary instrument?

The judge's decision

[20] It will be convenient to first address the judge's finding that the Agreement was testamentary and then consider whether it is not testamentary because it is a secret trust.

[21] Mr. Leslie's July 23, 2014 Will gifted registered plans to Ms. Gough and his home to Ms. Leslie. On the same day, Mr. Leslie, Ms. Gough, and Ms. Leslie entered into an Agreement which specifically described how to treat the gifts made by Mr. Leslie in his Will. The Agreement recites the Will in these terms:

> It is the intention of Allan, Shannon and Megan to contract into certain matters around the gifts being given under Allan's Will bearing even date herewith (the "Will").

[22] Clause II of the Agreement provides in part:

> **NOW THIS AGREEMENT WITNESSETH** that in consideration of the promises hereinafter expressed and other good and valuable consideration, the receipt and sufficiency whereof is hereby acknowledged, all of Allan, Shannon and Megan desiring to contract into certain matters around the gifts being given under the Will, hereby undertake and agree that:
>
> > (i) This agreement shall be deemed to be effective on execution by all of Allan, Shannon and Megan.
> >
> > (ii) All of Allan, Shannon and Megan agree to be bound by the provisions herein.
>
> [...]

[23] Clause III deals with the real property:

> After Allan's death, and in consideration of Allan's gift of the residue of his Estate to Megan, Megan agrees to hold Allan's real property […] (the "**Residence**") as a home for Shannon until the first to happen of:
>
> > (i) The date of the death of Shannon; or
> >
> > (ii) The date when Shannon advises Megan that she does not wish the Residence held for her; or
> >
> > (iii) The date when Shannon attains the age of seventy (70) years.
>
> The first to happen of such events shall be known as the "**Disposition Date**".
>
> Until the Disposition Date, the taxes, insurance, repairs, and any other charges or amounts necessary for the general upkeep of the Residence shall be paid by Shannon.
>
> On or before the Disposition Date, Shannon shall vacate the property.

[24] Clause IV addresses the RRSP:

> After Allan's death, and in consideration of Allan's gift of his RRSP to Shannon, Shannon hereby agrees:
>
> > (i) To permit Megan to manage the investment of Allan's Registered Retirement Savings Plan (the "**RRSP**") and to take no more of the income or capital thereof per year than the minimum required by law until her death;
> >
> > (ii) That her entitlement to withdraw from the RRSP will not commence until she attains the age of seventy (70) years; and
> >
> > (iii) To gift the amount remaining in the RRSP to Megan upon her death.

[25] The judge began his analysis by referring to the *Wills Act*:

> [29] Section 2(f) of the *Wills Act*, R.S.N.S. 1989, c. 505, defines a "will" as including "a codicil and an appointment by will or by writing in the nature of a will in exercise of a power, and also a disposition by will and testament or devise of the custody and tuition of any child, and any other testamentary disposition." If the agreement is a "testamentary disposition" – whether or not it complies with the formalities for the valid execution of a will under s. 6 of the Act – it was revoked when Allan executed the 2015 will.

[26] The judge then invoked leading cases which describe a testamentary disposition as intended to take effect upon the testator's death. The judge quoted a classic statement of the law from *Cock v. Cooke* (1866), L.R. 1 Pro. & Div. 241 cited by the Supreme Court in *MacInnes v. MacInnes*, [1935] S.C.R. 200:

> It is undoubted law that whatever may be the form of a duly executed instrument, if the person executing it intends that it shall not take effect until after his death, and it is dependent upon his death for its vigour and effect, it is testamentary.

[27] *MacInnes* was applied by the Nova Scotia Court of Appeal in *Turner Estate v. Bezanson* (1995), 143 N.S.R. (2d) 123 (leave to appeal denied [1995] S.C.C.A. 438).

