S. Kaptyn, Co-Executor and Trustee of the Estate of J. Kaptyn v. H. Kaptyn, Co-Executor and Trustee of the Estate of J. Kaptyn et al.

H. Kaptyn, Co-Executor and Trustee of the Estate of J. Kaptyn v. S. Kaptyn, Co-Executor and Trustee of the Estate of J. Kaptyn et al.

[Indexed as: Kaptyn Estate (Re)]

102 O.R. (3d) 1

2010 ONSC 4293

Ontario Superior Court of Justice,
D.M. Brown J.
August 6, 2010

Wills and estates -- Wills -- Ademption -- Testator owning some corporate and real estate assets directly and owning others indirectly through holding company -- Testator purporting to gift his corporate and real estate assets to his grandchildren -- Gifts of indirectly owned assets not failing.

Wills and estates -- Interpretation -- Particular phrases -- Testator executing Primary Will (dealing with all of his property except his shares in private corporations) and Secondary Will (dealing with those shares) -- Testator bequeathing particular assets to his grandchildren -- Secondary Will directing estate trustees to liquidate holding company and use proceeds together with "proceeds in my estate" to repay inter-company loans and taxes "with the intention that assets disposed of in this my will are transferred free and clear of such liabilities otherwise" -- Trustees directed to take such

steps as were reasonably necessary to maximize net benefit to each of grandchildren -- "Maximize the net benefit" meaning that grandchildren were to receive specific bequests free of any debt that might be owed by testator to another company in which he had interest and free of any tax liability -- Clause not giving estate trustees authority to wind up corporations that testator had specifically bequeathed to his grandchildren in order to maximize net benefit to grandchildren -- "Proceeds in my estate" referring to residue of Primary and Secondary Estates and not just Secondary Estate.

Wills and estates -- Interpretation -- Testator's intent -- Testator executing Primary Will (dealing with all of his property except his shares in private corporations) and Secondary Will (dealing with those shares) -- Executors' applications for advice and direction concerning interpretation and administration of those wills and beneficiary's challenge to codicil to one will consolidated -- Challenge to codicil heard first in anticipation that same judge would also hear applications for advice and directions -- Those applications ultimately heard by another judge -- [page2]Findings of fact about testator's testamentary intentions which were made by judge who heard codicil challenge binding at hearing of applications for advice and directions -- Principle of issue estoppel applying -- Whether execution of primary and secondary will creates two distinct estates or one estate administered under two wills will depend upon intention of testator as expressed in language of wills.

The testator disposed of his property by two wills, a Primary Will (dealing with all of his property except his shares in private corporations) and a Secondary Will (dealing with those shares). He executed a codicil to each of the two wills. Each of his executors brought an application seeking the advice and direction of the court on the interpretation and administration of the wills. Those applications were ordered consolidated, along with a challenge by one of the testator's grandsons to the validity of the codicil to the Secondary Will. The codicil challenge was heard first (and ultimately dismissed), and it was expected that the applications for advice and directions would be heard by the same judge. In fact, those applications

were heard by a different judge.

Held, the applications should be granted.

The findings of fact about the testator's testamentary intentions which were made by the judge who ruled on the challenge to the codicil were binding in these applications. Had that judge heard these applications, as initially contemplated, the parties could only have reasonably expected him to follow and apply those findings. Moreover, the principle of issue estoppel applied.

Whether the execution of multiple wills creates two distinct estates, or leaves one estate administered under two separate wills, will depend upon the intention of the testator as expressed in the multiple wills.

The testator owned some corporate and real estate assets directly and owned other assets indirectly, through a holding company. He purported to leave most of his corporate and real estate assets to his grandchildren. The gifts of indirectly owned assets did not fail.

The Secondary Will directed the trustees to liquidate a holding company and stipulated that the proceeds from the liquidation, together with "the proceeds in my estate", were to be applied in repayment of inter-company loans in which the testator had an interest and American and Canadian taxes, "with the intent that the assets disposed of . . . are transferred free and clear of such liabilities otherwise". The trustees were directed to "take such steps as are reasonably necessary including payment of taxes . . . in order to maximize the net benefit to each of my grandchildren". The meaning of the "maximize the net benefit" clause was that the grandchildren were to receive specific bequests of shares of private corporations and of real property free of any debt that might be owed by the corporations to another company in which the testator had an interest, as well as free of any tax liability imposed by any Canadian or American jurisdiction. The clause did not give the estate trustees the authority to wind u p the corporations that the testator had specifically bequeathed to

his grandchildren in order to maximize the net benefit to the grandchildren.

The words "proceeds in my estate" referred to the residue of the Primary and Secondary Estates, not just the Secondary Estate.

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1999 BCCA 371, 175 D.L.R. (4th) 318, 127 B.C.A.C. 272, 28 E.T.R. (2d) 168, 89 A.C.W.S. (3d) 634; Kaptyn Estate (Re), [2008] O.J. No. 4032, 43 E.T.R. (3d) 219, 2008 CanLII 53123, 171 A.C.W.S. (3d) 232 (S.C.J.); Kaptyn Estate (Re), [2009] O.J. No. 5150, 54 E.T.R. (3d) 313 (S.C.J.); Masoud Estate (Re), [1958] O.J. No. 291, 16 D.L.R. (2d) 134 (H.C.J.); Matzelle Estate v. Father Bernard Prince Society of the Precious Blood, [1996] O.J. No. 5107, 11 E.T.R. (2d) 78 (Gen. Div.); Meier Estate (Re), [2004] A.J. No. 1088, 2004 ABQB 352, 366 A.R. 299, 12 E.T.R. (3d) 92, 144 A.C.W.S. (3d) 189 (Surr. Ct.); Milwarde-Yates v. Sipila, [2009] B.C.J. No. 402, 2009 BCSC 277, 47 E.T.R. (3d) 270; Noik v. Noik Estate, [2003] O.J. No. 6235, 11 E.T.R. (3d) 175 (S.C.J.); Northern's Estate (Re), [1884] 28 Ch. D. 153; Perrin v. Morgan, [1943] A.C. 399 (H.L.); Philips v. Rail, [1906] W.R. 517 (Ch. Div.); R. v. Mahalingan, [2008] 3 S.C.R. 316, [2008] S.C.J. No. 64, 2008 SCC 63, 237 C.C.C. (3d) 417, EYB 2008-150418, J.E. 2008-2190, 243 O.A.C. 252, 300 D.L.R. (4th) 1, 79 W.C.B. (2d) 820, 381 N.R. 199, 61 C.R. (6th) 207; Rowland (Re), [1963] Ch. 1 (C.A.); Rudaczyk (Re) (1989), 69 O.R. (2d) 613, [1989] O.J. No. 1368, 34 E.T.R. 231, 17 A.C.W.S. (3d) 138 (H.C.J.); Skude (Re), [1950] S.J. No. 53, [1950] 3 D.L.R. 494 (K.B.); Smith Estate (Re), [2003] S.J. No. 612, 2003 SKQB 361, [2004] 7 W.W.R. 516, 240 Sask. R. 258, 3 E.T.R. (3d) 312, 125 A.C.W.S. (3d) 934; Stafford Estate v. Thissen, [1996] O.J. No. 1957, 5 O.T.C. 130, 12 E.T.R. (2d) 201, 63 A.C.W.S. (3d) 986 (Gen. Div.); Stuart Estate (Re), [1982] O.J. No. 1403, 13 E.T.R. 74 (H.C.J.); Sun Life Assurance Co. of Canada v. Woitte, [1992] B.C.J. No. 1105 (S.C.); Wilhelm v. Hickson, [2000] S.J. No. 45, 2000 SKCA 1, 183 D.L.R. (4th) 45, [2000] 4 W.W.R. 363, 189 Sask. R. 71, 1 C.C.L.T. (3d) 215, 31 E.T.R. (2d) 193, 94 A.C.W.S. (3d) 786

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APPLICATIONS for advice and directions.

B. Finlay, Q.C., M-A Vermette and J. Oelbaum, for Simon Maria Kaptyn.

I. Hull, S. Popovic-Montag and B. Wilson, for Henry Willhelm Kaptyn.

M. Kerr and K. Charlebois, for Jason and Jonathan Kaptyn.

D. Dochylo and B. Cohen, for Children's Lawyer.

R. Bohm, for Alexander Kaptyn.

D.M. BROWN J.: --

I. Overview

[1] Multiple wills are frequently used by testators to limit the exposure of their estate to probate fees. Typically, those assets whose administration will require probate are dealt with in a primary will, while those which will not, such as shares

in privately held corporations, are placed under a secondary will. These applications seek the opinion, advice and directions of the court on numerous aspects of the interpretation of the multiple wills made by John Kaptyn and raise questions about the relationship between the two wills in their administration.

[2] When John Kaptyn died on May 8, 2007, he left a substantial estate, valued at about $75 million. He disposed of his property by two wills -- a Primary Will and a Secondary Will executed on April 5, 2007. On April 25, 2007, John Kaptyn executed one codicil to each of those two wills.

[3] John Kaptyn's grandson, Alexander Kaptyn, challenged the validity of the codicil to the Secondary Will. Following a two-week trial, Lederer J. concluded that the codicil to the Secondary Will was a valid testamentary instrument. [See Note 1 below] [page5]

[4] In both wills, John Kaptyn named his two sons, Simon and Henry, as co-executors. Each has commenced an application seeking the opinion, advice and direction of the court on the interpretation and administration of the two wills. The questions posed to the court by each executor are reproduced in Appendix "A" to these reasons.

II. John Kaptyn: His Family and His Holdings

[5] John Kaptyn was survived by his wife, Doreen Kaptyn; his first wife, Mary Kaptyn, who is the mother of Simon and Henry; as well as by five grandchildren. His son Simon has two children, Jason and Jonathan; his other son, Henry, has three: Samantha, Robert and Alexander.

[6] John Kaptyn had carried on several businesses, including hotels, commercial real estate and real estate development.

[7] Over the years, John Kaptyn assembled a significant real estate portfolio and held those assets through a complex corporate structure. [See Note 2 below] Briefly described, John Kaptyn was the sole shareholder of several companies: Elgin Commercial Developments Inc., which was inactive at the time of

his death; 9011 Leslie St. Inc.; West Beaver Creek Management Limited, a company which owned two properties -- Hensim and 650 Highway 7 East; and 1171757 Ontario Limited ("117 Ontario"), which, through certain joint ventures, had an interest in the Parkway Hotel and Convention Centre.

[8] John Kaptyn held 80 per cent of the shares in 9005 Leslie St. Inc. and Jubilee Commercial Holidays Inc, with the other 20 per cent in companies held by the Simon Kaptyn Family Trust.

[9] Finally, John Kaptyn owned 100 per cent of the common shares in Marktur Limited, a company in which the Kaptyn Family Trust indirectly owned certain Class X shares. Marktur owned Captain Investments Inc., which in turn owned a commercial plaza and a residential beach house in Florida. The directions John Kaptyn gave in his Secondary Will about Marktur formed a significant point of controversy in this proceeding.

III. History of the Two Wills

[10] In his 2008 reasons, Lederer J. described at length the history of John Kaptyn's estate planning. Let me provide a condensed [page6]summary by drawing on those reasons. In the summer of 2006, John Kaptyn decided to restructure his estate. As Lederer J. put it:

> He wanted to "skip a generation". He wanted his real estate assets to be distributed to his grandchildren. He wanted his wife looked after and to make some charitable donations. The residue would go to his sons. [See Note 3 below]

[11] John Kaptyn executed primary and secondary wills on October 6, 2006, just before leaving on a trip to Asia. He anticipated that further work would have to be done on his wills upon his return. During his absence, John Kaptyn's financial advisors -- Michael Haschyc, the CFO of the Kaptyn group of companies, and his accountant, Sheldon Carr -- prepared schedules showing the division of his assets and discussed them with John Kaptyn on his return.

[12] On December 16, 2006, John Kaptyn met with his lawyer, Lawrence Fine, and Michael Haschyc, to consider further

revisions to his wills. Mr. Fine was charged with making certain changes.

[13] Before any changes were made, John Kaptyn discovered he had cancer. He sought treatment in the United States. While in Florida, he had further discussions with Messrs. Haschyc, Fine and Carr about changes to his will. On March 5, 2007, Mr. Fine sent redrafted wills to John Kaptyn in Florida. New primary and secondary wills were signed by John Kaptyn in March 2007.

[14] These were not the last wills of John Kaptyn. Further discussions with his advisors ensued throughout March and early April 2007. On April 4, 2007, John Kaptyn was transferred by air ambulance from Florida to the Markham/Stouffville Hospital. He went home the next day, where he signed new Primary and Secondary Wills. How the subsequent April 25, 2007 codicils to each of those wills came about was described by Lederer J. as follows [at paras. 61-63]:

> There was one further set of changes made to the Wills of John Kaptyn. Sometime after the execution of the Primary and Secondary Wills, Michael Haschyc had an opportunity to read them over carefully. He testified that this took place "mid month", "around April 15, 2007". He was concerned that the Secondary Will only referred to "the payment of taxes imposed by an American jurisdiction" and not to Canadian tax requirements. He realized that the change to include the reference to the redemption of the preference shares had not been made. Michael Haschyc telephoned the home of John Kaptyn and was advised by his wife, Doreen Kaptyn, that she would call him back. He wanted to find out what John Kaptyn wished him to do.
>
> He did not speak to John Kaptyn until April 24, 2007. (The delay is consistent with a period of delirium suffered by John Kaptyn to which I will refer later in these reasons.) John Kaptyn advised Michael Haschyc of two changes [page7]he wished to have made to his testamentary documents: (1) he wished to make a legacy to a third sister who had been "missed"; and (2) he wished to require that his grandson, Jonathan, give a power of attorney to his brother, Jason, to

ensure that Jason had the authority to operate the hotel complex. They reviewed the concerns of Michael Haschyc, being the omission of the reference to Canadian taxes and the omission of the reference to the redemption of the preference shares. With instruction from John Kaptyn, Michael Haschyc telephoned Lawrence Fine and directed him to make the changes. That day, Lawrence Fine delivered drafts of the Codicils for both Primary and Secondary Wills to Michael Haschyc "for your review and comment". Michael Haschyc sent back comments. In particul ar, he was still not happy with the provision dealing with the preference shares. He prepared his own wording which he delivered to Lawrence Fine. This wording indicated that the preference shares of Captain Investments Inc. owned by Marktur Limited were to be redeemed at a price of $1,000.00 US per share. It was incorporated into the Codicil to the Secondary Will of John Kaptyn.

Arrangements were made for Michael Haschyc and Lawrence Fine to attend at the home of John Kaptyn at 11:30 a.m. on April 25, 2007 to have the Codicils signed. They went into the bedroom. Lawrence Fine went through both of the Codicils. John Kaptyn read along as the changes were read to him. He followed along, all four fingers following line by line. As both Michael Hasschyc and Lawrence Fine recalled, when the redemption of the preference shares was reviewed, John Kaptyn asked Michael Haschyc to confirm that this was what they had talked about. Lawrence Fine asked if John Kaptyn had any questions or concerns. He did not. He expressed gratitude, particularly with respect to the inclusion of the bequest to his sister.

John Kaptyn died almost two weeks later, on May 8, 2007.

IV. General Description of the Two Wills

[15] Although a detailed analysis of certain provisions in John Kaptyn's Primary and Secondary Wills shall be required later, at this point it would be worthwhile to sketch out the key features of his wills and codicils.

A. Primary Estate

A.1 Primary Will

[16] In his Primary Will, John Kaptyn defined his "Primary

Estate" as "the whole of my property of every nature and kind whatsoever and wheresoever situate, including any property over which I may have a general power of appointment, but excluding my shares in the capital of the corporations which I refer elsewhere as my secondary estate". After giving his Primary Estates to his trustees, Simon and Henry Kaptyn, and describing their powers to administer his Primary Estate, John Kaptyn directed them to pay out of the capital of his Primary Estate his just debts, funeral and testamentary expenses and certain taxes. I shall return later to consider this clause in more detail. [page8]

[17] John Kaptyn directed his trustees to retain the services of his grandson, Jason, to conduct an orderly liquidation of his portfolio of stocks and bonds, and he gave Jason a gift of 10 per cent of the net proceeds of the stock liquidated "in consideration of my grandson's loyalty to me". A series of legacies then followed to friends and relatives, and John Kaptyn then gave directions regarding two residences for his wife, Doreen Kaptyn, and his former wife, Mary Kaptyn. John Kaptyn directed that trustees to give $3 million to charities. He made provision for monthly payments to his former wife and directed his trustees to transfer to his wife, Doreen, assets of Parkway Racquet & Fitness Club Ltd. This gift will be the subject of further discussion below.

[18] After satisfying those provisions of his Primary Will, John Kaptyn divided the residue of his Primary Estate into five shares, with one share to go to his son Simon and the remaining four shares to his other son, Henry.

A.2 Codicil to Primary Will

[19] Although a drafting error appeared in the codicil to the Primary Will, there is no dispute amongst the parties that the codicil operated to alter the cash legacies left by John Kaptyn, in particular by adding a legacy to one of his sisters, and the estate trustees have paid those legacies.

B. Secondary Estate

B.1 Secondary Will

[20] In his Secondary Will, John Kaptyn defined his

"Secondary Estate" as referring "only to my shares in the capital of the following companies: Elgin Commercial Developments Inc.; 9005 Leslie Street Inc.; 9011 Leslie Street Inc.; Jubilee Commercial Holdings Inc.; Marktur Limited; Captain Investments, Inc.; Parkway Hotels & Convention Centre Inc.; 1171757 Ontario Inc.; and West Beaver Creek Management Inc., and any other shares which are registered in my name of the share registers of companies after the date of this Will . . .". In his 2008 reasons, Lederer J. described those holdings as follows [at paras. 21-27]:

> An understanding of this structure begins with Marktur Limited. The equity in this corporation was 100% owned by John Kaptyn[.]
>
> Marktur Limited does not directly own any real estate. It was variously described as a holding company and a banker. This latter description reflects the fact that it held mortgages on real estate owned by other companies in which John Kaptyn held an interest. It made loans to and received loans from other companies and its own shareholders. The former description arises from its ownership of shares, particularly in Captain Investments Inc. [page9]
>
> Captain Investments Inc. is the vehicle through which John Kaptyn purchased real estate in the United States. As it was explained to the court, he utilized $10 million borrowed from the Bank of Nova Scotia through a company called Captain Developments Limited. With the $10 million, Captain Developments Limited purchased preference shares in Captain Investments Inc., thus making the money available to that company to acquire property in the United States. The bank was unaware that the money would be used in this way and required that the preference shares be "taken off the books" of Captain Developments Limited. This was accomplished by the bank loaning $4 million to a shell company that had been purchased by John Kaptyn. The shell company used the loan to purchase the preference shares from Captain Developments Limited at a discount. Although nothing specific was said about this, the value of the discount was presumably demonstrated by the difference in the loans ($6,000,000). The

shell company, having serv ed its purpose, was rolled into Marktur Limited, which became the owner of the preference shares of Captain Investments Inc. The preference shares, and how they were dealt with within the estate of John Kaptyn, are at the root of the issue before the court.

Captain Investments Inc. owns two pieces of real estate in Naples Florida: the first, a shopping plaza and the second, a beach house. For the purposes of estate planning and throughout this trial, the value of the beach house was said to be $6,600,000. It may or may not be that this value has fluctuated since it was established[.]

A significant portion of the real estate holdings owned by John Kaptyn and corporations in which he had an interest are located in Richmond Hill, Ontario in the area of Leslie Street and Highway 7. 9005 Leslie Street Inc. owns a property at that address. The company was 80% owned by John Kaptyn and 20% owned by the Simon Kaptyn Family Trust. Similarly, 9011 Leslie Street Inc. owns property at that address. Initially, the material presented in evidence explained that this company was 100% owned by John Kaptyn. Subsequently, his son, Simon Kaptyn, testified that the ownership in this corporation mirrored that of 9005 Leslie Street Inc., which is to say that it was 80% owned by John Kaptyn and 20% owned by Simon Kaptyn, either through the family trust, by him personally, or through one of his corporate holdings. Simon Kaptyn went on to say that he had agreed with his father that the ownership interests would be transferred so that John Kaptyn owned 100% of both companies. In evidence, he said that these transf ers could be, would be, but had not been, undertaken[.]

John Kaptyn owned 100% of West Beaver Creek Management Ltd. It owns two properties: the first is located at 650 Highway 7, East Richmond Hill; the second is described in the material presented to the court as the Hensin Property. These properties are the subject of direct bequests in the Secondary Will of John Kaptyn. The first is to go to the children of his son, Simon, and the second to the children of his son, Henry. The holdings in this company stand apart from

> the other real estate dealt with by the estate of John Kaptyn. Unlike the others, the two properties held by West Beaver Creek Management Limited were to be distributed subject to the mortgages in place at the time of the death of John Kaptyn[.]
>
> John Kaptyn also owned 100% of 1171757 Ontario Ltd. which, in turn, owned 50% of Parkway Hotels and Convention Center Inc. and 50% of Parkway Hotels and Convention Center Partnership. The remaining 50% of these entities was owned by corporations, in turn, owned by Simon Kaptyn. While the details of this part of the corporate structure were never fully explained, the upshot is that, through these corporate holdings, John Kaptyn owned 50% of two hotels, a Sheraton Hotel and a Best Western Hotel, [page10]located on property on the northeast quadrant of land at the intersection of Leslie Street and Highway 7 in Richmond Hill.

[21] John Kaptyn directed his executors, Simon and Henry Kaptyn, to pay his just debts, funeral expenses and certain taxes. Again, as this clause is the subject of dispute, I will deal more fully with it later. His Secondary Will then contained a "cross-over" clause, para. 4(c), which read as follows:

> To the extent that those assets of my Primary Estate, which are governed by the provision of my Will, executed on or about the 5th day of April, 2007, (hereinafter called my "Primary Will"), which Primary Will was executed prior to this Will, are insufficient to fully satisfy the gifts set out in Paragraph 4 of my Primary Will, I direct my Trustees to satisfy any such deficiencies with the assets held by my Trustees under this Will and to that extent I incorporate such provisions of my Primary Will into this Will by reference, with the necessary changes.

[22] There then followed four clauses under the heading "Corporate Investments". These clauses lie at the heart of the dispute amongst the parties on this application and will attract detailed examination later. For present purposes, their key features can be summarized as follows:

(i) the Trustees were directed to liquidate Marktur and use the proceeds to repay certain inter-company loans and certain taxes (clause 4(d.1));
(ii) the trustees were directed to "take such steps as are reasonably necessary . . . to maximize the net benefit to each of his grandchildren" (clause 4(d.2));
(iii) Simon's children, Jason and Jonathan Kaptyn, were to receive "any interest that I may have" in 1171757 Ontario Limited, Parkway Hotels & Convention Centre Inc., 9005 Leslie Street Inc., and 650 Highway 7 East, Richmond Hill property (clause 4(e));
(iv) Henry's children, Samantha, Robert and Alexander, were to receive "all my common, special or preferred, (sic) owned by me" in 9011 Leslie Street Inc., the Hensin Property and Captain Investments Inc. (clause 4(f)).

[23] As in the Primary Will, the Secondary Will divided the residue into five shares, with one to be distributed to Simon and four to Henry.

B.2 Codicil to Secondary Will

[24] In his codicil to the Secondary Will, John Kaptyn amended each of the provisions dealing with his "Corporate Investments", clauses 4(d.1) through 4(f). [page11]

V. Procedural History of these Applications

[25] The procedural history of these applications has some bearing on the manner in which I propose to approach the interpretation questions posed by both estate trustees. On July 19, 2007, Simon Kaptyn commenced his application for opinion, advice and directions regarding the interpretation of the Primary and Secondary Wills. On November 30, 2007, Allen J. appointed Henry and Simon Kaptyn as estate trustees during litigation of the property of the Primary and Secondary Estates of John Kaptyn. On January 11, 2008, Day J. granted a consent order directing a mediation of the issues. On February 14, 2008, Henry Kaptyn, as estate trustee, initiated his application for opinion, advice and directions. At some point, Alexander Kaptyn commenced his challenge to the validity of the codicil to the Secondary Will, for on April 9, 2008, Morawetz J. granted an order giving directions in that proceeding.

