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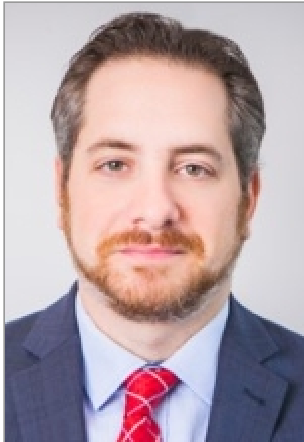
Multiple Wills

Milne, Panda rulings could affect thousands of Ontario wills

By **Arin Klug**



Arin Klug

(January 18, 2019, 8:44 AM EST) -- Probate is the judicial process of validating the will of a deceased person and confirming the appointment of the estate trustees named in the will. When a will is submitted for probate, an estate administration tax (commonly known as probate fees) is payable at a rate of approximately 1.5 per cent of the value of all of the assets governed by the will.

There is no requirement to obtain probate, and probate is not necessarily required for all assets. For example, a financial institution will typically require the estate trustees to obtain probate prior to granting access to the deceased's accounts; in contrast, probate is usually not required to deal with assets involving only non-arm's length parties, such as shares of privately held companies. This distinction is the basis for using multiple wills to minimize probate fees.

For many years, multiple wills have been used as a common estate planning tool. In these cases, the testator's assets are allocated between two pools. All assets requiring probate (e.g. bank accounts) are dealt with under a "public" or "primary" will, and assets that do not require probate (e.g. private company shares) are dealt with in a "private" or "secondary" will.

By probating only the primary will, probate fees are only exigible on the value of the "primary estate" assets, and not those governed by the secondary will. While the use of multiple wills remains a legitimate estate planning strategy, a recent decision of the Ontario Superior Court has raised questions as to whether a common will drafting practice has rendered many existing Ontario wills invalid.

Milne Estate (Re) 2018 ONSC 4174, dealt with the validity of two primary wills. The issue arose from the manner in which the primary estate assets were defined in the primary wills. In each case the primary estate was defined to mean all of the testator's property, except certain specifically enumerated assets and, "any other assets for which [the] Trustees determine a grant of authority by a court of competent jurisdiction is not required for a transfer or realization thereof."

The purpose of this "basket" or "catch-all" provision was to allow the estate trustees to exclude from the primary estate any other assets not requiring probate, so that they could be dealt with under the secondary will.

The applicants in *Milne* argued that the probate function of the court is limited to ascertaining factual matters, such as proper execution of a will, and that its jurisdiction did not extend to matters of construction and interpretation of a will. Relying on the Ontario Court of Appeal's decision in *Neuberger Estate v. York* 2016 ONCA 191, the court concluded that it was both entitled and required to determine a will's validity in cases where questions arise from the court's *ex facie* examination of the will.

Then, starting from the premise that, "a will is a form of trust," the court reasoned that in order for a will to be valid, it must create a valid trust at the time of the testator's death and must therefore satisfy the "three certainties": (i) the intention to create a trust; (ii) the subject matter of the trust;

and (iii) the objects/purposes to which the trust property is to be applied.

The focus of the court's inquiry was whether the primary wills provided certainty of subject matter, given that the basket clause allowed the estate trustees to determine which assets were to be dealt with under that will.

The court concluded that the assets forming part of an estate must either be specifically identified or objectively identifiable by reference to the testator's intentions and not the subsequent decision of the estate trustees; on this basis, the court found the primary wills in question to be invalid.

The use of "basket clauses" in the context of multiple will planning has been relatively common for years. If the *Milne* decision is correct, thousands of existing wills in Ontario would be invalid.

Unsurprisingly, much has been written by members of the estates bar on the *Milne* decision, many of whom disagree with the court's ruling, and notably the premise that "a will is a form of trust." The appeal of *Milne* was heard in December 2018, and estates practitioners are hopeful that the Divisional Court will provide clarification regarding: (i) the probate court's jurisdiction; (ii) whether a will is a trust that must satisfy the "three certainties"; and (iii) if so, whether the element of trustee discretion violates the requirement for certainty of subject-matter.

In the meantime, some practitioners may take comfort from the more recent decision in *Panda Estate (Re)* 2018 ONSC 6734. *Panda* came before the court as a motion for directions after a probate application was denied for ostensibly the same reasons as set out in *Milne*.

Regarding the issues dealt with in *Milne*, the court in *Panda* determined that: (i) the principal issues raised in *Milne* were matters of broad construction that should not be dealt with in the context of a probate application; and (ii) a will is not a trust, and its validity therefore does not require the three certainties.

While the decision in *Panda* is more consistent with the estate bar's general view regarding the nature of wills, the *Milne* appeal will hopefully provide the clarity that practitioners are awaiting.

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