[28] The judge also noted a distinction between an instrument taking effect when signed and a testamentary interest, relying on respected authorities:

> [35] In summary, a testamentary disposition is one which "disposes of the testator's property, takes effect only upon the testator's death and neither before nor after, is revocable until the testator's death, and is made *animo testandi*" (Albert H. Oosterhoff et al., *Oosterhoff on Wills*, 8th ed. (Toronto: Thomson Reuters Canada, 2016) at p. 107). As noted in *Halsbury's Laws of Canada - Wills and Estates* (2020 Reissue) at para. 2:
>
> > The most definitive point for the classification of a testamentary document is whether it depends upon the death of the donor to take effect. ...
> >
> > [I]f, at the time of its execution, the document is legally effective to pass some immediate interest in the property, no matter how slight, the transaction will not be classified as testamentary. ...

[29] The judge summarized his "testamentary disposition" analysis by concluding:

> [45] Having found that the agreement depends on Allan's death to take effect, and that, when considered together with the 2014 will, it disposes of Allan's property, it remains to consider whether the agreement was revocable – the final criteria for a testamentary instrument. As noted earlier, the gifts given under the 2014 will are the subject matter of the agreement, as well as the consideration from Allan. There is nothing in the agreement preventing Allan from changing his will at any time. Upon revocation of the 2014 will, the subject matter of the agreement (and Allan's consideration) ceased to exist. As a result, although there were three parties to the agreement, Allan was free to revoke the agreement, by revoking the 2014 will, at any time before his death. And he did.
>
> [46] I find that the agreement was a testamentary instrument (of dubious enforceability) that was revoked when Allan executed the 2015 will. I further find that it was Allan's intention to revoke the agreement. Any argument that Allan intended for the agreement to remain in effect is undermined by the fact that, upon executing the new will, Allan removed Sharon [*sic*] as beneficiary of his RRSP. As a result, there was no longer any consideration from Allan to Shannon, or from Shannon to any other party under the agreement.

[30] Ms. Gough counters that unlike the Will, the Agreement gifts nothing. That it operates after death does not make it a testamentary disposition. Many instruments operating after death are not testamentary. She cites shareholder agreements, marriage contracts, pre-nuptial agreements, *inter vivos* trusts, family trusts, and the like. She argues "[…] all wills only take effect on death, but not all instruments that take effect on death are wills".

[31] Ms. Gough also objects that the judge confused revocability of the 2014 Will with revocability of the Agreement. She argues by analogy that an agreement to make mutual wills is not revoked when one party revokes her will. The agreement endures, and gives rise to an action for breach of contract.

[32] Finally, Ms. Gough says the judge failed to apply the fourth criterion for determining whether an instrument is testamentary—whether the Agreement demonstrated an *animo testandi*—a testamentary intention. She says it did not.

[33] Ms. Gough adds because the 2014 Will and Agreement were executed simultaneously, it would be absurd to attribute testamentary intention to the Agreement when that intention was already expressed in the Will, which on the judge's analysis would revoke the Agreement if the Will was executed second.

[34] It is true the Agreement operates after Mr. Leslie's death, although it says it is effective on execution (cl. II(i)). The Agreement assumes the prior vesting of gifts in the beneficiaries described in the 2014 Will. So the terms of the Agreement can only operate then. The "vigour and effect" (*MacInnes*, at ¶26 above) of the occupational rights conferred on Ms. Gough flow from the Agreement.

[35] The meaning of an instrument having "vigour and effect" after death was discussed in *Corlet v. Isle of Man Bank Ltd.*, [1937] 3 D.L.R. 163 (Alta. C.A.). The deceased assigned some life insurance policies to a trustee. The court found that a trust of the life insurance proceeds was not testamentary:

> The fallacy in the argument based upon the "oft quoted words" of Sir J. P. Wilde in *Cock v. Cooke* (1866), L.R. 1 P. & D. 241, lies in a misunderstanding of what the words "***vigour and effect***" are applicable to. They ***are clearly applicable not to the result to be obtained by, or to the performance of, the terms of the instrument, but to the instrument itself***. The question is whether the instrument has vigour to effect, and does effect, or is "consummate on execution" to effect, a gift or to create a trust. If the document ***is "consummate" to create a trust in praesenti, though to be performed after the death of donor it is not dependent upon his death for its vigour and effect***.
>
> [Emphasis added]

[36] The trial decision in *Corlet* provides a useful discussion of the case law ([1937] 1 D.L.R. 768 (Alta. S.C.)).