[26] A series of orders dealing with productions and cross-examinations then ensued, as well as an order directing the payment of certain charitable bequests contained in the Primary Will.

[27] Then, by order made April 24, 2008, Archibald J. ordered that the separate interpretation applications launched by Simon and Henry Kaptyn be consolidated together with Alexander Kaptyn's application to challenge the validity of the codicil to the Secondary Will, with the codicil challenge to be heard first, followed by a joint hearing of the two interpretation applications. Paragraph 15 of that order giving directions contemplated that the consolidated proceeding would be determined without a jury in September 2008, using a common trial record. Paragraph 16 of the order required that the interpretation applications not be heard until the completion of the trial of an issue relating to claims asserted by John Kaptyn's wife, Doreen Kaptyn.

[28] Lederer J. heard the will-challenge trial in September 2008 and released his reasons in October 2008. Lederer J. was then to proceed to hear the second stage of the proceeding involving interpretation issues. As events transpired, the parties entered into settlement discussions mediated by Lederer J. Those discussions did not produce an agreement. As a result of his involvement in those settlement discussions, Lederer J. could not hear the second, "interpretation", stage of the proceeding.

[29] During 2009, Strathy J. heard and determined several motions concerning the administration of specific assets under the wills, as well as the payment of legacies and specific pecuniary bequests made in the Primary Will, as modified by its codicil. Ultimately, the interpretation applications came before me for hearing in January 2010. [page12]

VI. General Principles of Will Interpretation

A. The objective of the interpretive exercise

[30] When a court interprets a person's will, it seeks to determine the disposition of the property intended by the

testator, [See Note 4 below] in other words, to ascertain the testator's true intention. [See Note 5 below] The Court of Appeal has observed that the basic rule for the construction of wills is to determine the true intention of the testator in the light of all the surrounding circumstances. [See Note 6 below] How a court should undertake such an exercise was described by the Court of Appeal in Burke (Re), [See Note 7 below] where the court gave the following directions to applications judges:

> Each Judge must endeavour to place himself in the position of the testator at the time when the last will and testament was made. He should concentrate his thoughts on the circumstances which then existed and which might reasonably be expected to influence the testator in the disposition of his property. He must give due weight to those circumstances in so far as they bear on the intention of the testator. He should then study the whole contents of the will and, after full consideration of all the provisions and language used therein, try to find what intention was in the mind of the testator. When an opinion has been formed as to that intention, the Court should strive to give effect to it and should do so unless there is some rule or principle of law that prohibits it from doing so.

[31] In interpreting a will, a court seeks to ascertain, if possible, the testator's actual or subjective intent, as opposed to an objective intent presumed by law. [See Note 8 below] What the interpreting judge seeks to avoid is to find himself, in the colourful words of Lord Atkin, as part of that group of judicial personages who have misconstrued the wills of testators and whom the "ghosts of dissatisfied testators . . . wait on the other bank of the Styx to receive . . . ". [See Note 9 below] Or, as put by Lord Denning in Rowland (Re):

> I have myself known a judge to say: "I believe this to be contrary to the true intention of the testator but nevertheless it is the result of the words he has used." When a judge goes so far as to say that, the chances are that he has [page13]misconstrued the will. For in point of principle the whole object of construing a will is to find out the testator's intentions, so as to see that his property is

> disposed of in the way he wished. True it is that you must discover his intention from the words he used: but you must put upon his words the meaning which they bore to him . . . not the meaning which a philologist would put upon them. And in order to discover the meaning which he intended, you will not get much help by going to a dictionary. It is very unlikely that he used a dictionary, and even less likely that he used the same one as you. What you should do is to place yourself as far as possible in his position, taking note of the facts and circumstances known to him at the time; and then say what he meant by his words. [See Note 10 below]

B. The limited utility of previously decided cases

[32] Other will-construction cases afford very little assistance to a court in forming an opinion about the intention of the testator in the particular case before it. Since the meaning of words in wills can differ so much according to the context and circumstances in which they are used, "it seldom happens that the words of one instrument are a safe guide in the construction of another". [See Note 11 below] Each case is an authority only on the facts involved, except insofar as it may set forth or explain any applicable rule of construction or principle of law. [See Note 12 below]

C. How a court should approach the words used by a testator in his will

[33] As I read the authorities, the prevailing approach to will interpretation requires a court to concentrate on the subjective meaning of the words used by a testator in his will. [See Note 13 below] A court should consider the words used in the light of surrounding circumstances and by considering other admissible evidence, [See Note 14 below] and give the words placed in a will the meaning intended by the particular testator. [See Note 15 below] The cases recognize two qualifications to the subjective interpretation approach: (i) technical legal words likely will be assigned their technical meaning where they have acquired a fixed meaning in law; and (ii) where used in a will, statutory definitions should be given their fixed meaning. [See Note 16 below] [page14]

[34] I find useful the distinction made in Feeney's Canadian Law of Wills between the task of interpreting the meaning of words and the process of applying principles of construction:

> Interpretation is the process of ascertaining the subjective meaning of the testator from the words of his or her will in the light of the surrounding circumstances. Construction is a default process used when attempts at interpretation fail, and it involves the application of rules or operating assumptions concerning presumed intent and meaning when the testator's actual intention and meaning cannot be ascertained from the will and from admissible extrinsic evidence. [See Note 17 below]

Under this approach, courts need not resort to rules of construction when the testator's intention is reasonably clear from the will and other admissible evidence. [See Note 18 below]

D. The role and scope of evidence of surrounding circumstances

[35] As the Court of Appeal observed in Burke (Re), [See Note 19 below] in applying the "armchair rule" a court should put itself in the place of the testator at the time he made his will and concentrate "on the circumstances which then existed and which might reasonably be expected to influence the testator in the disposition of his property". [See Note 20 below] Due weight should be given to such circumstances as were known to the testator insofar as they bear on the intention of the testator. At present, a tension exists in Ontario law about what evidence of the surrounding circumstances a court may take into account in interpreting a will. Direct evidence of a testator's intention generally is considered inadmissible in the exercise of interpreting a will, whereas as "indirect extrinsic evidence" may be used by a court where the function of such evidence is to explain what the testator wrote, but not what he intended to write. [See Note 21 below]

[36] The rationale for this principle of admissibility rests in preserving the role of the written will as the primary evidence of the testator's intention and avoiding displacing the written will with an "oral will" gleaned from evidence of the testator's declarations of intent. [See Note 22 below] An

exception exists to the inadmissibility of [page15]direct evidence of intent in the case of an equivocation where the words of the will describe two or more persons or things equally well -- declarations of testamentary intention can be used to establish which of the persons or things was intended by the testator. [See Note 23 below]

[37] Inadmissible direct evidence has included (i) handwritten notes of the deceased directly stating her intentions regarding the disposition of property; [See Note 24 below] (ii) statements made by the deceased to another about his intention; [See Note 25 below] and (iii) the instructions the testator gave to her solicitor and the advice she received on the legal effect of the document under interpretation. [See Note 26 below]

[38] Admissible indirect evidence of surrounding circumstances includes such matters as (a) the character and occupation of the testator; (b) the amount, extent and condition of his property; (c) the number, identity and general relationship to the testator of the immediate family and other relatives; (d) the persons who comprised his circle of friends; and (e) any natural objects of his grant. [See Note 27 below] Cases have also treated as admissible words spoken and written by the testator which have an independent significance to render intelligible something in the will that would otherwise be unintelligible. [See Note 28 below]

VII. Admissible Evidence Regarding the Circumstances Surrounding the Making of John Kaptyn's Wills and Codicils

[39] An unusual feature of this hearing was that it was the "second stage" in a consolidated proceeding. As mentioned earlier, by order dated April 24, 2008, Archibald J. consolidated the two interpretation applications with the Secondary Will codicil challenge and directed that the will challenge be heard first, and the interpretation applications "second and together". In his 2008 reasons disposing of the first, "validity", stage of this consolidated proceeding, Lederer J. reviewed extensive evidence about the circumstances surrounding John Kaptyn's execution of his Primary and Secondary Wills and their codicils, and he also made findings [page16]of fact about the testator's intention. No appeal

was taken from the decision of Lederer J., so the parties are bound by the findings which he made. I therefore propose to set out the evidence of surrounding circumstances found by Lederer J., then identify any other admissible evidence of surrounding circumstances taken from the record before me and, finally , reproduce the findings which Lederer J. made about the testator's intent.

A. Surrounding circumstances mentioned in the reasons of Lederer J.

[40] In his 2008 reasons Lederer J. accepted, as proven, the following circumstances surrounding the making by John Kaptyn of his Primary and Secondary Wills and related codicils:

(i) John Kaptyn was a knowledgeable and experienced businessman who was committed to understanding his commercial and investment interests, was very knowledgeable in respect of real estate and knew finance very well; [See Note 29 below]

(ii) John Kaptyn was regarded as very sophisticated in his understanding of the tax issues he confronted; he was astute, and money was moved amongst his corporations during his lifetime in a fashion designed to minimize taxes; [See Note 30 below]

(iii) a large part of the value of John Kaptyn's holdings, or estate, was in real estate; [See Note 31 below]

(iv) John Kaptyn also held significant liquid assets, including shareholder loans receivable from Marktur, cash on hand and a stock portfolio valued in the area of $20 million; [See Note 32 below]

(v) John Kaptyn understood the structure of his estate:

The evidence presented to the court demonstrated that John Kaptyn had a long-standing and sophisticated understanding of his business interests and the tax obligations it produced. Sheldon Carr advised the court that, over the years, the tax implications of redeeming the preference shares had been reviewed and discussed with John Kaptyn in what was an unsuccessful effort to find a way to limit the tax that would be generated. [See Note 33 below] [page17]

(vi) Commencing in the summer of 2006, John Kaptyn took steps to restructure his estate and testamentary instruments;

(vii) John Kaptyn executed Primary and Secondary Wills on

October 6, 2006, prior to leaving on a trip to Asia, but on the understanding that further work would be done on his estate upon his return; [See Note 34 below]

(viii) "John Kaptyn wished to have a complete understanding of the distribution of the properties"; [See Note 35 below]

(ix) During his absence on the trip to Asia, and at his request:

> . . . Michael Haschyc prepared schedules ("Schedules") that demonstrated and compared the value of the assets to be distributed to the two sets of grandchildren. They also showed the value of the assets set aside to pay taxes, inter-company loans and legacies. As envisioned by the Schedules, the value of the beach house ($6.6 million) was to be included in the assets attributed to the children of Henry Kaptyn. The preference shares owned by Marktur Limited in Captain Investments Inc. were to be redeemed.
>
> The results of this work were reviewed with John Katpyn in late October, 2006 after his return from Asia. Although the value of the assets to be left to the children of Henry Kaptyn exceeded the value of those to be left to the children of Simon Kaptyn ($20,133,801 as compared to $18,787,229), John Kaptyn considered the difference to be nominal and the proposed distribution appropriate. The value of the liquidation of Marktur Limited when added to the value of the liquid assets of John Kaptyn would provide a considerable sum of money ($30,689,407). Although, at that point, no work had been done to assess the taxes that the estate would pay, Sheldon Carr advised the court that he anticipated that something in the area of $12 million to $15 million would be owed. There would be more than enough to pay the taxes, inter-company loans and legacies. There would be money left to fall into residue and be distributed to the two sons of John Kaptyn. [See Note 36 below]

(x) John Kaptyn met with his lawyer, Lawrence Fine, accountant, Sheldon Carr, and the CFO of the Kaptyn family companies, Michael Haschyc, several times between December 19, 2006 and the date of execution of his final Primary and Secondary Wills in order to discuss in detail his property

and intentions for its disposition;

(xi) John Kaptyn signed "penultimate" Primary and Secondary Wills in March 2007, while in Florida, but thereafter continued discussing the details of his property dispositions with his legal and financial advisors: [page18]

On April 5, 2007, Sheldon Carr, Michael Haschyc and Lawrence Fine attended at the home of John Kaptyn. The Wills were reviewed with John Kaptyn. They were discussed on a global basis without the values attributed to the specific properties being discussed. John Kaptyn did not read the Wills word for word. According to Sheldon Carr, he flipped through the Wills as they were reviewed with him. Lawrence Fine testified that John Kaptyn used his hand to read line by line. Consistent with his determination of the day before, John Kaptyn struck out the bequest to the Markham/Stouffville Hospital. The re-organization proposed in the memo of Cary Heller was brought to his attention. He was advised that money would be saved if the re-organization was completed. John Kaptyn felt this could be done later, after he had passed away . . . . [See Note 37 below]

(xii) John Kaptyn signed his new, and final, Primary and Secondary Wills on April 5, 2007;

(xiii) On April 24, 2007, John Kaptyn told Michael Haschyc about two changes he wished to make, one to each will. "They reviewed the concerns of Michael Haschyc, being the omission of the reference to Canadian taxes and the omission of the reference to the redemption of the preference shares."

Arrangements were made for Michael Haschyc and Lawrence Fine to attend at the home of John Kaptyn at 11:30 a.m. on April 25, 2007 to have the Codicils signed. They went into the bedroom. Lawrence Fine went through both of the Codicils. John Kaptyn read along as the changes were read to him. He followed along, all four fingers following line by line. As both Michael Hasschyc and Lawrence Fine recalled, when the redemption of the preference shares was reviewed, John Kaptyn asked Michael Haschyc to confirm that this was what they had talked about. Lawrence Fine asked if John Kaptyn had any

questions or concerns. He did not. [See Note 38 below]

(xiv) During the last month of his life, John Kaptyn had discussions with his grandson, Jason, about executing certain transactions for his stock portfolio. [See Note 39 below]

B. Other surrounding circumstances referred to in the evidence filed on these applications

[41] The schedule of assets and liabilities of the corporations constituting John Kaptyn's holdings prepared by Michael Haschyc contained three pages:

(i) the first listed and valued the assets, showing Captain Investments Inc. as the U.S. asset, and Canadian assets of 9005 Leslie Street, 9011 Leslie Street, West Beaver Creek Management and Parkway Hotels & Convention Centre; [page19]

(ii) the second page showed "division of corporate assets" and allocated CII, 9011 Leslie and part of West Beaver Creek to Henry Kaptyn's children, and 9005 Leslie, Parkway Hotels & Convention Centre and part of West Beaver Creek to Simon's children. There was a notation: "1171757 Ontario Ltd. goes with Parkway Hotel & Convention Centre Inc.)." The value of the assets totalled $38.921 million, with $20.133 million attributed to the assets allocated to Henry's children and $18.787 million to those for Simon's children;

(iii) the third page was entitled "Liquid Assets of Marktur Limited + John Kaptyn". It detailed the components of Marktur's assets and valued them at $9.163 million. The liquid assets of John Kaptyn were then listed and valued, as at May 31, 2006, at $21.526 million. The following notation appeared at the bottom of the third page: "Available for: (i) distributions to others; (ii) payment of all taxes; (iiii) distributions to beneficiaries."

C. Findings made by Lederer J. about the testator's intent

[42] As I read his 2008 reasons, Lederer J. made the following findings about the testamentary intention of John Kaptyn. First, regarding John Kaptyn's general intent in

restructuring his estate, Lederer J. wrote [at paras. 29-30, 33 and 109]:

> In the summer of 2006, John Kaptyn determined to restructure his estate. He wanted to "skip a generation". He wanted his real estate assets to be distributed to his grandchildren. He wanted his wife looked after and to make some charitable donations. The residue would go to his sons.
>
> He wanted the assets left to the children of his son, Henry, to be equal in value to the assets left to the children of his son, Simon. The families were to be treated the same. There was to be no shared ownership between them. This necessitated a consideration of the division of the assets. Given that the family of his son, Simon, already owned half of the hotel complex and that the hotels were being managed by Simon and his son, Jason, John Kaptyn determined that the remaining 50% of the ownership of the hotel complex should be left to the two sons of Simon (Jason and Jonathan). Given the value of the hotels, it would be necessary to develop a grouping of properties to be left to the children of his son, Henry. This would be done by leaving them the two properties in Florida (the plaza and the beach house) and some additional Canadian properties. John Kaptyn also determined that he wished his grandchildren to receive these assets free of any tax and inter-company debt then present in his holdings. Money n eeded to be set aside for this purpose. It was determined that Marktur Limited would be liquidated and the money acquired from the liquidation used for the purpose of dealing with these liabilities. The stock portfolio which was held by John Kaptyn would be added to the resources to be used for the payment of taxes, the payment of the inter-company loans and the specific legacies (including the charitable donations). Any value left over would fall into residue and be distributed between his two sons. [page20]
>
> . . . . .
>
> [John Kaptyn] wished to be sure the distribution between the two families would be equal in value and to be certain that the stock portfolio and the liquidation of Marktur Limited

would provide the funds necessary to pay the taxes, loans and legacies."

. . . . .

In the summer of 2006, John Kaptyn determined to restructure his estate so that his real estate assets were gifted directly to his grandchildren. No intention was ever expressed that the grandchildren were to receive the benefits of any of the inter-company holdings, in general, or the preference shares in particular. As demonstrated by the Schedules prepared by Michael Haschyc during October, 2006, the express intention was to redeem those shares as part of the liquidation of Marktur Limited to be utilized to pay taxes, inter-company loans, legacies and, ultimately, to contribute to the residue. The failure of the testamentary documents to account for this intention prior to the Wills of April 5, 2007 or the Codicil to the Secondary Will of April 25, 2007 does not detract from that intention. It just means that it took those preparing the Wills that long to include the expression of that intention in the testamentary documents.

[43] Similarly, in para. 143 of his reasons, Lederer J. wrote:

The evidence of the intention of John Kaptyn was consistent. He wanted the preference shares to be redeemed and the proceeds to be included in the liquidation of Marktur Limited. At the same time, he intended the distribution to the two sets of grandchildren to be equal. He intended his grandchildren to receive real estate, referred to during the trial as "hard assets". There is no reason to distinguish between his understanding of the redemption of the shares and the fact that the shares were not to be part of the gift to the children of his son, Henry Kaptyn. One follows from the other. They are part of the same intended consequence. When John Katpyn asked: "Do we still have to do this?" Michael Haschyc replied: "Yes, if you want to conform to the Schedules." The Schedules prepared by Michael Haschyc indicate that preference shares were to be redeemed, that the division between the two sets of grandchildren involved only

real estate and did not include the proceeds of the redemption which were to be part of the liquidation of Marktur Limited.

[44] Again, dealing with how the preference shares held by Marktur were to be treated, Lederer J. wrote [at para. 140]:

> To interpret these questions as submitted by counsel for the objector is to deny the evidence that demonstrates that, from at least October 2006, it was the intention of John Kaptyn that the preference shares be redeemed.

[45] Finally, in respect of the discussions that John Kapytn had with his advisors on April 5, 2007, prior to signing the wills Lederer J. wrote [at para. 56]:

> On being advised that the tax issues had not been resolved, John Kaptyn told them not to worry about it. He was no longer looking for tax deferrals. The taxes were to be paid so that his grandchildren received the real estate free of tax. Sheldon Carr testified that John Kaptyn believed his children would pull together and do what he wished. Michael Haschyc advised the court he did not play an active role in the conversation. He sat, on his own, [page21]at the end of the bed and reminisced. Nonetheless, he recalled that John Kaptyn told them not to worry about the tax issues.

[46] Lederer J. also considered the issue of intention in his December 4, 2008 endorsement dealing with the costs of the trial. An issue arose as to whether the costs of the challenge to the validity of the codicil to the Secondary Will should be paid out of the residue of the Secondary Estate or from that of the Primary Estate, which consisted largely of the testator's stock portfolio. Lederer J. held that those costs should be paid out of the Primary Estate.

[47] As these extracts from the reasons and the costs endorsement of Lederer J. show, as a result of hearing close to two weeks of evidence during the "first stage" of this consolidated proceeding, Lederer J. made extensive findings of fact about the testamentary intentions of John Kaptyn when he

made his Primary and Secondary Wills and their codicils. That is not surprising given the arguments that were put to him by the parties, [See Note 40 below] as well as the legal principle that at the will validity stage of a proceeding direct evidence about the testator's true intention is admissible.

[48] My understanding of the procedural history of this consolidated proceeding is that initially it was anticipated that Lederer J. would hear both the first and second stages of the proceeding. After he released his reasons the parties asked Lederer J. to mediate the issues in dispute involving the interpretation of the wills and codicils. Lederer J. did so, but no agreement was reached between the parties. As a result of his participation in those settlement discussions, Lederer J. could no longer preside at the second, interpretation stage of the hearing. Had Lederer J. presided at the second stage, as initially contemplated, the parties could only have reasonably expected [page22]him to follow and apply the findings about the testator's intention that he had made in the first stage.

[49] Moreover, the principle of issue estoppel applies to the findings made by Lederer J. about the intention of testator. Issue estoppel is concerned with whether an issue to be decided in proving the current proceeding is the same as an issue decided in a previous proceeding; issue estoppel precludes the relitigation of an issue that has been finally decided by a court in another proceeding. [See Note 41 below] In the civil context, three preconditions must be met for issue estoppel to be successfully invoked: (1) the issue must be the same as the one decided in the prior decision; (2) the prior judicial decision must have been final; and (3) the parties to both proceedings must be the same, or their privies. [See Note 42 below] All three preconditions are present in this proceeding. The issue of John Kaptyn's intention when he made his Primary and Secondary Wills is the same in the first and second stages of this consolidated proceeding; no appeal was taken from the decision of Lederer J.; and the parties to the first and second stages are the same.

[50] Although it is recognized that even when a party has established the preconditions to the operation of issue estoppel

"the court must still determine whether, as a matter of discretion, issue estoppel ought to be applied", [See Note 43 below] I see no factor relating to the proper administration of justice that would sanction departing from the findings made by Lederer J. on the extensive record he heard, especially given that initially it was anticipated Lederer J. would hear both the first and second stages of this consolidated proceeding.

[51] While the findings regarding the testator's intent made by Lederer J. do not cover all the disputed questions before me on these applications, I conclude that where the findings are applicable, they are binding on the parties.

[52] Finally, I wish to comment that having heard the argument of these applications and reread the submissions of the parties, it has become apparent to me that the parties have ignored many of the findings made by Lederer J. about John Kaptyn's intention. Had both estate trustees reflected on, and then followed, the findings made by Lederer J., I suspect many of the questions posed in these applications would have disappeared. [page23]Instead, these applications proceeded as if the findings of Lederer J. had no binding effect on the co-trustees.

VIII. The Principles Governing the Interpretation and Administration of Multiple Wills

[53] At his death, John Kaptyn left two wills -- his Primary Will and his Secondary Will, each with one codicil. John Kaptyn had utilized the technique of multiple wills through several of his wills, as witnessed by his previous primary and secondary wills of October 22, 2003, October 6, 2006 and March 2007.

