Beneficiary Designations and Secret Trusts

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Beneficiary designations can be challenged in a few ways, including the presumption of resulting trust, unjust enrichment, rectification and secret trusts.[1] Secret trusts appear to be making a resurgence and can affect Clients' beneficiary designations and estate planning.

This article provides a brief overview of secret trusts. It will also discuss *Gough v. Leslie Estate,*[2] where the Nova Scotia Court of Appeal (NSCA) applied a secret trust to a beneficiary designation. The NSCA also found that secret trusts cannot be revoked by subsequent Wills.

It is therefore important to be aware of secret trusts. If there are any other agreements with family members that may constitute secret trusts, then these may affect beneficiary designations and any subsequent Wills.

What is a Secret Trust?

A secret trust is a trust where an individual makes a gift (often a property or properties) to a person, but privately agrees with that person that they are to hold the gift in trust for a third person. A secret trust can arise where:

- a person gives property to another (the donee),
- the person communicates to the donee an intention that the property be dealt with in a specific way upon the happening of an event, and

[1] For more information, see Sanjana Bhatia and Jennifer Eshleman, "Beneficiary Designations: A Dive into Uncertain Waters," STEP Inside, October 2023.
[2] 2022 NSCA 25, rev'g 2021 NSSC 63 (CanLII). (*Gough*)

- the donee accepts the obligation.

Silence may constitute acceptance of the trust obligation. Courts have taken the view that if the person creating the trust (testator) makes a request of the potential donee, the potential donee will need to specifically reject the testator's instructions if he or she wants to keep the property. Acquiescence and/or silence will constitute the donee's acceptance of the obligations.[3]

In addition to the above requirements, the three certainties necessary for an express trust must be present:

- the words creating the trust must be imperative,
- the subject of the trust must be certain, and
- the object or person intended to take the benefit of the trust must be certain (the beneficiary).

A semi-secret trust can also arise where an individual creates a trust but does not indicate the beneficiary's identity.

Secret trusts can be written or verbal. However, there may be evidentiary issues with verbal secret trusts. There is a risk that the donee may deny receiving instructions from the testator and deny the existence of a trust.

Discussed below is *Gough* - a recent example of a case where a secret trust arose when a father gave property to his daughter for the benefit of his common law spouse.

Facts in *Gough*

Allan Leslie (Allan) and Shannon Gough (Shannon) were in a common law relationship. Allan also had a daughter, Megan. In 2014, Alan made a Will where he appointed Megan as executor. He left his

[3] *Bergler v. Odenthal*, 2020 BCCA 175 (CanLII) and *Armstrong v. Kotanko*, 2023 BCSC 989 (CanLII).

house to Megan and his registered retirement savings plan (RRSP) and pension plan benefits to Shannon.

On the same day, Allan, Shannon and Megan entered into a written agreement (the 2014 Agreement). The 2014 agreement was not referred to in Alan's Will. It provided that on Alan's death:

1) Shannon could live in the house until the earliest of three events:

    - Shannon's death,
    - Shannon advises Megan she does not want the house held for her, or
    - Shannon turns 70.

2) Shannon would receive the RRSP income, but on her death that RRSP capital would pass to Megan.

In November 2015, Allan and Shannon had a falling out. Allan made a new Will (the 2015 Will) in which he stated:

> **I HEREBY REVOKE** 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.

The 2015 Will did not mention the 2014 Agreement and made no provision for Shannon. In 2018, Allan made a codicil to his 2015 Will in which he gifted a registered retirement income fund (RRIF) to Shannon and gifted Megan the residue of his estate. After Allan's death, Shannon remained in the house according to the 2014 Agreement, which she argued was a "secret trust." She also argued that the 2014 Agreement survived the 2015 Will and the 2018 codicil.

Court Decisions

The main issue was whether the 2014 Agreement constituted a secret trust. The NSCA reversed the decision of the Nova Scotia Supreme Court (NSSC). It found that the 2014 Agreement was indeed a secret trust because it provided for:

- Holding property for the beneficial use of another - Megan would hold Allan's home for the beneficial use of Shannon until the earliest of the three events described above.
- Communication of the deceased's intentions - Allan's intention was clearly communicated to Megan because Allan gave Megan the 2014 Agreement by which that intention was expressed.
- Acceptance of the deceased's intentions – Megan agreed to honour Allan's intention because she signed the 2014 Agreement.

The NSCA concluded that the 2014 Agreement satisfied the three certainties to form a trust because it described:

- what Allan intended,
- what property was subject to beneficial claim, and
- the object being Shannon.

The NSCA reiterated that no technical language is necessary to create a trust - it is intention that matters.

Additional Issues

Other additional issues raised in this case were:

- Was the 2014 Agreement not a secret trust because it was not a secret?
- Was the 2014 Agreement testamentary and therefore revoked by the 2015 Will?
- Did the gift of the house to Shannon offend the principle of repugnancy?

Was the 2014 Agreement not a secret trust because it was not a secret?

The NSCA dismissed Megan's argument that the 2014 Agreement was not a secret trust because it was not secret. It noted that secret trusts do not have be "secret" and that their secrecy relates to their private character. Unlike Wills, secret trusts do not generally become public documents. The secrecy of the trust simply meant that the obligations described do not appear in the testator's Will.

Was the 2014 Agreement testamentary and therefore revoked by the 2015 Will?

The NSSC held that the 2014 Agreement was testamentary because it disposed of Allan's property on his death and therefore was revoked by the 2015 Will. The NSCA disagreed and explained that secret trusts:

- are a species of trusts that operate independently of the *Wills Act,*[4] and
- prevent inequitable conduct by upholding an obligation undertaken by the legal title holder to whom title was granted (Megan) in reliance on the undertaking to hold title for the benefit of others (Shannon).

The NSCA concluded that the 2014 Agreement created a secret trust, which is not a testamentary instrument like a Will. As such, Allan's 2015 Will and 2018 Codicil did not revoke the 2014 Agreement.

Did the gift of the house to Shannon offend the principle of repugnancy?

The principle of repugnancy is a doctrine which refers to a contradiction or inconsistency between clauses of the same document, deed, or contract, or between allegations of the same pleading. At common law, the court will resolve contradictions in a document based on the primary intention of

[4] R.S.N.S. 1989, c. 505.

the parties. If this cannot be established, the court treats the earlier statement as effective in the case of a deed and the later statement as effective in the case of a Will.

The NSSC found that the 2014 Agreement was of dubious enforceability because it breached the principle of repugnancy. The NSCA disagreed and found that the trial judge misunderstood the principle of repugnancy. The NSCA stated that the principle of repugnancy only applies if there is a contradiction in what is granted, after ascertaining intention in all circumstances. The NSCA concluded that the limited occupation interest created in the 2014 Agreement in favour of Shannon does not detract from nor is it repugnant to the fee simple interest in the house that Megan would eventually enjoy.

End Result

The end result was that Shannon received the RRIF because it had been designated to her, prior to death and outside the Will. The NSCA sent the matter back to the trial judge for rehearing once the 2014 Agreement was ruled not to be a testamentary disposition.[5] The 2015 Will and the 2018 codicil were still valid, and the grant of probate to the executor was not revoked. The terms of those documents were modified, though, by the secret trust embodied in the 2014 Agreement.

Key Takeaway

The key takeaway from *Gough* is that it is important to be aware of secret trusts. If there are any other agreements with family members that may constitute secret trusts, then these may affect beneficiary designations, any subsequent Wills, and Clients' ultimate wishes.

[5] The rehearing, however, did not occur because the parties settled.