[37] In *Corlet*, the deceased could have frustrated the trust by not paying the policy premiums during his lifetime. That prospect did not invalidate the assignment or the trust funded by the insurance proceeds after death.

[38] Most cases following *Corlet* involve a transfer of property to trustees before death (e.g. *Easingwood v. Easingwood Estate*, 2013 BCCA 182; *Anderson v. Patton*, [1948] 2 D.L.R. 202 (Alta. S.C.A.D.)). But transfer of property relates to the funding of the trust, not its creation. *Corlet* may be an outlier regarding the efficacy of a trust funded after the settlor's death.

Secret Trust

[39] The Agreement here can be potentially effective in two ways which need not be mutually exclusive. First, there is a potential contractual claim. Second, the Agreement may be characterized as creating a secret trust.

[40] In principle, trusts and contracts are legally different. A contract is a personal common law obligation arising from an agreement between the contracting parties. A trust is an equitable, proprietary obligation which may arise independently of any agreement. But the two are not mutually exclusive. A contract may also create a trust. An employee pension trust resulting from a collective agreement is an obvious example (*Baird v. Baird*, [1990] 2 A.C. 548; *Imperial Group Pension Trust Ltd. v. Imperial Tobacco Ltd.*, [1991] 1 W.L.R. 589 (Ch. Div.)).

[41] In her original factum, Ms. Gough mentions secret trusts under repugnancy, but it is more relevant to determining whether the Agreement is testamentary. In fairness to Justice Arnold, it was never put to him that the Agreement may be a secret trust. Most of his exchanges with Ms. Gough's then counsel related to the contractual character of the Agreement.

[42] In *Waters' Law of Trusts*, 5th ed (Toronto: Thomson Reuters, 2021) at p. 294, the author describes when a secret trust arises:

> Whenever a person takes property beneficially under a will or on an intestacy, and it is shown that during the testator's, or the intestate's, lifetime the devisee, legatee, or intestate successor undertook to hold the property on trust for specified objects, he will be held to that obligation on the death of the deceased. What must be shown is that there was a communication to the devisee, legatee, or intestate heir of the deceased's intentions, and an acceptance by that person of the request that he hold the property on trust for the enumerated person or purposes.

[43] The case law provides two bases for giving effect to secret trusts. First, they are a species of trust and operate independently of the *Wills Act*. Second, they prevent inequitable conduct by upholding an obligation undertaken by the legal title holder to whom title was granted in reliance on the undertaking to hold title for the benefit of others.

[44] In *Feltner v. The Queen in Right of Nova Scotia* (1972), 7 N.S.R. (2d) 549 (S.C.), the court quotes from the House of Lords in *Cullen v. Attorney-General for Ireland* (1866), L.R. 1 H.L. 190 at p. 198, which alludes to both bases for upholding secret trusts:

> [...] where there is a secret trust, or where there is ***a right created by a personal confidence*** reposed by a testator in any individual, ***the breach of which confidence would amount to a fraud***, the title of the party claiming under the

> secret trust, or claiming by virtue of that personal confidence, ***is a title dehors the will***, and which cannot be correctly termed testamentary.
>
> [Emphasis added]

See also ¶27-30 of *Feltner*.

[45] The inapplicability of the *Wills Act* to secret trusts was explained in *Re Young*, [1951] Ch. 344 at p. 350:

> […] the whole theory of the formation of a secret trust is that the *Wills Act* 1837 has nothing to do with the matter because the forms required by the *Wills Act* are entirely disregarded, since the persons do not take by virtue of the gift in the will, but by virtue of the secret trusts imposed upon the beneficiary who does in fact take under the will.