[54] Multiple wills have gained currency as an estate planning technique, especially by persons enjoying a high net worth. As Clare A. Sullivan has written:

> Drafting multiple Wills has become an integral part of estate planning along with other common methods used to minimize probate fees, including joint ownership of assets, beneficiary designations under life insurance policies, pension plans, RRSPs and RRIFs, inter vivos gifts and inter vivos trusts

(such as joint partner or alter ego trusts). [See Note 44 below]

[55] A testator may use multiple wills to govern the disposition and administration of different pools of assets he owns at the time of death. Multiple wills have enjoyed a long history where a testator owned assets located in different jurisdictions. [See Note 45 below] During the 1990s, in Ontario multiple wills emerged as a device by which to divide assets into different pools as a means to reduce the probate fees that would otherwise be payable. As Greer J. observed in Granovsky v. Ontario: [See Note 46 below] "Testators therefore have the right to organize their affairs in a way which will allow their estates to pay as few probate fees or as few taxes as legally possible." She went on to hold:

> The estate planning of having multiple Wills in the form of a Primary Will and a Secondary Will which take effect on death is, in my view, simply another example of how a careful testator plans to have her or his estate pay the least possible probate fees on death. There is no legal obligation to obtain probate and, as I have noted above, limited grants are permissible. If the directors of the private companies in which the deceased owns shares or has an interest at death do not require the formal grant from the Court to deal with the transmission of the assets and are prepared to deal with the [page24]estate trustees named in the Secondary Will, why then should the estate have to pay probate fees on those assets? [See Note 47 below]

Greer J. concluded that where the executors under one multiple will had no need for probate to deal with the assets identified in that will, no requirement existed for them to pay probate fees on the assets governed by it.

[56] Multiple wills are very flexible documents which a testator can use to establish a variety of regimes to govern the disposition of his property on his death. A testator can draft multiple wills to create distinct pools of assets administered by different sets of executors. [See Note 48 below]

[57] An initial question which divides the parties on this

application is whether the execution of multiple wills creates two distinct estates or leaves one estate administered under two separate wills. Little commentary appears to exist on this point. Martin Rochwerg and Leela Hemmings, in their article, "Wills Substitutes in Canada", hint at a "two estates" model:

> One form of probate planning which does not involve will substitutes is the execution of dual wills. This form of will planning involves splitting an estate into two, with the "primary estate" containing assets that require probate for their transfer (this estate will be governed by the "primary will") and the "secondary estate" containing assets that do not require probate (this estate will be governed by the "secondary will"). [See Note 49 below]

Sed contra, Clare Sullivan, who, in her article "Life in a Multiple Will Regime" suggested a "one estate" model:

> [M]ultiple wills require very careful drafting to ensure that the Wills work together and that the provisions complement each other when necessary. Both the draftsman and the Testator should understand that it is one estate, overall, and one set of beneficiaries, governed by two or more documents. [See Note 50 below]

[58] In my view, it is unnecessary to wade into debates about the existential effects of multiple wills. I think the answer is a more simple one -- the extent to which the assets governed by each multiple will are to be administered together or separately will depend upon the intention of the testator as expressed in the [page25]multiple wills. The use of multiple wills does not give rise to questions of asset ownership -- the "primary assets" and "secondary assets" are both those of the testator -- but may give rise to issues about how the two sets of assets are to be administered. So, then, it is open to a testator to use multiple wills to create separate silos of assets, divided by an impenetrable wall and administered completely separately, if that be his wish. The appropriate drafting language can be used to achieve that result. On the other hand, a testator may wish to minimize probate fees by splitting his assets into two pools, but draft his multiple

wills in such a way that a degree of i nterdependence exists in the administration of the two pools of assets. In sum, the degree of relatedness or separateness of assets governed by multiple wills turns on the intention of the testator as expressed in the language of his wills.

IX. The "Big Picture" of the Testator's Intent

[59] On these two applications, the co-trustees have placed close to 30 discrete questions before this court for consideration, with many of the questions broken down into multiple sub-questions. Having read the Primary and Secondary Wills, and their codicils, considered the admissible extrinsic evidence on intent which I set out above, and having read the 2008 reasons and cost endorsement of Lederer J., I am left with the distinct impression that the co-trustees have not placed themselves in the "armchair" of their father in order to determine how to proceed with the administration of his Primary and Secondary Estates. Although I recognize some technical difficulties are posed by a few features of the wills, the "big picture" of John Kaptyn's testamentary intention seems pretty clear from the language of his wills, the admissible extrinsic evidence and the binding findings of Lederer J.

[60] So, before dealing with the specific issues raised by the co-trustees, let me begin with a consideration of the "big picture" of the testator's intentions. First, as Lederer J. found, John Kaptyn was a very successful and highly sophisticated businessman who knew what he owned, understood its complexity and knew what he wanted to do with it.

[61] Second, again as Lederer J. made clear in his findings, John Kaptyn's testamentary intention contained several keys features:

(i) he wanted his wife, Doreen, looked after, some legacies paid to friends and relatives, and some charitable donations made;

(ii) he wanted to distribute the rest of his property equally between the families of his two sons;

(iii) he wanted to skip a generation and gift his real estate assets directly to his grandchildren; [page26]

(iv) he decided to place the disposition of his "corporate

empire" under his Secondary Will and let his Primary Will deal with his more liquid assets, [consisting] primarily of a very sizeable investment portfolio;

(v) the two sides of the family were not to share assets; the assets were to be divided between the two groups;

(vi) the grandchildren were to receive their gifted assets free of any tax and inter-company debt then present in his holdings, with a few exceptions; and

(vii) any residue was to go to his sons in unequal proportions.

[62] Third, in terms of what John Kaptyn knew when he turned to preparing his wills, Lederer J. pointed out the central role the Haschyc Schedules played in the testator's decision-making. Those Schedules recorded several pieces of information:

(i) the value of the assets and liabilities as at May 31, 2006 associated with each company in John Kaptyn's holdings gifted to his grandchildren under his Secondary Will;

(ii) the value to each side of the family that would result from a division of those "net" corporate assets -- the Schedules showed a split of approximately $20.1 million to Henry's children and $18.8 million to Simon's;

(iii) the net value of Marktur's liquid assets was approximately $9.16 million as of May 31, 2006; and

(iv) John Kaptyn's liquid assets were worth about $21.5 million as of May 31, 2006.

One can only take from these Schedules that as John Kaptyn was preparing his wills, he knew that Marktur would provide some source of liquidity, but that an even greater of amount of liquidity was contained in his personal investment assets, including a securities portfolio worth about $18.6 million as of May 31, 2006.

[63] John Kaptyn's final Primary and Secondary Wills reflected this "big picture" intention:

(i) he placed his corporate holdings, direct and indirect, into his Secondary Estate, with the remaining assets in his Primary Estate;

(ii) he looked to the more liquid assets of his Primary Estate (i) to satisfy his legacies, including a cash gift to his grandson, Jason, tied to the net proceeds of the liquidation of his stock portfolio; (ii) to provide for the

gifts to his wife, Doreen, and [page27]his former wife, Mary; and (iii) to fund the $3 million in charitable donations he directed his trustees to make;

(iii) he directed, in his Secondary Will, that his trustees liquidate Marktur and use "the proceeds from the liquidation together with the proceeds in my Estate" to repay certain liabilities "with the intent that the assets disposed of in this my Will are transferred free and clear of such liabilities", with certain specified exceptions; and

(iv) he purported to divide his corporate assets, both direct and indirect, between his two sets of grandchildren -- Jason and Jonathan were to get 9005 Leslie, 650 Highway 7 East and 117 Ontario; and Samantha, Robert and Alexander were to get 9011 Leslie, Hensim Property and Captain Investments. Whether the language he used in his Secondary Will was adequate, as a matter of law, to implement those gifts, the fact remains that John Kaptyn could not have been clearer about which assets were to go to which set of grandchildren.

The division of assets John Kaptyn tried to make in his Primary and Secondary Wills reflected the division of assets sketched out on the Haschyc Schedules.

[64] In sum, I conclude that the "big picture" intentions of John Kaptyn regarding the disposition of his property on his death were quite clear -- his Primary Estate would take care of specified legacies and gifts; specific assets in his corporate holdings would be divided amongst his grandchildren in such a fashion that both sides of the family would receive gifts of approximately equal value, and the grandchildren would receive a transfer of such assets "free and clear" of certain liabilities. In their reply factum, Jason and Jonathan Kaptyn agreed that "their grandfather intended a roughly equal distribution of his Estate as between the two sets of grandchildren, based on the values he ascribed to his assets". [See Note 51 below]

[65] I recognize that in gifting some of the corporate assets to his grandchildren, John Kaptyn treated assets which he owned indirectly through certain corporations in the same fashion as those which he owned directly. Whether the language he used was

sufficient, as a matter of law, to effect such transfers is an issue I will address later. But, putting aside that technicality, I have difficulty understanding how, in reading their father's wills, Simon [page28]and Henry Kaptyn could have any reasonable doubt about their father's intentions -- those intentions were quite clear.

[66] Not only was the "big picture" clear, but John Kaptyn gave his two sons extensive powers and directions to achieve his intentions. First, his Primary Will and Secondary Will gave the co-trustees a set of identical, broad powers of administration. Clauses 4(a)(i) through (v) of each will granted the co-trustees powers to (i) retain assets; (ii) sell, call in and convert into money any asset; and (iii) partition or appropriate, and distribute in specie any asset. In this regard, the two wills mirrored each other.

[67] Second, both the Primary Will (clause 4(a)(vi)) and Secondary Will (clause 4(c)) contained provisions directing the co-trustees to look to the assets of the Secondary Will to satisfy any gifts made in para. 4 of the Primary Will in the event the assets of the Primary Estate proved insufficient.

[68] Then, in his Secondary Will, as amended by its codicil, John Kaptyn gave his co-trustees specific directions to give effect to his intentions to gift his corporate and real estate assets to his grandchildren. Clauses 4(d.1) and (d.2) of his Secondary Will directed his trustees, in part, to "take such steps as are reasonably necessary . . . to maximize the net benefit to each of my grandchildren . . . " and to "liquidate Marktur Limited as soon as they in their discretion deem it advisable" and to apply "the proceeds from the liquidation together with the proceeds in my Estate" for stated purposes. Simon and Henry cannot agree on what it means "to maximize the net benefit to each of my grandchildren"; they cannot agree on what constitutes "such steps as are reasonably necessary" to do so; nor can they agree on what constitutes "the proceeds from the liquidation [of Marktur] together with the proceeds in my Estate", with the result that the "strategic directions" their father thought would be sufficient to guide his sons to implement his wishes have turned into a dispute which has

deadlocked the administration of John Kaptyn's assets.

X. Sequence of Addressing the Questions Posed by the Co-Trustees

[69] The specific questions referred by Simon and Henry Kaptyn to the court for opinion, advice and direction are reproduced in Appendix "A" at the end of these reasons. I think it appropriate to deal with the questions posed by the co-trustees in the following sequence. First, I shall consider those questions relating to the calling-in of the assets of the estate. Then, I will deal with questions touching on the payment of John Kaptyn's debts. Next, I will turn to the questions involving the gifts of specific assets to the grandchildren, followed by a consideration of the questions relating to the condition or state in which those gifted assets were to be [page29]transferred -- i.e., free and clear from specified liabilities. Finally, I will look at any miscellaneous questions posed by the co-trustees.

XI. Collecting Debts Due to the Estate of John Kaptyn: The Issue of Salaries and Bonuses

A. The issue

[70] Simon has posed several questions as to whether the trustees should cause some of the corporations to pay to John Kaptyn's estate bonus or salary payments pro-rated to the date of his death. [See Note 52 below] Specifically, Simon has asked whether the trustees should cause the following companies to pay the estate of John Kaptyn pro-rated bonuses for certain corporate year-ends: 9011 Leslie -- year ending December 31, 2007; 9005 Leslie -- year ending December 31, 2007; West Beaver Creek -- year ending September 30, 2007; Marktur -- year ending December 31, 2007; and 117 Ontario -- year ending March 31, 2008.

B. Background

[71] Historically, John Kaptyn drew salaries or management fees from several of his corporations -- 117 Ontario, 9005 Leslie, 9011 Leslie and West Beaver Creek. According to Jason Kaptyn, his grandfather did so in order to defer and minimize tax. For example, 117 Ontario held a 50 per cent partnership share in Parkway Hotels and Convention Centre Partnership. 117

Ontario's annual allocation of partnership profit from Parkway Partnership for the previous partnership year, less the expenses of 117 Ontario in its fiscal year, would usually be paid by 117 Ontario to John as either a salary or a bonus. Since 117 Ontario would have paid its surplus funds to Marktur in the course of the fiscal year, it was customary for John Kaptyn to cause Marktur to re-advance to 117 Ontario funds equivalent to 117 Ontario's partnership profit for the previous year. That would allow 117 Ontario to pay John a salary or a bonus and thus eliminate taxable income in 117 Ontario.

(i) Salary or bonus from 117 Ontario

[72] The salary or bonus was paid to John Kaptyn to defer and minimize tax. As Parkway Partnership and 117 Ontario have different year-ends, it was possible for John Kaptyn to defer the payment of income tax on 117 Ontario's proportionate share of partnership profits for almost 17 months. Further, John would [page30]invest the funds in marketable securities personally and be taxed at a slightly lower rate overall.

[73] For the Parkway Partnership year-end April 30, 2006, 117 Ontario was allocated the amount of $2,195,829 as its profit share as a partner in the Parkway Partnership. This amount was reported by 117 Ontario in its fiscal year ending March 31, 2007 as its share of partnership profit.

[74] Prior to [his] death, John Kaptyn did not direct that 117 Ontario pay him a salary or a bonus for 117 Ontario's fiscal year ended March 31, 2007, and no salary or bonus was paid or declared by 117 Ontario in favour of John Kaptyn's estate with respect to that fiscal year. For a salary or bonus to be paid, the liability for such salary or bonus to John Kaptyn had to exist by March 31, 2007.

[75] 117 Ontario's income tax return for the fiscal year [ending] March 31, 2007 had to be filed with the Canada Revenue Agency no later than September 30, 2007. As no salary or bonus was paid, 117 Ontario was obligated to pay corporate tax in the amount of $758,809 on its taxable profit of $2,107,794 (i.e., the sum of $2,195,829 minus certain deductions available to 117 Ontario).

[76] For the Parkway Partnership year-end April 30, 2007, 117 Ontario was allocated a partnership profit of $929,977. These applications pose the question whether the trustees should cause 117 Ontario to pay a salary or bonus to John Kaptyn's estate in that amount for the corporate year-end March 31, 2008.

(ii) Salary and bonus from other corporations

[77] When he was alive, John Kaptyn also would direct other companies -- 9011 Leslie, 9005 Leslie, West Beaver Creek and Marktur -- to pay him an annual salary or bonus in order to benefit from tax deferrals. However, at no time did John Kaptyn direct that of these companies to pay him or his estate a salary or bonus for the 2007 fiscal year-ends of these companies. For salaries or bonuses to be paid, the liability for such salaries or bonuses had to exist by the date of death.

(iii) No declaration of salaries or bonuses

[78] The parties agreed that prior to his death, John Kaptyn did not take any steps to cause these companies to declare the payment of a salary or bonus to him for their last corporate year, nor did the trustees take any steps to declare such salaries or bonuses for the corporate years in question.

C. Positions of the parties

[79] Simon Kaptyn took the position that no salary, bonus or management fee is payable to the estate of John Kaptyn from [page31]those companies -- most of which were gifted to his grandchildren -- because such payments would have the effect of benefitting the residuary beneficiaries, when the testator's intent was to maximize the value of the companies bequeathed to his grandchildren.

[80] Henry Kaptyn argued that this issue is more properly dealt with on a passing of accounts application. I gather Henry takes this view because he contended that his brother unilaterally filed a tax return for 117 Ontario for the relevant period which did not declare a salary or bonus and that such conduct should be reviewed on a passing of accounts. Alternatively, Henry Kaptyn submitted that a salary or bonus

payable to the estate should have been declared by these corporations.

[81] Jason and Jonathan Kaptyn contended that the companies should not pay a salary or bonus to the estate.

[82] The OCL [Office of the Children's Lawyer] submitted that no basis existed at the present time for the trustees to authorize such payments.

D. Analysis

[83] In order for a corporation to deduct the payment of a salary or management fee in a year for income tax purposes, the salary or management fee must be paid within 180 days of it being declared. There is no dispute that John Kaptyn did not cause 117 Ontario to declare the payment of a salary or management fee to him for the corporate year ending March 31, 2007, and there is no dispute that the trustees did not cause 117 Ontario and the other companies to declare such payments for the corporate fiscal years in which John Kaptyn died. The 180 days has long passed in respect of each such corporation.

[84] Given that the trustees, by virtue of their failure to act together, did not cause the corporations to declare the payment of salaries or management fees to the estate of John Kaptyn for the years in question, I regard the questions posed on this issue as moot and see no need to answer them.

[85] In declining to answer the questions, I make no comment on the reasonableness or propriety of the conduct of either estate trustee in respect of the failure to declare the payment of salary or management fees.

XII. The Payment of John Kaptyn's Debts

A. The issue

[86] The trustees have raised several questions about the allocation of liabilities between the Primary and Secondary Estates [page32]of John Kaptyn. [See Note 53 below] Henry Kaptyn has framed several questions with the view of ascertaining whether the two wills contemplated shortfalls in either the Primary or Secondary Estate. [See Note 54 below] Both

trustees have asked whether the deceased's debts should be paid primarily out of the Primary Estate or Secondary Estate, or equally out of both, or in some other proportion. [See Note 55 below] Both have asked whether the estate's tax liability related to the deemed disposition of assets distributable under each will should be paid from the assets to which the tax liability related or otherwise. [See Note 56 below]

B. Background

[87] At the time of his death on May 8, 2007, John Kaptyn's Primary Estate was worth about $26.48 million and his Secondary Estate $41.52 million. The assets of his Primary Estate were much more liquid than those of his Secondary Estate. The Primary Estate cash and investment portfolios were valued at about $24.16 million. Although Marktur, the company which he directed be liquidated, had shares valued at $12.19 million, that valuation included the shares in Captain Investment, a company John Kaptyn wished to gift to Henry's children.

[88] The main debts and expenses of John Kaptyn identified by the parties in their materials were the following:

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[page33]

[89] By order made April 24, 2008, Archibald J. directed that the taxes associated with the terminal tax return be paid out of funds available in the Primary Estate, subject to a possible later determination on these applications that the taxes be paid from the Secondary Estate. By judgment dated December 19, 2008, Lederer J. ordered that the costs of the will-challenge litigation be paid from the residue of the Primary Estate.

[90] The terminal tax return filed for John Kaptyn recorded taxable income of $23.274 million, of which $21.304 million related to taxable capital gains. Of the total capital gains of $42.609 million, approximately $37.272 million related to the gains occurring as a result of the deemed disposition of John Kaptyn's shares in companies forming part of his Secondary Estate -- 117 Ontario, West Beaver Creek, Marktur, 9005 Leslie and 9011 Leslie -- and $5.015 million arising from the deemed

disposition of his investment portfolio. Most taxable income therefore resulted from the deemed disposition of his shareholdings in Secondary Estate companies.

C. Positions of the parties

[91] Henry Kaptyn took the position that a proper interpretation of the wills requires that tax liabilities related to specific Primary or Secondary Estate assets should be paid from the residue of the respective estate, and other liabilities identified as a Primary Estate or Secondary Estate liability should be paid from the respective estate. More specifically, Henry Kaptyn submitted that the capital gains tax arising from the deemed disposition of a particular asset should be paid from the assets of the Primary or Secondary Estate to which it belongs. Accordingly, in Henry's view, the Secondary Estate should be looked to in order to pay the capital gains taxes associated with the deemed disposition of the corporate shares in the Secondary Estate. Henry Kaptyn submitted that the payment of debts and taxes out of the residue of the Primary or Secondary Estate is not necessary because the assets themselves are capable of paying their own debts and taxes.

[92] Simon Kaptyn submitted that the residues of both the Primary Estate and Secondary Estate are jointly and severally liable for the payment of debts and "upon one residue being exhausted, the other residue is to be applied to pay debts". [See Note 57 below] He also argued that capital gains tax is a debt of the estate which must first be paid out of the estate's residue. [page34]

[93] Jason and Jonathan Kaptyn supported the position advanced by their father.

[94] The OCL took the position that as long as residual assets existed in both the Primary and Secondary Estates, they should be looked to in order to satisfy John Kaptyn's debts, including personal income taxes, so that the gifts made in para. 4 of the Secondary Will are maintained and do not abate.

D. Analysis

[95] The paragraphs of the Primary and Secondary Wills dealing with the payment of debts and expenses are virtually identical:

> 4(b) To pay out of and charge to the capital of my general Primary [Secondary] Estate, my just debts, funeral and testamentary expenses and all succession duties and Primary [Secondary] Estate[,] inheritance and death taxes, whether imposed by this or any other jurisdiction whatsoever that may be payable in connection with any property passing on my death (but not including any property transferred to or acquired by a purchaser or transferee upon or after my death pursuant to any agreement with respect to such property, and not including any property which does not actually pass on my death but is merely deemed so to pass by any governing law, save as hereinafter mentioned) or in connection with any insurance on my life and/or annuities on my life or any gift or benefit given or conferred by me either during my lifetime or by survivorship or by this my Will or any Codicil hereto, and whether such duties and taxes be payable in respect of Primary [Secondary] Estate[s] or interests which fell [fall] into poss ession at my death or at any subsequent time; and I hereby authorize my Trustees in their uncontrolled discretion to commute or prepay any such taxes or duties. Any duties or taxes so paid shall be treated as an ordinary debt of my Primary [Secondary] Estate.

[96] As a matter of law, debts, funeral and testamentary expenses, and the costs and expenses of administration of an estate are payable out of the residue "except so far as a contrary intention appears from the person's will or codicil". [See Note 58 below] Income tax payable on capital gains arising on the death of the deceased is a general debt of the estate, payable out of the residue, unless otherwise provided by the terms of the will. [See Note 59 below]

[97] In each will, John Kaptyn charged his respective defined "estate" with the payment of "my just debts, funeral and testamentary expenses". Neither will contained language directing the executors to look only to the assets governed by that will in order to pay any debts or liabilities associated

with that will. Instead, John Kaptyn appointed the same executors for [page35]his Primary and Secondary Wills, named the same residuary beneficiaries in the same proportions under each will, and then included virtually identical, general debt-payment language in each will -- the language chosen made his debts and expenses the responsibility of both the Primary and Secondary Estate. Such drafting, I conclude, indicates that John Kaptyn intended that the residues of both his Primary Estate and Secondary Estate be made available to pay his debts and expenses.

[98] I see nothing in the language of either will pointing to an intention that responsibility for the payment of particular debts be limited to the residue of the Primary or Secondary Estate in which those debts arose. Although para. 4(b) in both wills include the phrase, "in connection with any property passing on my death (but not including . . . and not including any property which does not actually pass on my death but is merely deemed so to pass by any governing law, save as hereinafter mentioned)", I do not read those phrases as assigning the tax liability for the deemed disposition of assets to the particular Primary or Secondary Estate. Those phrases simply clarify that capital gains taxes do not form part of "all succession duties and Primary [Secondary] Estate inheritance and death taxes" referred to earlier in para. 4(b), leaving the capital gains portions of income taxes to be treated under each will as part of his "debts". Accordingly, I do not accept Henry Kaptyn's argument that the phrase "d eath taxes" as used by the testator was intended to include capital gains payable on the deemed disposition caused by the testator's death. Capital gains taxes so arising are simply a form of income tax under the Canadian tax regime, not a death tax.

[99] Further, although John Kaptyn included in both wills a pour-over clause which would ensure payment of the legacies specified in his Primary Will from the assets of his Secondary Estate in the event of a shortfall in his Primary Estate, the clause does not cover the payment of debts or expenses and does not detract from the interpretation that the residues of both the Primary and Secondary Estate were available to pay the

testator's debts and expenses.