[46] In *Blackwell v. Blackwell*, [1929] A.C. 318 at p. 336, the House of Lords elaborates on the equitable basis for disregarding the *Wills Act*, relying on *McCormick v. Grogan* (1869), L.R. 4 H.L. 82 at p. 97:

> It is a jurisdiction by which a Court of Equity, proceeding on the ground of fraud, converts the party who has committed it into a trustee for the party who is injured by that fraud. … The Court of Equity has, from a very early period, decided that even an Act of Parliament shall not be used as an instrument of fraud; and if in the machinery of perpetrating a fraud an Act of Parliament intervenes, ***the Court of Equity, it is true, does not set aside the Act of Parliament, but it fastens on the individual who gets a title under that Act, and imposes upon him a personal obligation, because he applies the Act as an instrument for accomplishing a fraud. In this way the Court of Equity has dealt with the Statute of Frauds, and in this manner, also, it deals with the Statute of Wills***.
>
> [Emphasis added]

[47] Other Nova Scotia cases applying the secret trust principle include *Re Hardy*, [1952] 2 D.L.R. 768 (N.S.S.C.); *Re Armstrong* (1969), 7 D.L.R. (3d) 36 (N.S.S.C.) and most recently, *MacCallum Estate*, 2022 NSSC 34.

[48] The Agreement was executed simultaneously with the 2014 Will to which it refers and was intended to be effective at that time. The Will could only take effect on death. The arrangement contemplates that once Ms. Leslie took title to the residence, the terms of the Agreement could be implemented.

[49] Ms. Leslie insists that the Agreement is not a secret trust because: a) it is not a secret; b) it does not satisfy the three certainties to form a trust; c) the trust was not constituted; and d) the Agreement does not meet the test for a secret trust.

[50] The first submission can be readily dismissed—secret trusts do not need to be "secret". The secrecy in question relates to their private character. Unlike wills in most common law jurisdictions, secret trusts do not generally become public documents. The secrecy of the trust simply means that the obligations described do not appear in the testator's will.

[51] All Ms. Leslie's arguments on the three trust certainties: intention to create a trust, the certainty of subject matter, and certainty of trust objects (beneficiaries) rely upon consideration of the subsequent 2015 Will and 2018 codicil. These instruments may be relevant to determining whether the Agreement is enforceable, but they do not resolve whether the Agreement meets the three certainties. Obviously the Agreement does. It describes what Mr. Leslie intended, what property is subject to a beneficial claim, and who the beneficiaries are. It is intention that matters. No technical language is necessary to create a trust (*Waters*, p. 143).

[52] With respect to the particular requirements of a secret trust (¶42 above)—these are clearly met. The Agreement provides that Ms. Leslie would hold Mr. Leslie's home for the beneficial use of Ms. Gough until the "Disposition Date" defined in the Agreement. Mr. Leslie's intention was clearly communicated to Ms. Leslie because he gave her the Agreement by which that intention was expressed. Finally, Ms. Leslie agreed to honour Mr. Leslie's intention because she executed the Agreement acknowledging she would do so.

[53] Next, Ms. Leslie protests that a secret trust was never constituted—that the trust property was not transferred to the trustee. Only when constituted (funded) does a trust become enforceable (*Waters* at p. 28). Once again, Ms. Leslie refers to the 2015 Will and 2018 codicil as necessary to decide this question. Ms. Gough replies that the trust was properly constituted once title was vested in Ms. Leslie, as Mr. Leslie's personal representative under s. 46(1) of the *Probate Act* or by deed, once the property was beneficially conveyed to her in accordance with Mr. Leslie's testamentary wishes.

[54] These arguments anticipate the second hearing to be scheduled in the court below. They do not relate to whether the Agreement is a secret trust, but whether the trust was properly constituted and thus enforceable.

[55] Similarly, none of the foregoing is a comment on the enforceability of the Agreement on contractual principles.

[56] Because the Agreement creates a secret trust, it cannot be a testamentary instrument and it is not revoked by later wills.

Did the judge breach procedural fairness and err by considering whether the Agreement offends the principle of repugnancy?

[57] Fairness will be considered first and repugnancy second.

Fairness

[58] Ms. Gough complains the judge went beyond the issues and jurisprudence in the arguments before him by speculating on Mr. Leslie's estate planning and drawing an inference that he created an agreement of "dubious enforceability" because it allegedly was repugnant to the absolute character of the gifts in the will.