[100] The evidence of the surrounding circumstances also supports this interpretation. John Kaptyn knew what he owned and understood the business world, including taxes. The Haschyc Schedules had given the testator a pretty good idea about where his liquidity lay and the value of the corporate assets he wished to give to his grandchildren. To accept Henry Kaptyn's position that the assets of each estate -- Primary or Secondary -- should satisfy only the debts or expenses associated with that estate would risk requiring the executors to sell some of the corporate assets he [page36]wished to give to his grandchildren in order to meet the tax liabilities generated by the deemed disposition of those shares, all the while leaving a huge pool of liquid assets untouched in his Primary Estate. Such a result would go directly contrary to John Kaptyn's intent to benefit his grandchildren.

[101] The OCL submitted that the provision in clause 4(d.1) of the Secondary Will (as amended) directing the trustees to use the proceeds from the liquidation of Marktur together with the proceeds in the testator's estate for "the payment of taxes imposed by any American and/or Canadian jurisdiction on each such corporation" created a pool from which to pay the testator's personal taxes. I will address clause 4(d.1) in some detail below, but suffice it to say I conclude that the clause does not address the issue of the testator's personal taxes, including taxes calculated on capital gains arising by reason of his death, but deals instead with taxes imposed on corporations within his holdings.

[102] The questions posed by both executors ask for guidance in understanding the extent to which they should look to the residues of the Primary and Secondary Estate to pay the testator's debts and expenses. From the perspective of the residuary beneficiaries, it makes no difference -- Henry and Simon Kaptyn are the residuary beneficiaries under each will and in the same proportion. That points to what I would have thought to be the obvious answer intended by their father -- pay the debts and expenses from the appropriate pool of assets in order to accomplish the testator's goals of leaving

bequests to named individuals and ensuring that his grandchildren end up with the gifts he specified. Since the Primary Estate holds most of the liquidity, that would seem to be the obvious place to start. That said, I see no need to give detailed guidance on the precise proportions. John Kaptyn had confidence that his sons could figure out how to pay his debts and expenses while ensuring his gifts were achieved.

XIII. The Effectiveness of Gifts of Specific Assets to the Grandchildren

A. The issue

[103] In clauses 4(e) and 4(f) of his Secondary Will, John Kaptyn purported to gift most of his corporate and real estate assets to his grandchildren -- 9005 Leslie, 650 Highway 7 East and 117 Ontario to Jason and Jonathan; and 9011 Leslie, the Hensim Property and Captain Investments to Samantha, Robert and Alexander Kaptyn. In the broadest, colloquial, sense of the word, John Kaptyn owned all those assets at the time of his death. In a narrower, legal sense, he owned some of the assets [page37]directly -- shares in 117 Ontario, 9005 Leslie and 9011 Leslie -- but others he owned indirectly -- 650 Highway 7 East and the Hensim Property through his ownership of West Beaver Creek, and Captain Investments through his ownership of Marktur.

[104] One reasonably could have thought that since the co-trustees exercised control over all those assets, either directly or indirectly, it would be a simple task for them to take the appropriate steps to give effect to their father's clear intention of giving specific assets to certain of his grandchildren. That has not occurred. The two brothers are incapable of co-operating to give effect to their father's clear intention. Instead, both trustees have posed a number of questions about the effectiveness of certain of the gifts. [See Note 60 below] Specifically, they have asked whether the devises of the following assets adeem -- 650 Highway 7 East; [See Note 61 below] the Hensim Property; [See Note 62 below] and Captain Investments Inc. ("CII"). [See Note 63 below] In addition, questions were posed about the effectiveness of the gift of occupancy of the Florida Residence given to Doreen Kaptyn in light of the ownership of that property by CII. [See Note 64

below]

B. Background

[105] As mentioned, in clause 3(a) of his Secondary Will John Kaptyn defined his Secondary Estate to include the assets in his corporate empire:

> The term "my Secondary Estate" for all purposes of this my Will shall refer only to my shares in the capital of the following companies: Elgin Commercial Developments Inc.; 9005 Leslie Street Inc.; 9011 Leslie Street Inc.; Jubilee Commercial Holdings Inc.; Marktur Limited; Captain Investments, Inc.; Parkway Hotels & Convention Centre Inc.; 1171757 Ontario Inc.; and West Beaver Creek Management Inc., and any other shares which are registered in my name on the share registers of companies after the date of this Will (Hereinafter called "my Corporations").

[106] Apart from Jubilee and 9005 Leslie, in which he held 80 per cent of the issued common shares, John Kaptyn owned all the issued common shares in the other corporations named as forming part of his Secondary Estate. In the case of Jubilee and 9005 Leslie, the Simon Kaptyn Family Trust held the other 20 per cent of the issued common shares. [page38]

[107] Clauses 4(e) and 4(f) of his Secondary Will, as amended by the codicil, purported to divide most of John Kaptyn's Secondary Estate between his sets of grandchildren in the following manner:

> 4(e) I give to my grandson, JASON KAPTYN, and my grandson, JONATHAN KAPTYN, who are the sons of my own son SIMON KAPTYN, equally, any interest that I may have, including without limitation, my shares of stock, whether common, special or preferred, owned by me in:
>
> (i) 9005 Leslie Street Inc; and 650 Highway 7 East, Richmond Hill property.
>
> (ii) 1171757 Ontario Limited, provided that JOHNATHAN KAPTYN shall have first granted in writing to JASON KAPTYN unconditional power of attorney to manage the assets of 1771757 Ontario Limited, including

> without limitation a permanent proxy to vote the shares of both 1171757 Ontario Limited and Parkway Hotels & Convention Centre Inc., the granting of which is to be completed within the first six (6) months next following the date of my death.

Jason Kaptyn had assisted his grandfather in operating the hotels which fell under the 117 Ontario corporate umbrella, and this gift was intended to ensure that Jason would continue to manage those properties.

[108] As to the children of Henry, John Kaptyn made the following gifts:

> 4(f) I give to my grandchildren, SAMANTHA KAPTYN; and, ROBERT KAPTYN; and ALEXANDER KAPTYN, who are the issue of my son, HENRY WILLHELM KAPTYN, in equal shares per stirpes, all my common owned by me in: 9011 Leslie Street Inc.; the Hensin Property; and Captain Investments, Inc. Notwithstanding the foregoing, my Trustees shall hold in trust in accordance with the provision of paragraph 4(k) of this my Will the appropriate proportion of the such share for the issue of my son HENRY WHILLHELM KAPTYN entitled to such portion and who has not attained the age of thirty-five (35) years on the day of my death.

[109] Although clauses 4(e) and 4(f) clearly identify who gets what, two issues arise. First, John Kaptyn did not own directly shares in CII; he had an indirect interest in that company through his ownership of its parent, Marktur. Second, John Kaptyn purported to split the assets of West Beaver Creek between his two sets of grandchildren -- 650 Highway 7 East to Jason and Jonathan, and the Hensim Property to Samantha, Robert and Alexander -- instead of splitting different amounts of his shareholdings in West Beaver Creek to each set of grandchildren. Nevertheless, John Kaptyn's scheme of distribution in clauses 4(e) and 4(f) of his Secondary Will mirrored that sketched out in the Haschyc Schedules and sought to implement his testamentary intention, which Lederer J. found to be as follows [at paras. 29-30]: [page39]

> In the summer of 2006, John Kaptyn determined to

restructure his estate. He wanted to "skip a generation". He wanted his real estate assets to be distributed to his grandchildren. He wanted his wife looked after and to make some charitable donations. The residue would go to his sons.

He wanted the assets left to the children of his son, Henry, to be equal in value to the assets left to the children of his son, Simon. The families were to be treated the same. There was to be no shared ownership between them. This necessitated a consideration of the division of the assets.

[110] So, notwithstanding that John Kaptyn owned, either directly or indirectly, all the assets he purported to gift to his grandchildren in clauses 4(e) and 4(f) of his Secondary Will, and notwithstanding that his co-executors possess all necessary powers to give effect to John Kaptyn's clear intent, they come before this court querying whether the language used in the Secondary Will was adequate, as a matter of law, to give effect to John Kaptyn's clear intention. Let me describe the position taken by the co-executors and other parties on this issue and the arguments they advanced in support of their positions.

C. Positions and arguments of the parties

C.1 Simon Kaptyn

[111] In his factum, Simon Kaptyn submitted that the gifts by his father of 650 Highway 7 East, the Hensim Property and CII failed because John Kaptyn did not own those assets. He contended that courts consistently have applied a rule that a gift of specific property fails or adeems when its subject matter is not found among the testator's assets at the testator's death. Even if the application of such a rule effected a result directly contrary to the intention of the testator, Simon Kaptyn contended that the rule must be applied, citing, in support, the 1923 decision of the Supreme Court of Canada in Church v. Hill, [See Note 65 below] in which Mignault J. wrote: "Dura lex, it is true, sed lex, and the law must be applied."

[112] Simon Kaptyn also pointed to a number of authorities

which, he submitted, uniformly applied the principle that where a testator devises specific property to a beneficiary and such property is held by a corporate vehicle controlled or wholly owned by the testator, the gift fails because the property was not owned by the testator and the property falls into the residue of the estate.

[113] Simon Kaptyn further submitted that it would be an entirely speculative undertaking to determine what John Kaptyn would have done with the three assets had he known that he [page40]could not devise them in the manner that he did. Accordingly, Simon Kaptyn argued that the court must find that the gifts failed and that the properties fall into the residue of the Secondary Estate.

[114] Simon's submissions will receive consideration. At the same time, I confess to some unease that an executor of an estate would advance aggressively a position contrary to the interests of other beneficiaries, but which would benefit him as a residuary beneficiary under the wills.

C.2 Jason and Jonathan Kaptyn

[115] Jason and Jonathan Kaptyn, the beneficiaries of the purported gift of 650 Highway 7 East, supported their father's position, and they submitted that the gifts of the three assets -- including the gift of 650 Highway 7 East to them -- failed because the law of ademption applied.

C.3 Henry Kaptyn

[116] Henry Kaptyn submitted that since his father indirectly owned the properties in question, the trustees could exercise control over the relevant companies to effect the devises to the grandchildren in accordance with John Kaptyn's wishes.

C.4 Alexander Kaptyn

[117] Alexander Kaptyn adopted the position advanced by his father, Henry Kaptyn.

C.5 Office of the Children's Lawyer

[118] The OCL concurred with the submission of Henry Kaptyn, and it further submitted that since the intention of John

Kaptyn was clear and certain, the court could rectify the will to add several words necessary to give effect to the devises to the grandchildren.

D. Analysis

D.1 Ademption

[119] Where a will describes the subject matter of a gift with specificity, ademption of the specific legacy occurs "if, at the testator's death, the specific property is not found among the testator's assets". In those circumstances, the gift fails, or adeems. [See Note 66 below] As explained by Gillese J.A. in McDougald Estate v. Gooderham: [page41]

> Wills often contain bequests, which are directions that specific items of property are to be given to named recipients upon the testator's death. Sometimes the specified item cannot be found among the testator's assets at the time of death. This can happen because the item is lost, destroyed, sold or given away before the testator dies. At common law, in such a situation, the bequest is held to have adeemed and the gift fails. If there are proceeds from the disposition of the item of property, the proceeds fall into residue and are distributed accordingly. The proceeds are not given to the named beneficiary. [See Note 67 below]

[120] In Doyle v. Doyle Estate, [See Note 68 below] Greer J. referred to the rationale for ademption as identified by the Law Reform Commission of British Columbia in its 1989 report, "Wills and Changed Circumstances":

> This rule is based on two assumptions. First, it is assumed that a testator who makes a gift of a particular item of property does not intend to confer general economic benefit on the beneficiary. Second, it is assumed that when property cannot be found in the testator's estate after his death, he intended to revoke the gift of it in his will.

D.2 Cases relied upon by Simon Kaptyn and his sons

[121] Simon and his sons, Jason and Jonathan, relied on two main groups of cases in support of their positions that John

Kaptyn's gifts of indirectly owned assets failed -- the "sale prior to death" cases and the "property owned indirectly through a corporation" cases.

D.2.a. The "sale prior to death" cases: Church v. Hill [See Note 69 below] and Wilson Estate (Re) [See Note 70 below]

[122] In Church v. Hill, the testator had devised a specific property to his youngest daughter and left the balance of his property to be divided equally amongst his other three children. A year before he died, the testator entered into an agreement of purchase and sale for the property under which the purchaser paid a certain amount down and then agreed to pay the balance through monthly installments. Upon payment in full, the purchaser would obtain a deed for the land. Following her father's death, the youngest daughter claimed, not an interest in the property, but the balance of the purchase price due. The Supreme Court of [page42]Canada rejected her claim, holding that at the time of the testator's death the purchaser had acquired equitable ownership of the property to the extent of moneys paid and that the estate was not entitled to cancel the contract. The estate was left with a claim for the balance of the purchase price. Since the testator had devised the property to his daughter, and not the proceeds of its sale, the balance due of the purchase price fell into the residue.

[123] It was an unhappy court that reached such a result. Mignault J. could not conceal "my regret that this result cannot be avoided"; Chief Justice Davies felt compelled to reach the result, but did "so with great regret"; and Duff J. joined in the general expressions of regret.

[124] A similar result was reached in Wilson Estate (Re), a case in which the testatrix had left a specific devise of the "house and property I may own and be using as a residence at the time of my death". But, she had sold the house prior to her death, with the estate retaining some of the proceeds of the sale and a mortgage that had secured the sale.

[125] I do not find the decisions in Church v. Hill or Wilson Estate (Re) helpful because the facts differ from those in the

present case. There, the deceased had sold assets prior to their deaths; the question then became who was entitled to the proceeds from those sales. Here, John Kaptyn did not sell any of the gifted properties prior to his death. At the time he made his Secondary Will, he owned the three assets either directly or indirectly; that situation continued to prevail at the time of his death. Moreover, the result in Church v. Hill would not occur now because of statutory enactment. [See Note 71 below]

D.2.b. The "property owned indirectly through a corporation" cases: Thornton Estate [See Note 72 below] and Wong v. Lee Estate [See Note 73 below]

[126] Simon Kaptyn pointed to a number of authorities which, he submitted, applied the principle that where a testator devises [page43]specific property to a beneficiary and such property is held by a corporate vehicle controlled or wholly owned by the testator, the gift fails because the property was not owned by the testator, and the property falls into the residue of the estate.

[127] In Thornton Estate, the surrogate court held that because all of the lands specifically devised by the testator were owned by a corporation of which he was the sole shareholder, the gifts adeemed and fell into the residue. The case offered little legal analysis, relying on cases such as Church v. Hill for the proposition that where a testator devises specific property, but it is not found amongst his assets at death, the gift fails. In a related solicitor's negligence case, the Saskatchewan Court of Appeal commented that the surrogate court had misdescribed the result as one of ademption; in its view, a more proper description would be to view the gifts as ineffective because the testator had no land to give at the time he made the will. [See Note 74 below]

[128] In one case referred to by Simon Kaptyn -- Meier Estate (Re) [See Note 75 below] -- the testator had owned all the shares of the corporation whose assets he purported to gift. In Meier Estate, the court did not give effect to a gift of "my farmlands" when legal title to the farmlands was held at the time of the testator's death by a corporation of which he was

the sole shareholder. In that case, the court said that it had no doubt about the testator's intentions:

> This is not a case in which the testator's intentions are in any way ambiguous. On the face of the Will, it is clear that the testator intended to dispose of the farmlands, and he intended to give them to the claimant. [See Note 76 below]

Yet a few paragraphs later, after finding the gift ineffective, the court stated:

> I am satisfied that the testator intended to give the farmlands to the claimant. But he did not own them; he owned shares in the corporation that owned them. The testator could not give what he did not own, and the attempt to determine what he would have done had he been aware of the nature of the ownership of the land is an entirely speculative undertaking. [See Note 77 below]

I confess to some confusion as to how such an undertaking could be speculative when the court entertained no doubt about the testator's intention regarding the property. [page44]

[129] In two cases -- Wong v. Lee Estate [See Note 78 below] and Lewis's Will Trusts (Re) [See Note 79 below] -- the testators owned some, but not all, of the shares in a family holding company, but in their wills the testators purported to devise property owned by those corporations, or the proceeds derived from the realization of those properties. The courts held that the gifts failed. As the British Columbia Court of Appeal observed in the Wong case:

> . . . I note that, not only did the deceased not own the specified Alberta property, namely, the real estate, he did not even own all of the shares of the company which owned the real estate. In these circumstances, it could not be said with any degree of certainty what the deceased would have done if he had understood the nature and extent of the property he owned at the time he made his Will. Rewriting the deceased's Will in these circumstances would be a speculative exercise, at best. [See Note 80 below]

[130] In Lewis's Will Trusts (Re), the court noted that the

corporation owned more than just than farm property devised by the testator in his will, making any discernment of his intention that much more difficult. [See Note 81 below] In Lewis' Will Trusts (Re), the court cautioned:

> If the devise of the farm is to be given effect as a gift to the plaintiff son of the 750 shares of the testator in the company [out of 1,000 issued shares], it is necessary, in my judgment, to accept this principle, namely that, if a court of construction is satisfied that had the testator truly apprehended the asset which he held he would have disposed of it in a particular way, it becomes proper, as a matter of construction, to give effect to that intention. Of course, the conclusion of the court that the testator would have so intended can only be reached with the assistance of evidence which is admissible and the language of the will itself. But I am not satisfied that the principle represents a correct statement of the law. What the court has to do, I think, when faced with a testamentary provision the effect of which is in question, is to consider the language used in the light of the extrinsic evidence that is admissible and try to form a view as to what the testator meant by that language[.]
>
> If the construction of the testamentary language in that way is not possible, because the testator at the time he made his will is under a misapprehension as to what he owns, it is not, in my judgment, permissible for the court to alter the language so as to make the gift apply to a different asset altogether, notwithstanding that the court may be satisfied as to what the testator would have done had his mind been directed to the actual asset he owned.
>
> . . . . . [page45]
>
> That principle seems to me to be a necessary principle of construction because otherwise the process of construction would merge into a process under which the court itself would be making a will for the testator on the basis of evidence as to what the testator would have done had he had in mind the true position which he did not have in mind when he made his will. That, as it seems to me, is a process which, as a matter of principle, the courts ought not to undertake. [See Note 82

below]

D.3 Cases relied on by Henry Kaptyn

[131] Henry Kaptyn submitted that two Ontario cases -- McDougald Estate and Doyle v. Doyle Estate -- showed the willingness of courts to look beyond the corporate form of ownership of assets and to resist an overly technical approach in order to fulfill the intentions of the testator.

D.3.a. McDougald Estate

[132] The McDougald Estate case did not involve the construction of a will; it dealt with an interpretation of the anti-ademption provisions in the Substitute Decisions Act, 1992. [See Note 83 below] However, certain facts bear some resemblance to those in the wills before me. Ms. McDougald owned her residence in Palm Beach, Florida through a wholly owned holding company which held title to the property. In her will, she made a specific bequest of that property in the following terms:

> 3. I GIVE my property, including any property over which I may have a general power of appointment, to my Trustees upon the following trusts:
>
> . . . . .
>
> (12) To transfer to my sister, CECIL E. HEDSTROM, if she survives me for a period of sixty days for her own use absolutely the property municipally known as 640 South Ocean Boulevard, Palm Beach, Florida, U.S.A. and owned by me together with all furniture, furnishings and equipment therein contained or used in connection therewith.

Paragraph 4 of her will provided:

> If at my death any property referred to in paragraph 3 is owned by a corporation controlled by me immediately prior to my death, I direct my Trustees to do or cause to be done all things necessary to transfer that property held by the corporation to the person referred to in that paragraph without consideration.

[133] Although the interpretation of the will was not an

issue in the proceedings, Gillese J.A. made the following comments about the effectiveness of this testamentary technique: [page46]

> The attorneys' second obligation was to ensure that Ms. McDougald's testamentary intentions were fulfilled. Under the terms of Ms. McDougald's will, her sister, Cecil Hedstrom, was to receive the Palm Beach property. The fact that a corporation owned the property was not a problem because paragraph 4 of the will directed her trustees to do whatever was necessary to transfer property held by the corporation to the beneficiary. [See Note 84 below]

D.3.b. Doyle v. Doyle Estate

[134] In the Doyle Estate case, the testator provided in his will that "Insofar as my shares in the business known as DOYLE ELECTRIC LIMITED are concerned, I AUTHORIZE my Trustees to sell the same on the best terms possible as soon as may be convenient after my death and to pay the income therefrom to . . . " his wife, daughter and stepdaughter in different proportions. He left the residue of his estate to his wife.

[135] A year after he made his will, the testator effected a s. 85 income tax roll-over, the result of which saw the testator owning all the shares in Newco and Newco owning all the shares in Doyle. The testator later changed the name of Doyle to Theabush Investments Limited.

[136] An issue arose as to whether the gift of the Doyle shares adeemed because the testator did not own them at the time of his death; Newco did. Greer J. held that no ademption had occurred for several reasons. First, the will did not contain a specific bequest of the Doyle shares, rather a bequest of income from the sale of shares. Second, it was clear that the testator had intended to benefit his daughter with a gift of part of the proceeds from the sale of his only major asset -- the Doyle shares. Third, the doctrine of tracing enable the court to follow the shares through the testator's ownership of Newco to Theabush. As explained by Greer J.:

This principle was applied, in my view, by our Court of Appeal in Re Bird (1942), O.R. 415 at p. 419 where it held, referring to Theobald on Wills 9th ed., p. 107:

> The Court, in construing a will such as this, is entitled to take into consideration the condition of things in reference to which it was made, and, where there exists a specific description, to consider all the circumstances relating to the property and material to identify the thing described.

Applying this principle to the case at bar, the Doyle shares can be traced to the Theabush shares which are held by Newco. The shares have changed in name only. Newco owned the Doyle shares. There was no sale of shares, no stock splits, no stock conversion, no attempt by the deceased to divest himself of them, and finally no attempt by him to change his Will when he did dispose of the assets of Doyle Electric Limited. The only change which occurred was the change of the Doyle Electric Limited name to Theabush Investments Limited. [page47]

. . . . .

. . . it is important that the shares can be traced to their present reincarnation in Theabush. No one but the deceased had an interest in them and their value. At his death, this value was effectively the value that the deceased's daughter and her husband had paid for the assets of the company when they bought them. The corporate veil cannot be used to deter the tracing. [See Note 85 below]

[137] Greer J. concluded:

I have therefore concluded that the doctrine of ademption does not apply to the case at bar and hold that the Theabush shares held by Newco, the shares of which were owned by the deceased at his death, are the Doyle shares for purposes of interpreting the terms of the deceased's Will. As I understand it from the affidavit evidence, the assets of Theabush are liquid securities which can easily be realized and converted into cash. The companies can then be wound up and the cash

paid to the executors to be divided by them and paid to the beneficiaries in the appropriate percentages as are set out in subparagraph 3(b) of the Will. [See Note 86 below]

[138] The Court of Appeal dismissed an appeal from the judgment of Greer J.: "The will, viewed as a whole indicates that the testator intended to benefit the respondent with a gift of half the value of one of her major assets. This was not a specific bequest and the doctrine of ademption does not apply." [See Note 87 below]

D.4 Cases relied upon by the Office of the Children's Lawyer: The misdescription of property and rectification cases

[139] As the OCL noted in its submissions, several interpretative themes run through the jurisprudence on the construction of wills. The themes do not necessarily operate in the same direction; in some cases, tensions exist amongst them. But they are designed to serve as aides to the court in endeavouring to give effect to the testator's intentions. In the present case, the OCL highlighted several of those themes:

(i) the need to read a will so as to lead to a testacy, not an intestacy, because it is presumed that a testator intended to dispose of his estate by his will. [See Note 88 below] Lord Esher described this as a "golden rule"; [See Note 89 below] [page48]

(ii) to try to give effect to a testator's intention where he has used an ambiguous phrase or word, including ignoring, adding or substituting words or making a change to give effect to the intention of a testator as long as that intent is plain and clear; [See Note 90 below]

(iii) but, by way of limitation, to eschew substantially rewriting a will or writing a new will because "it is entirely another thing to supply a missing bequest out of thin air". [See Note 91 below]

[140] Against that background, courts have been ready, where an ambiguity or mistake exists in a will, to consider extrinsic evidence and, in the proper case, either delete words mistakingly included in a will or insert words if the context compels their insertion by necessary implication. In support of

this proposition, the OCL referred to several cases in which courts corrected misdescriptions of lands in a testator's will by rectifying the will to identify the property properly where the testator's intention could clearly be ascertained. [See Note 92 below] In other cases, courts have been prepared to insert language into a will where a review of the will made it "obvious that it has been copied in a blundering manner" [See Note 93 below], or the failure to correct "an obvious error" would lead to a "palpably absurd conclusion". [See Note 94 below]

D.5 What precisely is the issue?