[59] The judge queried the purpose of the Agreement:

> [42] So why didn't Allan simply make the conditions part of the 2014 will? Conditions of the nature set out in the agreement, if included in a will, are at risk of being struck on the basis that they are repugnant. In Albert H. Oosterhoff et al., *Oosterhoff on Wills*, 8th ed. (Toronto: Thomson Reuters Canada, 2016), the authors write at p. 735:
>
> > It is not possible at law to give property to a person while withholding from or denying to that person an essential attribute of property. Conditions attempting to do this are ignored on the basis that they are repugnant. Gifts which offend the rule in *Saunders v. Vautier* fall into this category. ***If A is vested in interest in respect of property and there is no prior interest which must conclude before A may vest in possession, it is not possible to delay vesting in possession against A's wishes. Doing so would be repugnant to the form of property presently held by A. Likewise, since the right to alienate property is an essential feature of property, restraints on alienation ... can be struck on the basis of repugnancy.*** ...[T]he same point applies to attempts to dictate how property given to A should be dealt with on A's death. Provided the form of property given to A does not terminate on A's death (as would be the case if a life estate *pur sa vie* was given to A), the entitlement to determine how that property should be distributed on A's death is within the bundle of rights that define the property held by A and is thus exclusive to A.

> [43] In *Blackburn and Cox v. McCallum*, (1903), 33 S.C.R. 65, Mills J., for the Supreme Court of Canada, stated the principle this way at pp. 92-93:
>
> > ***Where property is given absolutely a condition cannot be annexed to the gift inconsistent with its absolute character***, and where a devise in fee is made upon condition that the estate shall be shorn of some of its necessary incidents ... or that the proprietor shall not have the power to alien, either generally, or for a time limited, such conditions are void, because they are repugnant to the character of the estate.
>
> See also *Doherty v. Doherty*, [1936] 2 D.L.R. 180 (N.S.S.C. [In Banco]); *Re Malcolm*, [1947] 4 D.L.R. 756 (Ont. H.C.); and *Re Collier*, (1966), 60 D.L.R. (2d) 70 (Nfld. S.C.).
>
> [Emphasis added]

[60] Ms. Gough complains that the judge here conducted his own research to conclude that the Agreement was of "dubious enforceability":

> In this case, the question of whether Allan could do by will what he attempted by Agreement, in particular, was not addressed during the hearing and may not have arisen until the Court was formulating its decision.

[61] Ms. Gough relies upon *Slawter v. Bellefontaine*, 2012 NSCA 48 at ¶55 and the English Court of Appeal in *Murphy v. Wyatt*, [2011] EWCA Civ. 408 at ¶13, addressing the practice when a judge takes a point not argued:

> Thirdly, whether or not the point turns out to be open to the judge, it is clear that, save perhaps in very exceptional circumstances (which I find it very hard to envisage), ***he must ensure that the parties are given a fair opportunity to deal with the point***. If the point is, on analysis, a bad one, it is fairer to the parties and less embarrassing for the judge that this is established before the judgment is available, rather than the parties either having a hearing at which the judge has to withdraw or amend the judgment or suffering the delay and expense of an appeal.
>
> [Emphasis added]

[62] It would have been appropriate for the judge to seek submissions on his concerns about repugnancy before commenting on this principle. Had the decision turned on the repugnancy point, it would have been an error of law to decide the case on that basis without hearing from counsel. But the judge's remarks do not constitute the *ratio* of the case, which was decided on the testamentary instrument point. Nevertheless, it was reasonable for Ms. Gough to confront a principle to which the judge devoted substantial attention.

Repugnancy

[63] Ms. Gough objects that the judge improperly concluded Mr. Leslie was attempting to do by Agreement what he could not do by will. She argues that the judge misunderstood the principle of repugnancy.

[64] The Supreme Court describes the principle in *Blackburn v. McCallum* (1903), 33 S.C.R. 65 at ¶56, quoted by the judge (¶59 above).