[141] I reviewed at some length above the admissible extrinsic evidence relevant to the question of the interpretation of John Kaptyn's wills, together with the specific, binding findings made by Lederer J. regarding John Kaptyn's testamentary intention. John Kaptyn's intention was clear and unambiguous -- the assets held by West Beaver Creek were to be divided so that Simon's children received the 650 Highway 7 East property and Henry's the Hensim Property in London, Ontario; and Henry's children were to receive CII. Not only do the findings made by Lederer J. and the admissible extrinsic evidence support such a conclusion, the very language of clauses 4(e) and 4(f) of the [page49]Secondary Will, as amended by the codicil, express such an intention. Consequently, this is not a case where any doubt exists about the intent of the testator.

[142] Nor is this a case where the assets the testator purported to gift did not exist at the time of his death. Of course they did.

[143] Nor is this a case, as submitted by Simon Kaptyn, where John Kaptyn did not own the assets in question so he could not deal with them. Of course he did. Who else did? Or, speaking more precisely, who else on the face of this earth could gift those assets through a will? No one, other than John Kaptyn. The fact that he owned and controlled those properties indirectly through two holding companies, Marktur and West Beaver Creek, rather than directly speaks not to whether he could transmit those properties to others upon his death -- certainly he could -- but whether he chose the right

language in his will to give effect to his clear intent to transfer those specific assets to certain of his grandchildren on his death.

[144] Accordingly, as I perceive the matter, the sole issue for consideration is the adequacy of the language used by John Kaptyn in his will to implement his intention -- does the language of clauses 4(e) and 4(f) work and, if it does not, can the court cure any defects in the language so that John Kaptyn's clear intention is fulfilled?

D.6 650 Highway 7 East

[145] The sole issue involving gifts to Jason and Jonathan Kaptyn involves John Kaptyn's effort in clause 4(e) of the Secondary Will to leave them the 650 Highway 7 East, Richmond Hill property. West Beaver Creek owned that property. John Kaptyn included his shares in West Beaver Creek in the definition of his Secondary Estate.

[146] In clause 4(e), John Kaptyn purported to give Simon's children three assets -- 9005 Leslie, 117 Ontario and 650 Highway 7 East. The first two are corporations; the second a piece of real property. In his Secondary Will made April 5, 2007, John Kaptyn employed the following language to effect his intention:

> I give to my grandson, Jason Kaptyn, and my grandson, Jonathan Kaptyn, who are the sons of my own son Simon Kaptyn, equally, my shares of stock, whether common, special or preferred, owned by me in: 1171757 Ontario Limited; Parkway Hotels & Convention Centre Inc.; 9005 Leslie Street Inc; and 650 Highway 7 East, Richmond Hill property.

(Emphasis added)

Note the narrow language of gift: "my shares of stock, whether common, special or preferred, owned by me in". [page50]

[147] Three weeks later, on April 25, 2007, John Kaptyn altered clause 4(e) through the codicil to his Secondary Will. He made two changes. First, he removed the gift of shares in Parkway Hotels & Convention Centre Inc. That made sense. By giving Jason and Jonathan all his shares in 117 Ontario, they

obtained his indirect interest in Parkway Hotels, so there was no need to refer to the latter company.

[148] The second change John Kaptyn made was to broaden the language of gift in clause 4(e) from "I give . . . my shares of stock, whether common, special or preferred" to "I give . . . any interest that I may have, including without limitation, my shares of stock, whether common, special or preferred, owned by me in". In light of the chronology described by Lederer J. in his reasons about how the final testamentary documents came about, I have absolutely no doubt that the insertion of the phrase -- "any interest that I may have, including" -- through the codicil into clause 4(e) of the Secondary Will was done by John Kaptyn's advisors, and adopted by him, in order to give effect to the gift of the 650 Highway 7 East property in which John Kaptyn did indeed have an interest, albeit an indirect one through his total control of the registered owner of the property, West Beaver Creek. That language added by the codicil broadened the scope of his gift to Simon's children from a narrow on e of shares owned by him, to a more expansive one of "any interest" he might have in the described property, direct or indirect, by shares or otherwise.

[149] I conclude that the language of clause 4(e) operates to give to Jason and Jonathan Kaptyn the indirect interest owned by their grandfather, through his holdings in West Beaver Creek, in the 650 Highway 7 East property. That gift does not fail. I confess to some bafflement why Jason and Jonathan Kaptyn would take the position that their grandfather's gift to them of 650 Highway 7 East failed in light of the amended language used by John Kaptyn in clause 4(e) of his Secondary Will.

[150] The fact that 650 Highway 7 East is one of two major assets owned by West Beaver Creek presents no obstacle to the trustees giving effect to this gift. John Kaptyn left them ample technical powers in his Secondary Will to achieve his wishes. The provisions of clause 4 preceding the gifting clauses -- 4(e) and (f) -- grant John Kaptyn's co-trustees extensive and flexible powers to implement his gifts. Clauses 4(a)(ii) and 4(a)(iii) give broad powers to convert assets into

money or to partition and distribute in specie any part or asset of his Secondary Estate. Clause 4(d.2) goes even further, directing the trustees "to take such steps as are reasonably necessary . . . to maximize the net benefit to each of my grandchildren whom I have named to [page51]benefit under the following subparagraphs of this clause . . . ". Armed with those powers and directions, I suspect the distribution of the 650 Highway 7 East property to Jason and Jonathan Kaptyn would not involve the trustees taking cor porate steps that would rank high in their degree of difficulty on any test of corporate administration. [See Note 95 below]

D.7 The Hensim Property

[151] Does a similar result apply to the other main asset of West Beaver Creek -- the Hensim Property in London, Ontario? In his Secondary Will made April 5, 2007, John Kaptyn used the following language of gift for Henry's children:

> (f) I give to my grandchildren, Samantha Kaptyn; and, Robert Kaptyn; and Alexander Kaptyn, who are the issue of my son, Henry Whillhelm Kaptyn, in equal shares per stirpes, all my common, special or preferred, owned by me in: 9011 Leslie Street Inc.; the Hensin Property; and Captain Investments, Inc. . . .

Obviously an effort was made by the draftsman to track the gifting language used in the immediately preceding clause for Jason and Jonathan, but two mistakes were made. First, whereas the original clause 4(e) referred to "my shares of stock, whether common, special or preferred, owned by me", clause 4(f) dealing with Henry's children, left out the object of the gift. Where is the reference to "my shares of stock"? Nowhere. Instead, clause 4(f) purports to gift "my common, special or preferred". The phrase lacks an object. The adjectives do not modify a noun. The omission of a needed object is obvious, an omission which one can track back through the language of the March 2007 and October 2006 Secondary Wills. This simply illustrates the presence of a number of sloppy drafting errors throughout John Kaptyn's testamentary instruments.

[152] As in the case of clause 4(e), the codicil to the Secondary Will made April 25, 2007 attempted to change the

gifting language in clause 4(f). The phrase "all my common, special or preferred, owned by me in" became "all my common owned by me in". "Common" what? Again, the draftsman left out a key word. If we live in a world of "dura lex", as Simon Kaptyn submitted, why should the purported gift of 9011 Leslie to Henry's children have any effect when the phrase "all my common owned by me in" is patently incomplete and defective? In order to give effect to [page52]that gift, the court would have to insert some word, such as "shares", into that phrase. Notwithstanding the strenuous submissions of Simon Kaptyn and his sons that the court has no business making a new will, I heard no submission from them that the gift to Henry's children of 9011 Leslie should fail because of deficiencies in the language of gift.

[153] Given that to be the case, why then should the obviously intended gifts in CII and the Hensim Property fail? They should not. Again, the findings of Lederer J. which I reviewed above, together with the admissible extrinsic evidence, unequivocally disclose that John Kaptyn intended to split his Secondary Estate into two roughly equal shares, excluding his ownership of Marktur, and to allocate the split groups of assets to each set of his grandchildren. Clause 4(f) clearly identified those assets which were to go to Henry's children.

[154] I conclude that a plain and obvious drafting mistake was made in para. 3 of the codicil to the Secondary Will when the incomplete phrase, "all my common owned by me in", was included in the amended clause 4(f). I further conclude that I should rectify that patent mistake by replacing that phrase, "all my common owned by me in", in clause 4(f), with the phrase that John Kaptyn used in clause 4(e) to effect his gift to Simon's children -- i.e., "any interest that I may have, including without limitation, my shares of stock, whether common, special or preferred, owned by me in". I have found that such language operates to gift to Jason and Jonathan the properties described in clause 4(e); I find that such language is equally effective to implement the gifts of properties described in clause 4(f).

[155] To not so rectify clause 4(f) and to permit the gifts of indirectly owned assets to Henry's children to fail would result in a palpably absurd conclusion, obviously in contradiction to the testator's intention. [See Note 96 below] The Haschyc Schedules, which John Kaptyn reviewed prior to making his wills, showed a roughly equal split of corporate and real estate assets between the two sets of grandchildren -- $20.1 million to Henry's children and $18.787 million to Simon's children. In the event the gifts of indirectly owned assets failed, the division of assets, using the numbers in the Haschyc Schedules, would approximate the following: Henry's children -- $4.877 million; Simon's children -- $15.693 million. In other words, a finding of ademption or failure in respect of such gifts would result in a material disinheritance of [page53]Henry's children, with approximately $18.348 million falling into the residue, potentially to the benefit of the two co-trustees, Simon and Henry. Such a result would run direc tly counter to John Kaptyn's clear intention to benefit his two sets of grandchildren equally and to have the distribution of his corporate and real estate holdings skip a generation over his sons, to the benefit of his grandchildren.

[156] Decisions involving the possible addition of words to testamentary instruments turn on the sui generis facts of the cases. It is open to the court to remedy an omission or error by supplying words where the missing words are simply a reasonable inference from the will as a whole and the actual intention of the testator is clear. [See Note 97 below] Given the patent clerical mistake in clause 4(f) and the clear intention of John Kaptyn, I regard the rectification ordered as minor. Were I to hold otherwise and find that the gift of the Hensim Property failed, I have no doubt that John Kaptyn would be waiting, with the ghosts of other dissatisfied testators, on the other bank of the river Styx, ready to give me an earful when I arrived. [See Note 98 below] That is a confrontation I wish to avoid.

D.8 Captain Investments Inc.

[157] With the rectification of clause 4(f) of the Secondary Will that I have ordered, John Kaptyn's gift of the shares in CII which he indirectly owned also can be effected. As in the case of the gift of 650 Highway 7 East to Jason and Jonathan

Kaptyn, the powers and directions given by John Kaptyn to his co-trustees in clauses 4(a) through to 4(d.2) of the Secondary Will are more than adequate to accomplish the gifts of the indirectly owned assets made by John Kaptyn.

[158] Two other considerations arise in the context of the gift of CII: (i) on a proper construction of the wills, what happens to the Florida beach house owned by CII; and (ii) how is the gift of the shares in CII affected by John Kaptyn's direction in clause 4(d.1) of the Secondary Will to liquidate CII's parent company, Marktur? I will deal now with the issue of the Florida beach house and defer to a later section the issue of the liquidation of Marktur and its consequences.
[page54]

D.9 The Florida beach house

D.9.a. Background

[159] Turning to the Florida beach house, it constitutes one of the two real estate assets owned by CII. The parties appear to agree that the house is worth somewhere in the neighbourhood of US$6 to $8 million. As an asset of CII, the Florida beach house would form part of John Kaptyn's Secondary Estate by virtue of the definition of Secondary Estate found in clause 3(a) of his Secondary Will. However, in para. 4 of his Primary Will, John Kaptyn gave his Primary Estate to his trustees on certain trusts, one of which he described as follows, in para. 4(d)(ii) of his Primary Will:

> 4(d) If at the date of my death, I am both married to and co-habiting with my spouse, Doreen Kaptyn, then:
>
> Florida Vacation Property
>
> (ii) I direct my Trustees to permit, for a period of up to two years next following the date of my death, Doreen Kaptyn the right to occupy and enjoy any Florida vacation residence that I may directly or indirectly own and have been using as a vacation home, including the use of all furnishings, household effects of every kind and any other articles owned by me and used in connection with it except my boats, which I refer to as the "contents"

> of the Florida vacation residence. During this two year period I direct and authorize my Trustees to pay for all realty taxes, fire and content insurance, maintenance fees, if any, and repairs both of a capital and non-capital nature and any other amounts necessary for the general upkeep of the Florida vacation residence and its contents. Upon the second anniversary of my death, or at any time prior to the expiry of the three year period during the lifetime of Doreen Kaptyn, she desires to no longer use my Florida vacation residence as a residence or upon her death, whichever occurs first, I direct that my Florida vacation residence and its contents be sold on the open market and the net proceeds of sale form part of the residue of my estate and be dealt with accordingly; provided that Doreen Kaptyn shall have the right upon termination of her use of the Florida vacation residence to select any such contents that she wishes to retain as her own property and shall be at liberty to remove such contents upon vacating this Florida residence.

[160] By consent order made June 16, 2009, Strathy J. gave directions to the co-trustees for the rental of the Florida beach house and the purchase by Henry of beach house furniture through CII. A dispute arose between Simon and Henry regarding the rental of the property. In reasons released December 1, 2009 [[2009] O.J. No. 5150, 54 E.T.R. (3d) 313 (S.C.J.)], Strathy J. held [at paras. 12-13]: [page55]

> I am not impressed by Henry's accounting of his efforts to rent the beach house, notwithstanding his commendable achievement of two months' rental for $40,000. He is a trustee and he has responsibilities to the beneficiaries and to the court. I am equally unimpressed by Simon's rash response to Henry's e-mail. Nevertheless, as the parties are plainly incapable of cooperating, and Henry has given no explanation of why the beach house has not been fully rented, Simon should be given an opportunity to rent it, as contemplated by my order of June 16, 2009.

Simon shall therefore be entitled to take over the listing signed by Henry, subject to the terms of such listing. Simon shall advise Henry of any offer to lease and acceptance of an offer to lease shall require the signatures of both Simon and Henry.

D.9.b. Positions of the parties

[161] The parties took the following positions regarding the Florida beach house:

(i) Simon Kaptyn submitted that the direction to the trustees to sell the Florida property in para. 4(d)(ii) of the Primary Will is not effective because CII, not John Kaptyn, was the direct owner of the property. Simon also submitted that any expenses related to the Florida vacation property should be paid by CII;

(ii) Jason and Jonathan Kaptyn also argued that the direction failed because CII owned the Florida beach house, John Kaptyn could not deal directly with the property and the law of ademption applied;

(iii) Henry Kaptyn submitted that the direction to sell did not fail because the trustees under the Primary and Secondary Wills are the same, but he acknowledged in his factum [See Note 99 below] that on the sale of the Florida residence the net proceeds ought to be paid to CII and used, in part, to pay the tax liability associated with that sale (estimated at around US$2.2 million); and

(iv) the OCL argued that an inconsistency existed between para. 4(d)(ii) of the Primary Will and clause 4(f) of the Secondary Will, and the latter clause should prevail because it follows later in time. Consequently, the Florida vacation property remains owned by CII and should be dealt with under the Secondary Will. [page56]

D.9.c. Analysis

[162] When faced with conflicting provisions in a will, a court should make every effort to reconcile them, rather than ignore one or other of them, or call any of them void for uncertainty. [See Note 100 below] Where inconsistencies exist in the same will, a rule of thumb of last resort permits a court to

prefer the latter of the two inconsistent provisions, but only if the will and the surrounding circumstances provide no means of reconciling the two clauses. [See Note 101 below]

[163] Of course in the present case the inconsistency appears not in the same will, but as between the Primary and Secondary Wills. I conclude that the inclusion of para. 4(d)(ii) in the Primary Will was an error. John Kaptyn went to great pains to establish in his Secondary Will a regime for the administration and disposition of his corporate assets. No dispute exists that CII owns the Florida beach house. As an asset of CII, the beach house is subject to the directions John Kaptyn gave to his trustees in his Secondary Will; the directions in the Primary Will fail.

[164] As a practical matter, this holding is of little consequence. I understand that Doreen Kaptyn gave up any occupancy rights some time ago and, as the last order of Strathy J. indicated, the trustees are now renting, or attempting to rent, the Florida beach house. Moreover, Henry Kaptyn agrees that the proceeds of the sale should be paid to CII.

[165] Henry's Question 11(c) sought directions regarding the responsibility for the payment of expenses for the Florida beach house. Simon, Jason and Jonathan Kaptyn submitted that CII is responsible for the payment of such expenses. I have reviewed Henry's factums and his submissions at the hearing, and I could not identify Henry's position on this sub-question. Since CII owns the Florida beach house, in my view it follows that any on-going expenses relating to that property are the responsibility of CII.

D.10 Payment of estate taxes arising from these gifts [See Note 102 below]

[166] Finally, to the extent my findings that the gifts to the grandchildren of CII, the Hensim Property and 650 Highway 7 East do not fail gives rise to a tax liability for John Kaptyn or his Primary or Secondary Estate, that tax liability is to be paid out [page57]of the same sources as any other personal or estate tax liability -- i.e., the residues of the Primary and

Secondary Estates.

XIV. The "Free and Clear" Condition of the Assets Gifted to the Grandchildren

A. Overview of the issues

[167] Having dealt with the interpretation questions concerning which assets pass under the Secondary Will to the two groups of grandchildren, let me move to the next issue: in what state or condition are the grandchildren to receive the gifted assets? Are the grandchildren to receive their gifts saddled with certain liabilities, or are they to receive them liability-free? Here we arrive at the issue of the interpretation of clauses 4(d.1) and (d.2) of John Kaptyn's Secondary Will, which read as follows:

> 4(d.1) I direct my Trustees shall liquidate Marktur Limited as soon as they in their discretion deem it advisable upon such terms that are seen to be advantageous to my estate, including without limitation, redemption of any outstanding preference shares of Captain Investments Inc. owned by Marktur Limited which shares are to be redeemed at a price of $1,000 US per share. The proceeds from the liquidation together with the proceeds in my Estate shall be applied in repayment of any inter-company loans in which I have an interest and in the payment of taxes imposed by any American and/or Canadian jurisdiction on each such corporation with the intent that the assets disposed of in this my Will are transferred free and clear of such liabilities otherwise, excluding any inter-company debt associated in West Beaver Creek Management Inc. which balance pertains to the Hensin property on Wonderland Road in London, Ontario ("Hensin Property") but subject to any registered mortgages on title to 650 Highway No. 7 East, Richmond Hill.
>
> 4(d.2) I direct my Trustees to take such steps as are reasonably necessary including payment of taxes, whether capital gain on deemed disposition or on retained earnings or otherwise in order to maximize the net benefit to each of my grandchildren whom I have named to benefit under the following subparagraphs of this clause 4 of my Secondary Will.

[168] Both applicants have posed several questions concerning the interpretation of these two clauses:

(i) What is the meaning of the phrase "maximize the net benefit" in clause 4(d.2)? [See Note 103 below]

(ii) How are the inter-company loans amongst John Kaptyn's Secondary Estate corporate assets to be handled? [See Note 104 below] [page58]

(iii) Who is responsible for paying the tax liabilities of the corporations that made up John Kaptyn's Secondary Estate? [See Note 105 below]

(iv) How are the estate trustees to liquidate Marktur? [See Note 106 below]

(v) Must Marktur redeem its Class X preference shares owned by Captain Generation Mall Ltd. ("CGML")? [See Note 104 below]

(vi) Must CII redeem its preferred shares owned by Marktur? [See Note 108 below]

[169] Before turning to these specific issues, I think a general point needs to be made. Clauses 4(d.1) and (d.2) of the Secondary Will were the result of an evolution in John Kaptyn's thinking about how to select the best mechanism by which to accomplish his intention to divide his corporate assets amongst his grandchildren in a roughly equal fashion, an intention which first became manifest in his October 2006 Secondary Will. In that will, John Kaptyn directed the conversion of CII's fixed assets into cash, with the shares of CII passing to Henry's children. [See Note 109 below] That way of proceeding was discarded in his March 2007 Secondary Will, where, for the first time, John Kaptyn's direction to liquidate Marktur appeared. [See Note 110 below] The April 2007 Secondary Will saw refinements made to the Marktur liquidation clause and the insertion of the "maximize the net benefit" clause. Further refinements were added to the Marktur liquidation clause in the codicil to the Secondary Will.

[170] From this it is apparent to me that over the last six months of his life, John Kaptyn searched, with the assistance of his financial and legal advisors, for the most appropriate mechanism by which to give effect to his intention to divide his corporate assets amongst his two sets of grandchildren. As

the chronology of the final days of John Kaptyn described by Lederer J. in his reasons reveals, as death approached John Kaptyn appreciated that he might not have massaged the mechanics to perfection, but he was satisfied that the language of his final Secondary Will did a good enough job to give adequate "strategic directions" to his estate trustees, and he knew [page59]he had to leave certain implementation details to the discretion of his sophisticated sons. Here is what Lederer J. wrote about the meeting John Kapytn had with his advisors on April 5, 2007, prior to signing the wills:

> On being advised that the tax issues had not been resolved, John Kaptyn told them not to worry about it. He was no longer looking for tax deferrals. The taxes were to be paid so that his grandchildren received the real estate free of tax. Sheldon Carr testified that John Kaptyn believed his children would pull together and do what he wished. Michael Haschyc advised the court he did not play an active role in the conversation. He sat, on his own, at the end of the bed and reminisced. Nonetheless, he recalled that John Kaptyn told them not to worry about the tax issues. [See Note 111 below]

B. "Maximize the net benefit": clause 4(d.2)

B.1 Positions of the parties

Simon Kaptyn

[171] Simon Kaptyn submitted that the meaning of the "maximize the net benefit" clause was that the grandchildren were to receive specific bequests of shares of private corporations and of real property by John Kaptyn free of any debt that might be owed by the corporations to another company in which John Kaptyn had an interest, as well as free of any tax liability imposed by any Canadian or American jurisdiction -- i.e., "to maximize the after-tax amount allocable to each grandchild in the corporations" to be received by the grandchildren. [See Note 112 below]

[172] Simon argued that the clause did not give authority to the estate trustees to wind up the corporations John Kaptyn specifically had bequeathed to his grandchildren, even for the

purpose of maximizing the net benefit to the grandchildren.

Jason and Jonathan Kaptyn

[173] Jason and Jonathan Kaptyn contended that the clause should be interpreted to preserve the integrity of the family business and to ensure that the gifts of corporations to the grandchildren were not diminished by deemed disposition taxes and unpaid inter-company debts.

Henry Kaptyn

[174] Henry Kaptyn submitted that the "maximize the net benefit" clause meant that the estate trustees must maximize [page60]the after-tax amount allocable to each of John Kaptyn's grandchildren. He argued that clause 4(d.2) grants wide authority to the estate trustees "to do what is necessary to ensure that the highest present value of any bequest be realized", [See Note 113 below] including engaging in post-mortem tax planning and evaluating all available tax strategies, such as salary/ dividend planning, utilization of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), s. 164(6) election, [See Note 114 below] winding up any company in which John Kaptyn had an interest, payment of corporate taxes and repayment of inter-company accounts.

[175] Henry stated that following their father's death, the estate trustees sought tax advice from a financial advisor. He alleged that Simon refused to engage in post-mortem tax planning for the estate and, as a result, "the opportunity to make [a s. 164(6)] election under the Income Tax Act has now been lost". [See Note 115 below]

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[176] The OCL argued that the phrase "maximize the net benefit" meant that the estate trustees should take steps to maximize the after-tax value allocable to each grandchild, including, if necessary, winding up any of the corporations in which John Kaptyn had an interest.

B.2 Analysis

[177] As I understand their positions, two issues divide the co-trustees about the meaning of clause 4(d.2). Although both talk in terms of maximizing the after-tax position of the grandchildren, Simon interprets clause 4(d.2) as requiring the trustees to transfer the gifted corporations (or properties) to the grandchildren with a minimum of attached liability, whereas Henry does not regard the transfer of the corporations (or properties) per se as the task but, instead, maximizing the value of the monetary equivalent of the gifts made to the grandchildren. That is to say, I understand Simon to see the trustees' task as one of maximizing after-tax benefits in the context of effecting [page61]the transfer of the specific gifted corporations to the grandchildren, whereas Henry does not think that the corporations need to be transferred, rather they should be monetized and the trustees' job is to maximize the net value of the monetized gifts.

[178] In my view, the interpretation advanced by Simon Kaptyn reflects the intention of the testator. I reach that conclusion for several reasons.

[179] First, the language John Kaptyn used in clauses 4(e) and (f) of his Secondary Will contemplated the transfer of specific gifts to his grandchildren. The primary duty of the estate trustees is to effect those transfers.

[180] Dealing specifically with the testator's interest in the hotels, quite apart from the findings made by Lederer J. on the point, it is clear from the language of the Secondary Will that John Kaptyn wanted to ensure that the hotel assets were transferred to Jason and Jonathan so that they, especially Jason, could continue to operate the hotels which John Kaptyn had created. John Kaptyn intended that the "family" hotel business would continue intact. His intention can be seen clearly from the April 25, 2007 codicil to his Secondary Will, where he amended the language of gift of the assets to Jason and Jonathan (clause 4(e)) to include the following language regarding 117 Ontario, the corporate holder of John Kaptyn's interest in the hotel assets:

4(e)(ii) 1171757 Ontario Limited, provided that JONATHAN KAPTYN shall have first granted in writing to JASON KAPTYN unconditional power of attorney to manage the assets of 1171757 Ontario Limited, including without limitation a permanent proxy to vote the shares of both 1171757 Ontario Limited and Parkway Hotels & Conventions Centre Inc., the granting of which is to be completed within the first six (6) months next following the date of my death.

[181] Second, clause 4(d.2) must be interpreted within the context of the entire Secondary Will, and it is apparent that John Kaptyn intended it to operate hand-in-hand with clause 4(d.1). In a very real sense, those clauses expressed the "strategic directions" of the testator to his estate trustees about how to give effect to the gifts to his grandchildren described in clauses 4(e) and (f) of his Secondary Will. In clause 4(d.1), John Kaptyn directed his trustees to use certain proceeds to pay certain liabilities "with the intent that the assets disposed of in this my Will are transferred free and clear of such liabilities", excluding "any inter-company debt associated in West Beaver Creek Management Inc . . . ". Reading the language of clause 4(d.2) together with clause 4(d.1), and in light of the findings of the testator's intention made by Lederer J., I accept, as accurate, the following [page62]statement contained in para. 90 of Simon Kaptyn's factum about the meaning of clauses 4(d.1) a nd (d.2):

The plain meaning and intent of John was that the specific bequests of shares of private corporations and of real property made by him in paragraph 4 of his Secondary Will were to be received by his grandchildren free of:

(a) any debt that might be owed by the corporations to another company in which John had an interest; and
(b) any tax liability imposed by any American or Canadian jurisdiction.

[182] Henry Kaptyn submitted that the language of clause 4(d.2) imposed on the trustees an obligation to maximize the present value of any bequest made to the grandchildren, and if the "re-structure, wind-up and/or reorganization of any of the

corporations in which John had an interest will maximize the net benefit to each of John's grandchildren named in para. 4 of the Secondary Will, then the Trustees have the authority (and indeed the obligation) to do so". [See Note 116 below] In my view, this submission attempts to stretch the testator's language too far. Clause 4(d.2) talks about "such steps as are reasonably necessary", not any or every possible step imaginable. And, as I have pointed out, the possible range of reasonable steps available to the trustees is circumscribed by the overarching intent of the testator, as expressed in clause 4(d.1), that "the assets disposed of in this my Will are transferred free and clear of such liabilities".

[183] In other words, clauses 4(d.1) and (d.2) mean that in figuring out how to transfer the corporate assets and properties gifted by John Kaptyn to his grandchildren by clauses 4(e) and (f), the trustees must select the method, or methods (it may depend upon the nature of the asset), that will see the assets specifically gifted transferred to the grandchildren in a way that will maximize the net benefit to the grandchildren from those transfers. In clause 4(d.2), John Kaptyn identified (and directed) one such method -- pay the taxes relating to those assets; clause 4(d.1) identified another -- pay the inter-company loans owed by a gifted corporation. Could other steps be taken to maximize the net benefit to the grandchildren on the transfer of the specific assets to them? I do not know. No such evidence has been placed before me, and it is not the role of a court on an application for opinion, advice and direction to speculate or to deal with hypotheticals. Suffice it to say, the range of al ternatives open to the trustees pursuant to the testator's direction "to take such steps as are reasonably necessary" is bounded, or circumscribed, [page63]by the overarching intent of John Kaptyn to gift specific assets to each set of grandchildren.

[184] Henry Kaptyn asked, in his Question 1(b), whether clause 4(d.2) authorized the trustees to wind up any of the corporations in which John Kaptyn had an interest. My answer is no, not "any" corporation. John Kaptyn specifically directed the liquidation of Marktur in clause 4(d.1), and whether the most appropriate way to transfer the Hensim and 650 Highway 7

East properties to the grandchildren is by winding up West Beaver Creek is a matter on which the trustees should seek the appropriate expert advice. But, I conclude that John Kaptyn intended his other gifts of corporate assets to be transferred intact to his grandchildren, free and clear of specified inter-company debt and taxes. To wind up such corporate gifts would defeat the overarching intention of the testator.

C. The payment of inter-company loans and corporate taxes: clauses 4(d.1) and (d.2)

C.1 Background

[185] Simon Kaptyn's application record identified the following groups of inter-company loans involving corporations in which John Kaptyn had an interest at the time of his death: [See Note 117 below]

The "Schedule B" Loans: Due to Marktur Limited

[QL:GRAPHIC NAME="102OR3d001-2.jpg"/]

[page64]

The "Schedule C" Loans: Payable by Marktur Limited

[QL:GRAPHIC NAME="102OR3d001-3.jpg"/]

The "Schedule D" Loans (mortgages): As between companies in which John Kaptyn had an interest other than Marktur Limited

[QL:GRAPHIC NAME="102OR3d001-4.jpg"/]

[See Note 118 below]

C.2 Positions of the parties

Simon Kaptyn

[186] Simon Kaptyn submitted that clause 4(d.1) directs the estate trustees to use the proceeds of the liquidation of Marktur, together with the residue of the Primary and Secondary Estate, to pay all inter-company loans owed to Marktur by other companies in which John Kaptyn had an interest (except West Beaver Creek), as well as all inter-company loans owed by Marktur to companies in which John Kaptyn had an interest. More

specifically, in terms of the Schedule B, C and D loans, Simon submitted that those [page65]proceeds should be used to pay all Schedule B loans, except West Beaver Creek, and all the Schedule C and D loans.

[187] He also argued that the estate trustees are to use the liquidation proceeds and the residues of the Primary and Secondary Estates to pay the tax liabilities of each company John Kaptyn bequeathed to his grandchildren, with the tax liabilities to be calculated as at the date of death.

Jason and Jonathan Kaptyn

[188] Jason and Jonathan Kaptyn submitted that the proceeds from the liquidation of Marktur and the residue of the Primary and Secondary Estate should be used to pay (i) only the 117 loan shown on Schedule B; (ii) all Schedule C loans; and (iii) all Schedule D loans.

Henry Kaptyn

[189] Henry Kaptyn contended that the Secondary Will required that the inter-company loans payable to companies in which John Kaptyn had an interest at the time of his death be repaid by the debtor companies, on demand. If a particular company could not pay its debt, it would have to borrow to do so. Similarly, tax liabilities of the corporations in which John Kaptyn had an interest should be paid entirely by those corporations.

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[190] The OCL submitted that inter-company debts and income taxes of the testator's private corporations should be paid from the proceeds of the liquidation of Marktur and the residues of the Primary and Secondary Estates.

[191] The OCL argued that the clauses should be interpreted to mean that the grandchildren were to receive the assets bequeathed to them free of any corporate taxes owing and any inter-company debt present as of the date of John Kaptyn's death.

C.3 Analysis

C.3.a Clause 4(d.1): "proceeds in my Estate"

[192] Let me deal first with the phrase, "The proceeds from the liquidation together with the proceeds in my Estate", used by John Kaptyn in the second sentence of clause 4(d.1) of his Secondary Will. I conclude that the words, "proceeds in my Estate", refers to the residue of his Primary and Secondary Estates, not just his Secondary Estate. [page66]

[193] First, while the Primary Will and the Secondary Will each contain a definition of "Primary Estate" or "Secondary Estate", respectively, neither contains a definition of "my Estate", suggesting that those words refer to both the Primary and Secondary Estates.

[194] Second, that "my Estate" refers to the residues of both the Primary and Secondary Estates flows from the context in which that term was used. With the exception of Marktur, Elgin Commercial Developments and Jubilee Commercial Holdings, John Kaptyn gifted to his grandchildren all other assets constituting his Secondary Estate. From the Haschyc Schedules, it is apparent that of those three ungifted corporations, only Marktur had any real value. To limit the words "my Estate" in clause 4(d.1) of the Secondary Will to the proceeds of the Secondary Estate, excluding Marktur and the gifted corporations, would result in a financially meaningless interpretation. What proceeds would exist, unless the gifted corporations were turned into cash? But, that would result in the failure of gifts to the grandchildren, while the Primary Estate remained awash in cash! That would benefit the testator's sons to the detriment of his grandchildren -- clearly not John Kaptyn's intention.

[195] Finally, the findings made by Lederer J. [See Note 119 below] and p. 3 of the Haschyc Schedules clearly identify the proceeds from the liquidation of Marktur, together with the residue of the Primary Estate, as the primary sources to pay the inter-company loans and taxes prescribed by John Kaptyn in his Secondary Will.

C.3.b. Clause 4(d.1): "inter-company loans"

[196] As I have already stated, the purpose of clauses 4(d.1) and (d.2) was to provide the trustees with strategic directions to give effect to the intention of John Kaptyn that "the assets disposed of in this my Will are transferred free and clear of such liabilities to my grandchildren". Those liabilities included any inter-company loan as between a gifted corporation and any other company in which John Kaptyn had an interest, as well as specified taxes.

[197] What loans were owed by the gifted companies to other companies in which John Kaptyn had an interest? Schedules B and D identified four such loans:

(i) Schedule B identified two loans owed by a gifted company to Marktur and, of the two, the loan owed by West Beaver Creek [page67]was specifically excluded by John Kaptyn in the closing language of clause 4(d.1). That leaves only the loan due from 117 Ontario to Marktur;

(ii) Schedule D identified three loans owed by a gifted company to another company in which John Kaptyn had an interest -- the debt 9005 Leslie owes to CII; the debt 9011 owes to CII; and the debt 117 Ontario owes to Parkway Racquet & Fitness Club Limited.

I conclude that clause 4(d.1) of the Secondary Will means that the trustees are to use the proceeds from the liquidation of Marktur and the residues of the Primary and Secondary Estates to pay the loans owed by 117 Ontario to Marktur, 9005 Leslie St. to CII, 9011 Leslie St. to CII, and 117 Ontario to Parkway Racquet in order to fulfill the testator's stated intent that such assets be transferred free and clear of such liabilities.

[198] I do not interpret clause 4(d.1) as including any of the loans identified on Schedule C. Those are loans owed by Marktur to named corporations. Marktur was not a gifted company, so those loans are not liabilities of any gifted company; they are assets of those companies -- i.e., receivables. The gifted assets could be transferred with such receivables still due to them; such would not violate the testamentary direction to transfer them "free and clear of such liabilities". However, John Kaptyn's direction in the first sentence of clause 4(d.1) to liquidate Marktur will require

Marktur to repay such loans to the gifted corporations identified on Schedule C as part of the liquidation process.

[199] Obviously, I reject the position advanced by Henry Kaptyn that each gifted corporation should pay for its inter-company debt. I am simply repeating myself -- John Kaptyn's largesse to his grandchildren included a special provision that they receive the gifted assets free and clear from debts owed by such entities to other companies in which John Kaptyn had an interest. Grandfather showed great generosity to his grandchildren; his estate trustees must honour that largesse.

C.3.c. Clauses 4(d.1) and (d.2): taxes payable by the gifted corporations

[200] Grandfather's generosity did not end there. Of course his Primary Estate and Secondary Estate would have to pay any taxes which he owed as a result of income he received prior to his death and as a result of taxes triggered by reason of his death, such as taxes payable on capital gains resulting from the deemed disposition of his assets. But, John Kaptyn went further. He made clear in clauses 4(d.1) and (d.2) that he required his [page68]trustees to ensure that the assets he gifted to his grandchildren would pass free and clear of any Canadian or American taxes imposed on the corporations he was gifting to them in furtherance of his intention to "maximize the net benefit to each of my grandchildren whom I have named to benefit under" clauses 4(e) and (f) of his Secondary Will.

[201] Henry Kaptyn submitted that to "assign a corporate tax liability to the Estate [would be] fundamentally irrational". [See Note 120 below] I disagree and make four points in response. First, John Kaptyn intended his gifted assets to pass without tax liability to his grandchildren. He expressly said so. That was his choice. Second, he made it clear that he intended to benefit his grandchildren by so doing. Indeed, he directed his trustees to take steps to maximize the net benefit to his grandchildren; he did not direct his trustees to act to maximize the benefit to the residuary beneficiaries. John Kaptyn preferred to benefit his grandchildren, not his sons. Again, that was his choice. Third, p. 3 of the Haschyc Schedules stated that the liquid assets of Marktur and John Kaptyn would be

available to pay "all taxes". Finally, clause 4(d.2) does not limit the payment of taxes to capital gains on deemed dispositions, but goes on to include taxes "on retained earnings or otherwise", the latter term being broad enough to encompass corporate taxes payable.

[202] Henry Kaptyn also submitted that the phrase "on each such corporation" in the second sentence of clause 4(d.1) referred only to Marktur and CII, as did the term "assets disposed of" used later in that clause, with the result that only his children would receive the benefit of the application of the proceeds of the liquidation of Marktur and the residues to pay loans and taxes. I disagree. The phrase, "on each such corporation", must be read in light of the words that immediately follow which indicate that John Kaptyn intended that the "assets disposed of in this my Will" -- i.e., the assets gifted to all his grandchildren -- were transferred free and clear of inter-company loan and tax liabilities. Marktur was not gifted to any grandchild; John Kaptyn directed that it be wound up. Further, to limit the benefit of the clause to the application of the proceeds to the gift of CII to Henry's children would run directly counter to the obvious intent of John Kaptyn to treat each set of grandch ildren with an even hand.

[203] One final issue exists regarding the question of tax liability. Simon Kaptyn submitted that the tax liability of each gifted corporation should be calculated as at the date of John [page69]Kaptyn's death; his sons submitted that clause 4(d.1) of the Secondary Will points to the date of transfer of the gifts as the relevant date for calculating the tax liability to be paid by the estates because their grandfather wrote that he intended that his assets disposed of be "transferred free and clear of such liabilities". I suspect John Kaptyn expected that his sons would arrange for a prompt transfer of the gifts to his grandchildren -- clause 4(e)(ii) required Jonathan to provide a permanent proxy to Jason within six months of John Kaptyn's death -- and that the date of transfer would be very close to the date of his death, so this problem would not arise. A quick transfer has not occurred. The first 16 months following John Kaptyn's death were occupied by the will challenge undertaken by

one of Henry's sons, the next 22 months by these interpretation applications.

[204] I do not think it appropriate for me to give the opinion, advice or direction of the court on this question of timing in light of the limited record before me. As a pure matter of interpretation, there may be merit in the position advanced by Jason and Jonathan Kaptyn because of the language of clause 4(d.1) -- "transferred free and clear of such liabilities" -- but against that would have to be balanced the principle expressed by s. 2(1) of the Estates Administration Act [See Note 121 below] that on a person's death his property vests in his personal representatives as trustee for the persons by law beneficially entitled thereto. As well, some of the gifted corporations are operating corporations which have been active during the more than three years since John Kaptyn's death, so the issue of interpretation may become blended with issues of the administration of the estate, on which the record is very thin. As a result, on the state of the record before me, I decline to answer the question of which date should be used to calculate the taxes of the gifted corporations payable from the proceeds of the liquidation of Marktur or the residues of the Primary and Secondary Estates.

D. The liquidation of Marktur

D.1 Position of the parties

Simon Kaptyn

[205] Simon Kaptyn submitted that the direction to liquidate Marktur required the estate trustees to sell and convert all Marktur's assets to cash, cause Marktur to redeem its Class X [page70]preferred shares owned by CGML and cause CII to redeem its preferred shares owned by Marktur.

Jason and Jonathan Kaptyn

[206] Simon's sons took the same position as the one he advanced.

Henry Kaptyn

[207] Henry submitted that the timing of the liquidation of Marktur should be left to the discretion of the estate trustees as part of their overall evaluation of which post-mortem tax planning strategy they should select in order to maximize the after-tax amount allocable to each grandchildren.

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[208] The OCL submitted that when the trustees liquidate Marktur, the corporation must redeem its Class X shares and the estate trustees must cause CII to redeem its preference shares held by Marktur.

D.2 Analysis

[209] Henry Kaptyn does not seem to dispute that Marktur must be liquidated. The thrust of his submissions was that the liquidation should occur gradually over time -- a "slow burn" approach. [See Note 122 below] True enough, in clause 4(d.1) of his Secondary Will, John Kaptyn directed his trustees to liquidate Marktur "as soon as they in their discretion deem it advisable upon such terms that are seen to be advantageous to my estate". But, that discretion must be exercised in the larger context of the liquidation of Marktur standing as a step which probably must occur before the gifts made in clauses 4(e) and (f) can be transferred to the grandchildren because the proceeds of the liquidation will form part of the source of the payment of certain inter-company loans and taxes, as I have described above. Simply put -- no liquidation of Marktur; no transfer of gifts "free and clear".

[210] Estate trustees are required to act with reasonable diligence in the circumstances to administer an estate so that the beneficiaries receive their gifts in a timely fashion. I have already pointed to the language of clause 4(e)(ii) as an indication that John Kaptyn anticipated that the hotels would be under the control of Jason and Jonathan about six months after his death. [page71]Arguably, the testator might have contemplated an administration period of up to two years given Doreen's right to occupy the Florida beach house for that period. However, three-plus years have now elapsed since John Kaptyn's death. It strikes me that any reasonable period of

delay open to the estate trustees before proceeding with the liquidation of Marktur expired long, long ago. They should get on with their obligation to liquidate Marktur.

[211] That admonition, of course, is subject to the ability of the trustees to identify all liabilities of Marktur. From the materials filed, I gather it is common ground that the parties have agreed that a trial of an issue is required into the question of whether the sum of $4.95 million is held by Marktur on a resulting trust or a constructive trust for 117 Ontario or for Parkway. [See Note 123 below] That is a claim advanced by beneficiary grandchildren against the estate. I can only encourage the trustees and the grandchildren beneficiaries to bring some common sense and finality to the administration of the Primary and Secondary Estates and to resolve their differences. John Kaptyn evidently knew that the two sides of his family could not get along. That is why he divided his Secondary Estate in the way he did. The two sides of the family have to separate themselves financially, as John Kaptyn intended. The longer they delay in doing so, the greater the chance that they will succeed in turning the administration of Joh n Kaptyn's estates into this court's next Jarndyce v. Jarndyce.

[212] As to the process of liquidation, general corporate principles will apply. With one exception, Marktur will have to call in its assets, including the preference shares it holds in CII, convert them to cash and pay its liabilities, including the redemption of the its Class X preference shares owned by CGML. The one exception involves the common shares of CII owned by Marktur. I have held that the Secondary Will, properly interpreted and rectified, gifted that interest to Henry's children, so those shares do not form part of the assets of Marktur to be converted into cash.

XV. Doreen Kaptyn's Entitlement to Shares in Parkway Racquet & Fitness Club Limited [See Note 124 below]

[213] The trustees have posed the question whether Doreen Kaptyn is entitled to the outstanding shares of Parkway Racquet & Fitness Club Limited ("PAC"). [page72]

[214] In para. 4(i.2) of his Primary Will, John Kaptyn directed his trustees to "acknowledge the assets in the name at my death of Parkway Racquet & Fitness Club Ltd., including its lease of its operating premises are those of Doreen Kaptyn and not myself or any of my companies". Simon Kaptyn submitted that although at the testator's death Doreen was the registered legal owner of the only two issued and outstanding common shares of PAC, on May 1, 2005 she executed a written trust agreement acknowledging that she held the shares in trust for 117 Ontario and, as well, she endorsed the share certificates in blank and executed a resignation as director, president and secretary of PAC in blank. I understand that Doreen does not dispute that she signed such documents. [See Note 125 below]

[215] Henry Kaptyn, however, submitted that the content of the tax filings made by PAC and 117 Ontario in 2005, 2006 and 2007 evidenced a course of conduct treating Doreen Kaptyn as the beneficial owner of the shares of PAC

[216] I cannot resolve this issue by way of application. First, a dispute about material facts and the inferences to be drawn from such facts exists, so the trial of an issue is necessary. Second, the applicants seek a determination of the ownership of the shares of PAC when one of the affected parties -- Doreen Kaptyn -- is not before the court. From the final order of Czutrin J. dated February 6, 2009, resolving Doreen's family law litigation against the estate, it appears that Doreen is still asserting ownership of the PAC shares. She therefore is a necessary party to the adjudication of this dispute. Accordingly, pursuant to rule 38.10(1)(b) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194, I direct a trial of the issue of the ownership of the shares of PAC at the time of John Kaptyn's death and I direct that Doreen Kaptyn is a necessary party for the trial of that issue. Since the parties have already agreed to the trial of other issues, I leave it to them to seek the appropriate directions f or the timing of the trial of this particular issue, subject to my concluding comments below about further motions or applications in this matter.

XVI. Conclusion and Costs

[217] By reference to the groupings in Appendix "A", my responses to the questions posed by the co-trustees in their applications for opinion, advice and direction can be found in the following portions of these reasons: [page73]

[QL:GRAPHIC NAME="102OR3d001-5.jpg"/]

[218] I give the parties 30 days to attempt to settle the costs of these applications. If they do reach a settlement, it will require my approval because I have serious questions about the extent to which the Primary and Secondary Estates should bear the parties' costs of these applications. If the parties do not settle the issue of costs, I require any party seeking an award of costs to serve and file with my office written cost submissions, together with a bill of costs, by Friday, September 17, 2010. Any party who opposes any request for costs made by another party shall serve and file with my office responding written cost submissions by Friday, October 1, 2010. Such responding cost submissions must include a bill of costs setting out the costs which that party would have claimed on a full, substantial and partial indemnity basis. If a party opposing a cost request fails to file its own bill of costs, as I have directed, I may take that failure into account when considering the objections made by the pa rty to the costs sought by any other party. The costs submissions shall not exceed 20 pages in length, excluding the bill of costs. [page74]

[219] The disputes surrounding the administration of John Kaptyn's Primary and Secondary Estates involve both his children and grandchildren. The whole matter cries out for settlement. So, I make two points. First, I do not know how close the parties came to settling their differences during the mediation before Lederer J. Perhaps the opinions, advice and directions I have given in these reasons may narrow any remaining disputes. I would strongly encourage the parties to consider approaching Lederer J. to see whether he would be amenable to resuming the mediated settlement discussions.