[65] The doctrine was restated more broadly in *Re Malcolm*, [1947] 4 D.L.R. 756 (Ont. H.C.), as follows:

> The fundamental principle is that a condition, the effect of which would be to destroy or take away the enjoyment of the fee simple given is repugnant to the rights conferred on the holder of the fee.

[66] Ms. Gough says that the principle of repugnancy does not apply to conditional gifts or trusts and refers to the doctrine of secret trusts as an example of where the principle of repugnancy does not defeat the trust.

[67] Ms. Gough protests there was no obstacle to Mr. Leslie having created a trust as a side agreement to the 2014 Will, whereby Ms. Gough could have the benefit of living in the home for a limited time with a gift of the remainder to Ms. Leslie. She elaborates:

> In this case, Allan Leslie could have chosen not to leave the fee simple in the house to Megan, but instead used a spouse trust, or if he did wish to give the fee simple instead of a lesser interest, made it subject to a secret trust. Why he chose the use of an agreement should not have been a matter for conjecture. Ms. Watson Coles' notes on their face may not have revealed the reason for a side agreement over a spouse trust, but that does not mean the Application Judge's recourse to the law on conditions repugnant to the gift answers His Lordship's question. As noted above, the misapplication of the law on conditions repugnant to gift could have been avoided by simply asking the question or requesting submissions on the point.

[68] As a result, Ms. Gough says the judge wrongly concluded:

> [44] The most convincing inference is that by executing the agreement, Allan was attempting to do indirectly what he could not do directly through the 2014 will itself: create binding and enforceable obligations on Shannon and Megan to accept conditions on the absolute interests he gave them under the will. […] If

> these conditions had formed part of Allan's will, they would likely have been invalid.

[69] The principle of repugnancy does not apply if the limited nature of an apparently absolute gift is clear in all the circumstances, as Justice Hallett observed in *Cook v. Nova Scotia* (1982), 53 N.S.R. (2d) 87 (S.C.):

> [45] […] ***You cannot simply look at the first part of the will and say her intention was to devise an absolute interest. One must look at the whole will*** and when this is done, her intention is clear. There is no rule of law which prevents effect being given to this intention. In reading the will as a whole, it is apparent that the testatrix intended to limit the estate devised to her husband; it was not a restraint on alienation as he had not been devised the full interest when the will is looked at as a whole.
>
> [Emphasis added]

[70] The real question is what the settlor or testator intended, looking at the instrument(s) as a whole. The repugnancy principle only applies if there is a contradiction in what is granted, after ascertaining intention in all the circumstances.

[71] Ms. Gough is correct that creating a trust which modifies otherwise absolute gifts in a will need not engage the principle of repugnancy. Whether the repugnancy principle is offended in any particular case depends on the circumstances. The limited occupation interest created in the Agreement in favour of Ms. Gough does not detract from nor is it repugnant to the fee simple interest which Ms. Leslie is granted in the Will and which she will ultimately enjoy. The fee simple is vested in Ms. Leslie, but its full possessory benefit is deferred until Ms. Gough's occupancy right has been exhausted.

[72] In her factum, Ms. Gough speculated that the bifurcated process may have contributed to the judge's erroneous conclusion:

> In some respects, bifurcating the case into a hearing on this point and a separate hearing on the effect of the Agreement on the Estate may have contributed to the Court's difficulties, in that the kind of evidentiary record required for a hearing under CPR 12 was not present. This, combined with the absence of case law directly on point, led the Court to resort to fundamental wills principles without the benefit of counsel's argument to help separate the irrelevant from the relevant lines of inquiry. […]

[73] Ms. Gough is correct that Justice Arnold was given very little evidentiary and jurisprudential assistance when interpreting the testamentary instruments and Agreement in this case.

[74] The commendable impulse to conserve resources by limiting issues before the court may founder when those issues are so narrowly drawn that a comprehensive solution remains elusive. So it is here. It would have been preferable to put all issues and evidence before the judge to facilitate a final result.

[75] The appeal should be allowed, without costs.

Bryson, J.A.

Concurred in:

Wood, C.J.N.S.

Beaton, J.A.