[220] Second, both Strathy J. and I have commented, in previous decisions in this matter, on the inability of the two

estate trustees to co-operate. It seems that every issue in the administration of John Kaptyn's Primary and Secondary Estates spawns an application or motion to this court. To date, this court has made no less than 24 orders in proceedings involving John Kaptyn's Primary and Secondary Estates. If the co-executors cannot discharge jointly their legal obligations, I query whether it is the job of this court to resolve every dispute that arises between them, or whether other options should be pursued. All of which is to say, as administrative judge for the Estates List I direct that before the co-executors or beneficiary grandchildren seek to invoke again the process of this court, all parties must appear before me at a special scheduling appointment to discuss any remaining litigation for the administration of the Primary and Secondary Estates. Subject to that requirement, Strathy J. continues as the rule 37.15 judge for this matter.

[221] I wish to thank all counsel for their most helpful oral and written submissions.

Order accordingly.

APPENDIX "A": QUESTIONS REFERRED TO THE COURT

ITEM 1: MAXIMIZE THE NET BENEFIT

Henry's application question/position

Question 1:

Having regard to the provisions of the Primary Will, Primary Codicil, Secondary Will and Secondary Codicil as a whole, and the language of paragraph 4(d.2) of the Secondary Will and paragraph 1 of the Secondary Codicil in particular:

(a) Whether the phrase "maximize the net benefit" means:
  (i) to maximize the after-tax amount allocable to each grandchild; or
  (ii) something else and, if so, what? [page75]

(b) Whether the Trustees have the authority to wind up any of the corporations in which the Deceased had an interest, if

such wind up will maximize the net benefit to each of the Deceased's grandchildren named in clause 4 of the Secondary Will?

(c) If the answer to question 1(b) is yes, are the assets that are distributed to the Estate of the Deceased on wind up distributed to the beneficiaries in accordance with the specific bequest provisions to which they relate, or do they form part of the residue of the Primary and Secondary Estate respectively?

Simon's application question/position

SK agrees to ask HK's Q 1

ITEM 2: ALLOCATION OF ESTATE LIABILITIES (3 questions)

Henry's application question/position

Question 3:

Having regard to the provisions of the Primary Will, Primary Codicil, Secondary Will and Secondary Codicil as a whole, and the language of paragraphs 3(a), 3(b), 4(a)(vi), 4(b), 4(c), 4(k) and (4)(l) of the Primary Will, paragraphs 3(a), 3(b), 4(b), 4(c), 4(d.1), 4(d.2), 4(e), 4(f) and 4(g) of the Secondary Will, paragraph 1 of the Primary Codicil and paragraphs 1, 2 and 3 of the Secondary Codicil in particular:

(a) Whether the Primary Will and the Secondary Will should be interpreted to contemplate a shortfall in the residue of the Primary Estate only?

(b) If the answer to question 3(a) is yes, whether paragraphs 4(d.1) and 4(d.2) of the Secondary Will should be interpreted to ensure that there is no shortfall in the residue of the Secondary Estate?

(c) If the answer to question 3(b) is no, then how should the provisions of the Primary Will and the Secondary Will be interpreted to ensure that there is no shortfall in the

residue of the Secondary Estate?

(d) If the answer to question 3(a) is no, and in the event that there are insufficient assets in the residue of the Secondary Estate to pay any amount for which it is determined under this Application to be responsible, do the specific bequests contained in paragraphs 4(e) and (f) of the Secondary Will abate pro rata based on the fair market value of the assets in each of those paragraphs to pay the amounts pursuant to the Deceased's Secondary Will?

(e) In the event that the answer to question 3(d) is no, are the remaining amounts still unsatisfied after the residue of the Secondary Estate has been exhausted to be paid from the residue of the Primary Estate?

(f) If the answer to question 3(e) is yes, then do the specific bequests contained in paragraphs 4(k) and (I) of the Primary Will abate pro rata based on the fair market value of the assets in each of those paragraphs to pay the Deceased's just debts, funeral and testamentary expenses and income tax liability payable pursuant to the Deceased's Secondary Will?

(g) If the answer to question 3(f) is no, then from what funds or assets should these amounts be paid?

Question 4:

Having regard to the provisions of the Primary Will, Primary Codicil, Secondary Will and Secondary Codicil as a whole, and the language of [page76]paragraphs 3(a), 4(b), 4(k) and 4(l) of the Primary Will and paragraphs 3(a), 4(b), 4(h) and 4(i) of the Secondary Will in particular:

(a) Whether the Deceased's just debts, funeral and testamentary expenses that are related to specific assets of the Primary Estate should be paid:

(i) entirely out of those assets of the Primary Estate;
(ii) entirely out of the residue of the Primary Estate;
(iii) entirely out of the residue of the Secondary

Estate;

(iv) equally out of the residue of the Primary Estate and the Secondary Estate; or

(v) in some other fashion and from some other source and, if so, how or which?

(b) Whether the Deceased's just debts, funeral and testamentary expenses that are not related to specific assets of the Primary Estate should be paid:

(i) entirely out of the residue of the Primary Estate;

(ii) entirely out of the reside of the Secondary Estate;

(iii) equally out of the residue of the Primary Estate and the Secondary Estate; or

(iv) in some other fashion and, if so, how?

(c) Whether the Deceased's just debts, funeral and testamentary expenses that are related to specific assets of the Secondary Estate should be paid:

(i) entirely out of those assets of the Secondary Estate;

(ii) entirely out of the residue of the Secondary Estate;

(iii) entirely out of the residue of the Primary Estate;

(iv) equally out of the residue of the Secondary Estate and the Primary Estate; or

(v) in some other fashion and from some other source and, if so, how or which?

(d) Whether the Deceased's just debts, funeral and testamentary expenses that are not related to specific assets of the Secondary Estate should be paid:

(i) entirely out of the residue of the Secondary Estate;

(ii) entirely out of the residue of the Primary Estate;

(iii) equally out of the residue of the Secondary Estate and the Primary Estate; or

(iv) in some other fashion and, if so, how?

(e) If the answer to questions 4(a)(ii), 4(b)(i), 4(c)(iii) or 4(d)(ii) is yes, whether the Deceased's just debts, funeral and testamentary expenses should be paid:

(i) in accordance with the proportionate allocation of the residue of the Estate under paragraphs 4(k) and 4(l) of the Primary Estate; or

(ii) in some other proportion from the residue of the Primary Estate and, if so, which or how? [page77]

(f) If the answer to questions 4(a)(ii), 4(b)(i), 4(c)(iii) or 4(d)(ii) is no, whether the Deceased's debts, funeral and testamentary expenses should be paid:

(i) out of the assets of the Secondary Estate only to the extent that the assets of the Primary Estate are insufficient; or

(ii) entirely out of the residue of the Secondary Estate?

(g) If the answer to question 4(f)(ii) is yes, should the Deceased's just debts, funeral and testamentary expenses be paid:

(i) in accordance with the proportionate allocation of the residue of the estate under paragraphs 4(h) and 4(i) of the Secondary Estate; or

(ii) in some other proportion from the residue of the Secondary Estate and, if so, which or how?

(h) If the answer to question 4(f) is no, should the Deceased's debts, funeral expenses and testamentary expenses be divided equally between the residue of the Primary and Secondary Estates?

Question 5:

Having regard to the provisions of the Primary Will, Primary Codicil, Secondary Will and Secondary Codicil as a whole, and the language of paragraphs 3(a), 3(b), 4(a)(vi), 4(b) and 4(c) of the Primary Will, paragraphs 3(a), 3(b), 4(b), 4(c),

4(d.1), 4(d.2), 4(e) and 4(f) of the Secondary Will, paragraph 1 of the Primary Codicil and paragraphs 1, 2 and 3 of the Secondary Codicil in particular:

(a) Whether the Estate's tax liability related to the disposition or deemed disposition of assets distributable under each of the Primary Will, Primary Codicil, Secondary Will and Secondary Codicil is to be paid:

(i) from the assets of the Primary Estate to which it relates, with respect to the assets distributed under the Primary Will, and from the assets of the Secondary Estate to which it relates, with respect to the assets distributed under the Secondary Will;

(ii) from the residue of the Primary Estate, with respect to assets distributed under the Primary Will, and from the residue of the Secondary Estate, with respect to the assets distributed under the Secondary Will;

(iii) entirely from the residue of the Primary Estate;

(iv) entirely from the residue of the Secondary Estate; or

(v) from some other source and, if so, which?

Simon's application question/position

Question 1:

Having regard to the provisions of the deceased's Primary Will and Testament dated April 5, 2007 (the "Primary Will") and First Codicil to the Primary Will and Testament dated April 25, 2007 (the "Primary Codicil"); the provisions of the deceased's Secondary Will dated April 5, 2007 (the "Secondary Will") and First Codicil to the Secondary Will and Testament dated April 25, 2007 (the "Secondary Codicil'); and paragraphs 3(a) and 4(b) of the Primary Will and paragraphs 3(a) and 4(b) of the Secondary Will, [page78]

(a) Should the deceased's just debts, funeral and testamentary expenses, listed in Schedule "A" attached hereto, be paid entirely out of the residue of the Primary

Estate?

(b) If the answer to question 1(a) is in the negative, should the deceased's debts, funeral and testamentary expenses be paid entirely out of the residue of the Secondary Estate?

(c) If the answer to questions 1(a) and 1(b) are both in the negative, should the deceased's debts, funeral and testamentary expenses be divided equally between the residues of the Primary and Secondary Estates?

(d) If the answer to question 1(a), 1(b) and 1(c) are all in the negative, in what manner and from what source should the deceased's debts, funeral and testamentary expenses be paid?

Question 3:

Having regard to the Primary Will, and the Secondary Will as a whole; and particularly paragraphs 3(a), 3(b), 4(b) and 4(c) of the Primary Will; paragraphs 3(a), 3(b), 4(b), 4(c) and 4(g) of the Secondary Will;, in the event that there are insufficient assets in the residue of the Secondary Estate to pay the deceased's debts, funeral and testamentary expenses and income tax liability,

(a) Do the specific bequests contained in paragraph 4 of the Secondary Will abate pro rata to pay the deceased's just debts, funeral and testamentary expenses and income tax liability payable pursuant to the deceased's Secondary Will?

(b) In the event that the answer to Question 3(a) is in the negative, are the remaining debts, funeral and testamentary expenses and income tax liability, still unsatisfied after the residue of the Secondary Estate has been exhausted, to be paid from the residue of the Primary Estate?

(c) If the answer to questions 3(a) and 3(b) are both in the negative, then from what funds or assets should be any unsatisfied debts, funeral and testamentary expenses and income tax liability be paid?

Question 2 -- SK agrees to ask HK's Q 5

ITEM 3: INTER-COMPANY LOANS

Henry's application question/position

Question 6:

Having regard to the provisions of the Primary Will, Primary Codicil, Secondary Will and Secondary Codicil as a whole, and the language of paragraphs 1, 2 and 3 of the Secondary Codicil in particular:

(a) Whether the inter-company loans payable to companies in which the Deceased had an interest are:

(i) to be re-paid by the debtor companies; or
(ii) to be forgiven?

(b) If the answer to question 6(a)(i) is yes, whether the loans are:

(i) payable on demand; or
(ii) payable at some other time and, if so, when?
[page79]

(c) If the answers to questions 6(a)(i) and 6(a)(ii) are no, from what source(s) are these inter-company loans to be paid?

Henry's Application paragraph 2, pg. 20:

2. the opinion, advice or direction of the Court with respect to the existence of any obligation of the Executors and trustees to require the Deceased's wholly-owned corporations to make advances to satisfy obligations to other wholly-owned corporations owned by the Deceased;

Simon's application question/position

Question 4:

Having regard to the Primary Will and Secondary Will as a whole; and particularly paragraphs 1 and 2 of the Secondary Codicil;

(a) Are the inter company loans, as set out in Schedule "B" attached hereto, payable to Marktur Limited ("Marktur") to be re-paid to Marktur from the debtor companies?

(b) If the answer to question 4(a) is in the negative, are these loans to be forgiven?

(c) If the answer to questions 4(a) and 4(b) are both in the negative, from what sources are these inter-company loans to be paid to Marktur?

Question 5:

Having regard to the Primary Will, Secondary Will and Secondary Codicil as a whole; and particularly paragraphs 9 and 2 of the Secondary Codicil,

(a) Are the inter-company loans, as set out in Schedule "C" (attached hereto) owing by Marktur to corporations in which the deceased had an interest to be paid by Marktur prior to, or upon, the liquidation of Marktur?

(b) If the answer to question 5(a) is in the negative, are the loans, as set out in Schedule "C", to be forgiven?

(c) If the answer to question 5(a) is in the affirmative and Marktur does not have sufficient funds, upon its liquidation, to pay its indebtedness to companies in which the deceased had an interest, is Marktur's inter-company indebtedness, as set out in the Schedule "C", to be satisfied from the residue of the Secondary Estate?

(d) if the answer to questions 5(a) and 5(c) are both in the affirmative and in the event there are insufficient funds in Marktur or the Secondary Estate to pay Marktur's inter-company indebtedness, as set out in the Schedule "C", or in the event that the question to 5(a) is in the affirmative

and Marktur's inter-company indebtedness is not to be paid out of the residue of the Secondary Estate in the event that Marktur does not have sufficient funds upon its liquidation, is Marktur's inter-company indebtedness to be paid out of the residue of the Primary Estate?

(e) if the answer to question 5(a) is in the affirmative and the answer to question 5(d) is in the negative, from what source(s) is Marktur's inter-company indebtedness, as set out in Schedule "C" to be paid?

Question 6:

Having regard to the Primary Will, Secondary Will and Secondary Codicil as a whole; and particularly paragraphs 1 and 2 of the Codicil, [page80]

(a) are inter-company loans outstanding as of the date of the deceased's death between companies in which the deceased had an interest, other than Marktur, as set out in Schedule "D" hereto, to be paid from the proceeds of liquidation of Marktur?

(b) If the answer to questions 6(a) is in the affirmative and Marktur does not have sufficient funds, upon its liquidation, to pay its inter-company indebtedness set out in Schedule "D" hereto, are the inter-company debts, involving companies in which the deceased had an interest, other than Marktur, to be satisfied from the residue of the Primary Estate, in the event there are insufficient funds in Marktur or the Secondary Estate to pay the indebtedness for inter-company loans set out in Schedule "D"?

ITEM 4: CORPORATE TAXES

Henry's application question/position

Question 7:

Having regard to the provisions of the Primary Will, Primary Codicil, Secondary Will and Secondary Codicil as a whole, and

the language of paragraphs 3(a), 3(b), 4(b), 4(c), 4(k) and 4(l) of the Primary Will, paragraphs 3(a), 3(b), 4(b), 4(c), 4(h) and 4(i) of the Secondary Will, para. 1 of the Primary Codicil and paragraphs 1, 2 and 3 of the Secondary Codicil in particular:

(a) Whether the tax liabilities of the corporations in which the Deceased had an interest, that are related to specific public corporations of the Primary Estate, should be paid:

(i) entirely by those corporations;
(ii) entirely out of the residue of the Primary Estate;
(iii) out of the assets of the Secondary Estate, only to the extent that the assets of the Primary Estate are insufficient; or
(iv) entirely out of the residue of the Secondary Estate?

[(a) Need not be asked.]

(b) Whether the tax liabilities of the corporations in which the Deceased had an interest, that are related to specific corporations of the Secondary Estate, should be paid:

(i) entirely by those corporations;
(ii) entirely out of the residue of the Primary Estate;
(iii) out of the assets of the Secondary Estate, only to the extent that the assets of the Primary Estate are insufficient; or
(iv) entirely out of the residue of the Secondary Estate?

(c) If the answers to questions 7(a)(ii) and 7(b)(ii) are yes, should the corporate tax liability be paid:

(i) in accordance with the proportionate allocation of the residue of the Estate under paragraphs 4(k) and 4(l) of the Primary Estate; or
(ii) in some other proportion from the residue of the Primary Estate and, if so, which or how?

(d) If the answers to questions 7(a)(iv) and 7(b)(iv) are yes, should the corporate tax liability be paid: [page81]

(i) in accordance with the proportionate allocation of the residue of the Estate under paragraphs 4(h) and 4(i) of the Secondary Estate; or

(ii) in some other proportion from the residue of the Secondary Estate and, if so, which or how?

(e) If the answers to questions 7(a)(ii), 7(a)(iii), 7(a)(iv), 7(b)(ii), 7(b)(iii) and 7(b)(iv) are no, should the corporate tax liability be divided equally between the residue of the Primary and Secondary Estates?

(f) If it is determined that the corporate tax liability should be paid out of the assets of the Primary Estate and/or the assets of the Secondary Estate, rather than the corporations themselves, is the corporate tax liability to be calculated:

(i) as at the date of the death of the Deceased;

(ii) at the end of the fiscal year; or

(iii) at some other time and, if so, when?

(g) If the answer to question 7(f)(ii) is yes, is the corporate tax liability to be paid for only the 2007 fiscal year end?

(h) If the answer to question in 7(g) is no, how long should the assets of the Primary and Secondary Estates be used to pay corporate tax liability?

Simon's application question/position

Question 7:

Having regard to the Primary Will, the Secondary Will and Secondary Codicil as a whole; and particularly paragraphs 3(a), 3(b), 4(b) and 4(c) of the Primary Will; paragraphs 3(a), 3(b), 4(b) and 4(c) of the Secondary Will; and paragraphs 1, 2 and 3 of the Secondary Codicil,

(a) Are the tax liabilities of corporations wholly owned by the deceased and given to the deceased's grandchildren, pursuant to paragraph 4 of the Secondary Will, which obligations are set out in Schedule "E" (the "Corporate Tax Liability") to be paid out of the residue of the Secondary Estate rather than by the corporations themselves?

(b) If the answer to question 7(a) is in the affirmative and there are insufficient assets in the residue of the Secondary Estate, including upon the liquidation of Marktur, to pay the Corporate Tax Liability, is the Corporate Tax Liability to be paid out of the residue of the Primary Estate?

(c) If the answer to question 7(a) is in the affirmative and paragraph 7(b) is in the negative and there are insufficient assets in the residue of the Secondary Estate, including upon the liquidation of Marktur, to pay the Corporate Tax Liability, should the specific bequests contained in the Secondary Will abate pm rata to pay the Corporate Tax Liability?

Question 8:

Having regard to the Primary Will, the Secondary Will and the Secondary Codicil as a whole; and particularly paragraphs 3(a), 3(b), 4(b) and 4(c) of the Primary Will; paragraphs 3(a), 3(b), 4(b) and 4(c) of the Secondary Will; and paragraphs 1, 2 and 3 of the Secondary Codicil,

(a) If the Corporate Tax Liability is to be paid out of the estate and not by the corporations bequeathed to the deceased's grandchildren, is the Corporate Tax Liability to be calculated as at the date of death? [page82]

(b) If the answer to question 8(a) is in the negative, is the Corporate Tax Liability to be calculated as of each corporation's 2007 fiscal year end?

(c) If the answer to question 8(a) is in the negative and question 8(b) is in the negative, when is the Corporate Tax Liability to be determined?

Simon's Application Record paragraph 2(c), pg. 16

2. The opinion, advice and direction of the court with respect to the obligation of the executors and trustees to require the deceased's wholly owned corporation, Marktur Limited ("Marktur"), to advance to the deceased's wholly owned corporation, 1171757 Ontario Limited ("757 Ontario") the sum of $2,195,829.00 Canadian Dollars, and to:

(c) direct that Marktur advance the sum of $743,904.00 to pay the corporate tax obligation of 757 Ontario for the year ending March 31, 2007.

ITEM 5: INDIRECTLY OWNED ASSETS (5 questions)

Henry's Application question/position

Question 8:

Having regard to the provisions of the Primary Will, Primary Codicil, Secondary Will and Secondary Codicil as a whole, and the language of paragraphs 3(a), 3(b) and 4 of the Primary Will, paragraphs 3(a), 3(b) and 4 of the Secondary Will, paragraph 1 of the Primary Codicil and paragraphs 1, 2 and 3 of the Secondary Codicil in particular:

(a) Whether the devise of 650 Highway 7 East, Richmond Hill to the Deceased's grandsons, Jason Kaptyn and Jonathan Kaptyn (the "Grandsons"), adeems and falls into and forms part of the residue of the Secondary Estate, given that it was owned indirectly by the Deceased through wholly-owned West Beaver Creek Management Inc., which owns and controls 100% of 650 Highway 7 East, Richmond Hill?

(b) If the answer to question 8(a) is no, are the Grandsons entitled to receive the devise of the 650 Highway 7 East, Richmond Hill, Ontario property?

(c) If the answer to question 8(b) is yes, does paragraph 4(e) of the Secondary Will contemplate the wind up

[reorganization] of West Beaver Creek Management Inc.?

(d) If the answer to question 8(c) is no, then how is 650 Highway 7 East, Richmond Hill to be distributed to the Grandsons?

Question 9:

Having regard to the provisions of the Primary Will, Primary Codicil, Secondary Will and Secondary Codicil as a whole, and the language of paragraphs 3(a), 3(b) and 4 of the Primary Will, paragraphs 3(a), 3(b) and 4 of the Secondary Will, paragraph 1 of the Primary Codicil and paragraphs 1, 2 and 3 of the Secondary Codicil in particular:

(a) Whether the devise of the Hensim Property (misdescribed in the Secondary Will as the Hensin Property) to the Deceased's grandchildren, Samantha Kaptyn, Robert Kaptyn and Alexander Kaptyn (the "Grandchildren"), adeems and falls into and forms part of the residue of the Secondary Estate, given that it was owned indirectly by the Deceased through wholly-owned West Beaver Creek Management Inc., which owns and controls 100 per cent of the Hensim Property? [page83]

(b) If the answer to question 9(a) is no, are the Grandchildren entitled to receive the devise of the Hensim property?

(c) If the answer to question 9(b) is yes, does paragraph 4(f) of the Secondary Will contemplate the wind up [reorganization] of West Beaver Creek Management Inc.?

(d) If the answer to question 9(c) is no, then how is the Hensim Property to be distributed to the Grandchildren?

Question 10: [as amended as a result of the validation of the Codicil]

Having regard to the provisions of the Primary Will, Primary Codicil, Secondary Will and Secondary Codicil as a whole, and the language of paragraphs 3(a), 3(b) and 4 of the Primary

Will, paragraphs 3(a), 3 (b) and 4 of the Secondary Will, paragraph 1 of the Primary Codicil and paragraphs 1, 2 and 3 of the Secondary Codicil in particular:

(a) Whether the bequest of the common shares of Captain Investments, Inc. ("CII") to the Grandchildren adeems and falls into and forms part of the residue of the Secondary Estate, given that the shares were owned indirectly by the Deceased through Marktur Limited ("Marktur"), which the Deceased directed his trustees to liquidate in paragraph 4(d.1) of the Secondary Will?

(b) If the answer to 10(a) is no, how are the Grandchildren entitled to receive the bequest of CII?

Question 10.1: [as amended as a result of the consent Order to OCL addition]

(a) In the alternative, in the event that the answer to either or both of (9)(a) and 10(a) is yes, an Order that the devise of the Hensim Property and the bequest of Captain Investments, Inc. ("CII") be rectified so that clause 4(f), as set out in the Codicil to the Secondary Will, read, in part, as follows:

> "I give to my grandchildren, SAMANTHA KAPTYN; and, ROBERT KAPTYN; and, ALEXANER KAPTYN, who are the issue of my son, HENRY WILLHELM KAPTYN, in equal shares per stirpes, all of my common shares owned by me, and any interest in: 9011 Leslie Street Inc; the Hensim Property; and, Captain Investments, Inc., without limitation (. . .): [words in italics added or corrected]

(b) In the further alternative, in the event that the answer to either or both of 9(a) or 10(a) is yes, an Order that clause 4(f), as set out in the Codicil to the Secondary Will, be rectified as necessary to effect the devise of the Hensim Property and the bequest of the common shares of CII.

Question 11:

Having regard to the provisions of the Primary Will, Primary Codicil, Secondary Will and Secondary Codicil as a whole, and the language of paragraphs 3(a), 3(b), 4(d)(ii) of the Primary Will, paragraphs 3(a) and 3(b) of the Secondary Will, paragraph 1 of the Primary Codicil and paragraphs 1, 2 and 3 of the Secondary Codicil in particular:

(a) Whether the bequest in paragraph 4(d)(ii) of the Primary Will providing Doreen Kaptyn with the entitlement to occupy any Florida vacation residence (the "Florida Residence") and use its contents adeems, given that the Florida Residence and its contents are owned by Cll, a company wholly-owned by Marktur and leased by the Deceased from CII? [page84]

(b) If the answer to question 11(a) is no, whether Doreen Kaptyn is entitled to use and occupy the Florida Residence for:

(i) two years;
(ii) three years; or
(iii) some other period of time and, if so, what

[(a) and (b) no longer need to be asked]

(c) If the answer to question 11(a) is no, whether the realty taxes, fire and content insurance, maintenance fees, capital and non-capital repairs and amounts necessary for the general upkeep of the Florida Residence and its contents (the "Florida Residence Expenses") are payable by:

(i) the Primary Estate;
(ii) CII;
(iii) Marktur;
(iv) the residue of the Secondary Estate; or
(v) someone else and, if so, whom?

Question 12:

Having regard to the provisions of the Primary Will and Secondary Will as a whole, and the language of paragraphs 3(a), 3(b) and 4(d)(ii) of the Primary Will in particular:

(a) Does the direction to the trustees to sell the Florida Residence and its contents, after Doreen Kaptyn's entitlements, if any, are extinguished, and transfer the proceeds thereof to the residue of the Estate fail as the Florida Residence and its contents are owned by CII?

Simon's Application question/position

Question 11: SK agrees to ask HK's Q8

Question 12: SK agrees to ask HK's Question 9

Question 13: SK agrees to ask HK's amended Question 10

Questions 9 and 10: SK agrees to ask HK's Q 12

ITEM 6: PAC

Henry's application question/position

HK agrees to ask SK's Question A, below

Simon's application question/position

Simon's Supplementary Application Record Question A:

Disposition of additional assets not owned by John Kaptyn. Having regard to the provisions of John Kaptyn's Primary Will dated April 5, 2007 (the "Primary Will") and John Kaptyn's Secondary Will dated April 5, 2007 (the "Secondary Will") as a whole, and particularly paragraphs 4(i) and 4(1.2) of the Primary Will, in particular, is Doreen Kaptyn entitled to the outstanding shares of Parkway Racquet And Fitness Club Limited? [page85]

ITEM 7: PAYMENT OF "BONUS OR SALARY" TO JOHN KAPTYN

Henry's application question/position

HK Position: Should be dealt with on a Passing of Accounts;

HK will bring a return of motion at the outset of trial in this regard

Simon's application question/position

Simon's Application Record paragraphs 2(a) and (b), pg. 16

2. The opinion, advice and direction of the court with respect to the obligation of the executors and trustees to require the deceased's wholly owned corporation, Marktur Limited ("Marktur"), to advance to the deceased's wholly owned corporation, 1171757 Ontario Limited ("757 Ontario") the sum of $2,195,829.00 Canadian Dollars, and to:

(a) direct 757 Ontario to retain the sum of $2,195,829.00, being 757 Ontario's allocated share of partnership profit for the partnership year ending April 30, 2006 ("757 Ontario's Partnership Profit") in Parkway Hotels And Convention Centre Partnership ("Parkway Partnership"); or

(b) direct that 757 Ontario pay or transfer 757 Ontario's Partnership Profit to the deceased's estate as a salary or bonus for the year ending March 31, 2007.

Simon's Supplementary Application Record Question B:

B. Payment of Salaries or Bonuses to the Estate of John Kaptyn from various corporations in which John Kaptyn had an interest. Having regard to the Primary Will and Secondary Will as a whole, and particularly paragraph 4(d.2) of the Secondary Will, wherein the Testator has directed the trustees "to take such steps as are reasonably necessary including payment of taxes, whether capital gain on deemed disposition or on retained earnings or otherwise in order to maximize the net benefit to each of my grandchildren whom I have named to benefit under the following subparagraphs of this clause 3 of my Secondary",

(a) Should the executors and trustees cause 9011 Leslie Street Inc. ("9011 Leslie"), to pay the sum of $121,251.00, being the estimated pro-rata amount of income of 9011 Leslie,

to the Estate of John Kaptyn as a bonus or salary to John Kaptyn for the corporate year ending December 31, 2007 (pro-rated from January 1, 2007 to the date of John Kaptyn's death (May 8, 2007))?

(b) Should the executors and trustees cause 9005 Leslie Street Inc. ("9005 Leslie"), to pay the sum of $70,004.00 being the estimated pro-rata amount of income of John Kaptyn's 80% interest in 9005 Leslie, to the Estate of John Kaptyn as a bonus or salary to John Kaptyn for the corporate year ending December 31, 2007 (pro-rated from January 1, 2007 to the date of John Kaptyn's death (May 8, 2007))?

(c) Should the executors and trustees cause West Beaver Creek Management Inc. ("West Beaver Creek") to pay the sum of $449,881.00, being the estimated pro-rata amount of income of West Beaver Creek, to the Estate of John Kaptyn as a bonus or salary to John Kaptyn for the corporate year ending September 30, 2007 (pro-rated from October 1, 2007 to the date of John Kaptyn's death (May 8, 2007))?

(d) Should the executors and trustees cause Marktur Limited ("Marktur") to pay the sum of $132,000.00, being the estimated pro-rata amount of [page86]income of Marktur, to the Estate of John Kaptyn as a bonus or salary to John Kaptyn for the corporate year ending December 31; 2007 (pro-rated from January 1, 2007 to the date of John Kaptyn's death (May 8, 2007))?

(e) Should the executors and trustees cause 1171757 Ontario Limited ("757 Ontario") to pay the allocated partnership profit for the Parkway Partnership year end April 30, 2007 in the amount of $929,977.00 to John Kaptyn's Estate as a bonus or salary to John Kaptyn for 757 Ontario's corporate year ending March 31, 2008?

ITEM 8: REDEMPTION BY MARKTUR OF ITS 458,000 CLASS X PREFERENCE SHARES OWNED BY CAPTAIN GENERATION MALL LTD.

Henry's application question/position

Henry's Application Record, paragraphs 3 and 4 at pgs. 20-21

In lieu of his questions, HK agrees to ask Simon's question amended as follows:

3. The opinion, advice and direction of the Court with respect to the obligation of the Executors and trustees to require the Deceased's corporation, Marktur, to exercise its right to redeem from Captain Generation-Mall Limited its 459,000 Class X shares of Marktur, at the stipulated redemption price $1.00 per share.

Simon's Application Record paragraph 3, pg. 16

3. The opinion, advice and direction of the court with respect to the obligation of the executors and trustees to require the deceased's wholly owned corporation, Marktur, to exercise its right to redeem from Captain Generation-Mall Limited its 458,000 Class X shares of Marktur, at the stipulated redemption price $1.00, per share

ITEM 9: REDEMPTION BY CII OF 7,413 OF ITS PREFERENCE SHARES OWNED BY MARKTUR

Henry's Application Record, paragraphs 3 and 4 at pg. 20-21

In lieu of his questions, HK agrees to ask Simon's question amended as follows:

4. The opinion, advice and direction of the Court with respect to the obligation of the Executors and trustees to require CII, a Florida corporation, wholly-owned by Marktur, to purchase 7,413 preferred shares issued to Marktur, at the subscription price of U.S. $1,000.00 per share.

Simon's Application paragraph 4 pg. 17

4. The opinion, advice and direction of the court with respect to the obligation of the executors and trustees to require CII, a Florida corporation, wholly owned by Marktur, to purchase 7087 preferred shares issued to Marktur and 326

preferred shares issued to Captain Properties Limited, now 9120 Leslie Street Inc., and beneficially owned by Marktur, at the subscription price of U.S. $1000 per share.

ITEM 10: IF THE CAPITAL BEQUESTS OF ASSETS REFERRED TO ABOVE WHICH WERE NOT PERSONALLY OWNED BY JOHN KAPTYN ARE NEVERTHELESS VALID AND EFFECTIVE GIFTS, WHO OR WHAT IS RESPONSIBLE FOR THE TAX LIABILITY REGARDING THE DISPOSITION OR DEEMED DISPOSITION OF THE ASSETS?

Henry's position

HK agrees to ask SK's Q F [page87]

Simon's Supplementary Application Record Question F:

F. Payment of taxes arising upon the disposition of assets bequeathed by John Kaptyn but owned by corporations in which John Kaptyn had an interest. In the event that the Court determines that bequests of interests in the following property which was not personally owned by the testator, are valid and effective:

(i) shares of Captain Investments Inc. ("CII")
(ii) The Florida vacation property,
(iii) The Hensim Property; and
(iv) 650 Highway 7 East, Richmond Hill,

then having regard to the Primary Will as a whole and the Secondary Will as a whole, the Applicant seeks the opinion, advice and direction regarding the source of payment of the tax liability regarding disposition of the property, either as at the time of John Kaptyn's death, or as at the time of transfer of the property.

ITEM 11: HAVING REGARD TO THE DIRECTION TO "LIQUIDATE" MARKTUR, MUST THE TRUSTEES CONVERT ALL ASSETS OF MARKTUR TO CASH?

Henry's Question:

Consent Order of Brown, J. April 24, 2009

a. Having regard to the provisions of John Johannes Jacobus Kaptyn's Primary Last Will and Testament dated April 5, 2007 (the "Primary Will") and First Codicil to the Primary Last Will and Testament dated April 25, 2007 (the "Primary Codicil"), and the provisions of John Johannes Jacobus Kaptyn's Secondary Last Will and Testament dated April 5, 2007 (the "Secondary Will") and First Codicil to the Secondary Last Will and Testament dated April 25, 2007 (the "Secondary Codicil"), and having regard to subparagraph 4(d.1) of the Secondary Will and paragraph 1 of the Secondary Codicil, in particular, does the direction contained in paragraph 4(d.1) of the Secondary Will requiring the trustees to liquidate Marktur Limited require that the trustees sell and convert all of the assets of Marktur Limited to cash? If the answer to subparagraph (a) above is in the negative, how are the trustees to liquidate Marktur Limited?

Simon's Position

SK consented to this question being asked

Notes

Note 1: Kaptyn Estate (Re), [2008] O.J. No. 4032, 2008 CanLII 53123, 43 E.T.R. (3d) 219 (S.C.J.).

Note 2: A chart showing that corporate structure can be found appended to the 2008 reasons of Lederer J.

Note 3: Reasons of Lederer J., supra, at para. 29.

Note 4: Jim Mackenzie, Feeney's Canadian Law of Wills, 4th ed. (Toronto: Butterworths, 2000) at s. 10.1; Coughlin (Re) (1982), 36 O.R. (2d) 446, [1982] O.J. No. 3236 (H.C.J.), at p. 448 O.R.

Note 5: Haidl (Next friend of) v. Sacher, [1979] S.J. No. 428, 106 D.L.R. (3d) 360 (C.A.), at p. 368 D.L.R.

Note 6: Barlow v. Parks Estate, [1980] O.J. No. 266 (C.A.), at para. 10.

Note 7: Burke (Re), [1960] O.R. 26, [1959] O.J. No. 706 (C.A.), at p. 30 O.R.

Note 8: Feeney's, s. 10.1; Noik v. Noik Estate, [2003] O.J. No. 6235, 11 E.T.R. (3d) 175 (S.C.J.), at para. 4.

Note 9: Perrin v. Morgan, [1943] A.C. 399 (H.L.), at p. 415.

Note 10: Rowland (Re), [1963] Ch. 1 (C.A.), at pp. 9-10 (Ch.)

Note 11: Abbott v. Middleton (1858), 7 H.L. Cas. 68, 11 E.R. 28, at pp. 119-20 H.L. Cas.

Note 12: Burke (Re), supra, at p. 30 O.R.; Skude (Re), [1950] S.J. No. 53, [1950] 3 D.L.R. 494 (K.B.), at para. 12.

Note 13: Feeney's, s. 10.2.

Note 14: Ibid.

Note 15: Ibid.

Note 16: Ibid., s. 10.16.

Note 17: Ibid., s. 10.14.

Note 18: Ibid., s. 10.19; Smith Estate (Re), [2003] S.J. No. 612, 3 E.T.R. (3d) 312 (Q.B.), at para. 19.

Note 19: Burke (Re), supra, at p. 30 O.R.

Note 20: See, also, Matzelle Estate v. Father Bernard Prince Society of the Precious Blood, [1996] O.J. No. 5107, 11 E.T.R. (2d) 78 (Ont. Gen. Div.), at para. 17.

Note 21: Feeney's, s. s. 10.26 and 10.30.

Note 22: Ibid., s. 10.27.

Note 23: Ibid., s. 10.29.

Note 24: Stafford Estate v. Thissen, [1996] O.J. No. 1957, 12 E.T.R. (2d) 201 (Gen. Div.), at para. 11.

Note 25: Faucher v. Tucker Estate, [1993] M.J. No. 589, 109 D.L.R. (4th) 699 (C.A.), at p. 705 D.L.R.; Stafford Estate, supra.

Note 26: Rudaczyk (Re) (1989), 69 O.R. (2d) 613, [1989] O.J. No. 1368 (H.C.J.), at p. 621 O.R.

Note 27: Feeney's, s. 10.57; Skude (Re), supra, at para. 22.

Note 28: Feeney's, s. 10.31

Note 29: Lederer reasons, paras. 9 and 11.

Note 30: Ibid., para. 10.

Note 31: Ibid., para. 20.

Note 32: Ibid., para. 28.

Note 33: Ibid., paras. 108 and 110.

Note 34: Ibid., para. 31.

Note 35: Ibid., para. 34.

Note 36: Ibid., paras. 35 and 36.

Note 37: Ibid., para. 56.

Note 38: Ibid., paras. 62 and 63.

Note 39: Ibid., para. 79.

Note 40: For example, the objector filed expert evidence that

given the complexity of the estate and the nature of the changes represented by the codicils, one could not be certain that John Kaptyn possessed the requisite capacity when he executed the second codicil: Lederer reasons, para. 101. This led Lederer J. to consider the evidence regarding the nature and sophistication of John Kaptyn's understanding of the structure of his estate and the consistency of his general intention through the October 2006, March 2007 and April 2007 wills to gift his real estate assets directly to his grandchildren and to divide his estate equally between both sets of grand-children: Lederer reasons, paras. 108-10. The objector also argued that evidence of lack of knowledge and approval could be found in the changes made by the codicil which affected the treatment and disposition of the preference shares held by Marktur in Captain Investments Inc.: Lederer reasons, para. 138. In response to that argument, Lederer J. found that it was the intention of John Kaptyn, from at least October 2006, that the preference shares be redeemed: Lederer reasons, para. 140.

Note 41: R. v. Mahalingan, [2008] 3 S.C.R. 316, [2008] S.C.J. No. 64, at paras. 16 and 105.

Note 42: Ibid., para. 112.

Note 43: Ibid., para. 110.

Note 44: Clare A. Sullivan, "One, Two, Three or More: Multiple wills are such a Chore!", The Law Society of Upper Canada, 12th Annual Estate and Trust Summit (November 12, 2009) at p. 8-1.

Note 45: Granovsky v. Ontario, [1998] O.J. No. 508, 21 E.T.R. (2d) 25 (Gen. Div.), at para. 9.

Note 46: Ibid., para. 22.

Note 47: Ibid., para. 23.

Note 48: Ibid., para. 15, and the reference to Astor, In the Goods of (1876), 1 P.D. 150 (Eng. Prob. Ct.), quoted in Granovsky, at para. 10; Goushleff Estate (Re), [2008] O.J. No. 4053, 43 E.T.R. (3d) 319 (S.C.J.), at para. 9.

Note 49: Martin J. Rochwerg and Leela A. Hemmings, "Will Substitues in Canada" (2008), 28 E.T.P.J. 50, at p. 51.

Note 50: Clare A. Sullivan, "Life in a Multiple Will Regime", Law Society of Upper Canada's 7th Annual Estates and Trust Summit (December 1, 2004) at p. 2-3.

Note 51: Reply factum of Jason and Jonathan Kaptyn, para. 1.

Note 52: Appendix "A", Item 7, Simon's Supplementary Application Record, Question B.

Note 53: See Appendix "A", Item 2.

Note 54: Henry, Question 3.

Note 55: Simon, Question 1; Henry, Question 4.

Note 56: Henry, Question 5; Simon, Question 2.

Note 57: Simon Kaptyn's factum, para. 80.

Note 58: Estates Administration Act, R.S.O. 1990, c. E.22, s. 5; Feeney's, s. 8.53.

Note 59: Widdifield on Executors and Trustees, 6th ed. (Scarborough, Ont.: Carswell, 2002) at p. 3-63; Stuart Estate (Re), [1982] O.J. No. 1403, 13 E.T.R. 74 (H.C.J.), at p. 75 E.T.R.

Note 60: Appendix "A", Item 5.

Note 61: Henry, Question 8; Simon, Question 11.

Note 62: Henry, Questions 9 and 10.1; Simon, Question 12.

Note 63: Henry, Questions 10 and 10.1; Simon, Question 13.

Note 64: Henry, Questions 11 and 12; Simon, Questions 9 and 10.

Note 65: [1923] S.C.R. 642, [1923] S.C.J. No. 25, at p. 650 S.C.R.

Note 66: Feeney's, s. 15.1.

Note 67: McDougald Estate v. Gooderham, [2005] O.J. No. 2432, 255 D.L.R. (4th) 435 (C.A.), at para. 1.

Note 68: [1995] O.J. No. 3498, 9 E.T.R. (2d) 162 (Gen. Div.), at para. 19, affd [1998] O.J. No. 1909, 22 E.T.R. (2d) 17 (C.A.).

Note 69: Supra.

Note 70: [1989] B.C.J. No. 1628, 34 E.T.R. 121 (S.C.).

Note 71: Section 20(2) of the Succession Law Reform Act, R.S.O. 1990, c. S.26 provides: "Except when a contrary intention appears by the will, where a testator at the time of his or her death, (a) has a right, chose in action or equitable estate or interest that was created by a contract respecting a conveyance of, or other act relating to, property that was the subject of a devise or bequest, made before or after the making of a will . . . the devisee or donee of that property takes the right, chose in action, equitable estate or interest . . . of the testator.

Note 72: Thornton Estate (Re), [1990] S.J. No. 233, 85 Sask. R. 34 (Surr. Ct.).

Note 73: [1993] B.C.J. No. 262, 49 E.T.R. 121 (C.A.).

Note 74: Wilhelm v. Hickson, [2000] S.J. No. 45, 183 D.L.R. (4th) 45 (C.A.), at para. 12.

Note 75: Meier Estate (Re), [2004] A.J. No. 1088, 12 E.T.R. (3d) 92 (Surr. Ct.).

Note 76: Ibid., para. 19.

Note 77: Ibid., para. 21.

Note 78: Supra, at paras. 19-32.

Note 79: [1984] 3 All E.R. 930, [1985] 1 W.L.R. 102 (Ch. D.).

Note 80: Wong, supra, at para. 31.

Note 81: Lewis's Will Trusts (Re), supra, at p. 934, paras. c-e.

Note 82: Lewis's Will Trusts (Re), supra, at pp. 933-34.

Note 83: S.O. 1992, c. 30.

Note 84: McDougald Estate, supra, at para. 30.

Note 85: Doyle v. Doyle Estate, supra, paras. 32, 33 and 35.

Note 86: Ibid., para. 36.

Note 87: Doyle v. Doyle Estate, (C.A.), supra, at para. 1.

Note 88: Milwarde-Yates v. Sipila, [2009] B.C.J. No. 402, 2009 BCSC 277, at para. 73.

Note 89: Harrison Estate (Re) (1885), 30 Ch. D. 390 (C.A.), at pp. 393-94.

Note 90: Milwarde-Yates, supra, at paras. 48 and 74.

Note 91: Howell v. Howell Estate, [1999] B.C.J. No. 1490, 1999 BCCA 371, at para. 10.

Note 92: Sun Life Assurance Co. of Canada v. Woitte, [1992] B.C.J. No. 1105 (S.C.); Skude Estate (Re), supra.

Note 93: Philips v. Rail, [1906] W.R. 517 (Ch. Div.), at p. 518.

Note 94: Northern's Estate (Re), [1884] 28 Ch. D. 153, at p. 158.

Note 95: Those powers, when combined, are sufficient to operate in a similar fashion to those found in para. 4 of Ms. McDougald's will: McDougald Estate, supra, at para. 6.

Note 96: Northern's Estate (Re), supra, at p. 158.

Note 97: Feeney's, s. s. 10.88 and 10.89; A.H. Oosterhoff, Oosterhoff on Wills and Succession, 6th ed. (Toronto: Thomson Carswell, 2007) 98 at pp. 492-93, 501.

Note 98: Perrin v. Morgan, supra, at p. 415.

Note 99: Factum of Henry Willhelm Kaptyn, at para. 321.

Note 100: Noik v. Noik Estate, supra, at para. 15.

Note 101: Feeney's, s. 12.19; Masoud Estate (Re), [1958] O.J. No. 291, 16 D.L.R. (2d) 134 (H.C.J.), at para. 5.

Note 102: Appendix "A", Item 10.

Note 103: Appendix "A", Item 1.

Note 104: Appendix "A", Item 3.

Note 105: Appendix "A", Item 4.

Note 106: Appendix "A", Item 11.

Note 107: Appendix "A", Item 8.

Note 108: Appendix "A", Item 9.

Note 109: October 2006 Secondary Will, clause 4(e).

Note 110: March 2007 Secondary Will, clause 4(d).

Note 111: Lederer reasons, supra, para. 56.

Note 112: Simon Kaptyn's factum, para. 91.

Note 113: Henry Kaptyn's factum, para. 102.

Note 114: As described by Henry Kaptyn in his factum, such an election, if made within the first taxation year of an estate, may result in any capital loss associated with the redemption of shares to be deemed that of the deceased taxpayer, not that of the shareholder whose shares were redeemed: factum, para. 117.

Note 115: Henry Kaptyn's Factum, para. 116.

Note 116: My emphasis.

Note 117: I have excluded the inter-company loans dealt with in the matrimonial litigation.

Note 118: Factum of Jason and Jonathan Kaptyn, para. 76.

Note 119: Lederer J. reasons, para. 30.

Note 120: Henry Kaptyn factum, para. 216.

Note 121: R.S.O. 1990, c. E.22.

Note 122: Factum of Henry Kaptyn, paras. 283, 286 and 300.

Note 123: Factum of Simon Kaptyn, para. 67(d); reply factum of Henry Kaptyn, para. 55.

Note 124: Appendix "A", Item 6.

Note 125: See the extracts from the transcript of her cross-examination found at Tab 37 of the compendium filed by Jason and Jonathan Kaptyn.
