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# Wills & Estates

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## MULTIPLE WILLS MAKE A COMEBACK

by Mary Wahbi and Kathryn Balter

Mary Wahbi
Partner

t: 416.864.7629
mwahbi@foglers.com

Kathryn Balter
Associate

t: 416.864.0112
kbalter@foglers.com

The technique of using multiple wills, which became the standard among estate planning solicitors as a method of limiting the amount of probate fees (now called Estate Administration Tax), took a beating in the *Re Milne*[1] decision of September 11, 2018.

As summarized in our October 12, 2018 Article Multiple Wills: A Little Worse for Wear but Still Worthwhile, the technique involves segregating the assets of the estate into two pools: the first pool consists of assets that require probate for their administration and are governed by a "**Primary Will**" which is submitted for probate, and the second pool consists of those assets that do not require probate for their administration and are governed by a "**Secondary Will**" which is not submitted for probate. The result is a savings of the probate fees (approximately 1.5%) on the value of the assets governed by the Secondary Will. In order to capture as many of the assets that may not require probate for their administration as possible in the Secondary Will, the technique can include the use of various provisions to permit the estate trustees to determine which assets fall into each will after death based on whether such assets require a probated will for their administration (a "**basket clause**") and as well, the ability to disclaim any asset that falls into the Secondary Will but turns out to require probate for its administration (a "**disclaimer**").

According to the decision of Justice Dunphy in *Re Milne*, a will is a trust and a trust requires three certainties, one of which is certainty of subject matter i.e. certainty of assets. Justice Dunphy further held that this certainty must be in existence as of the date of death and if that is not the case, the Will is not valid. He then determined that the Primary Will in that case was not valid because the language of the basket clause permitted the estate trustees to retroactively determine which assets were included in the Primary Will and therefore the Primary Will lacked certainty of subject matter on the date of death.

The *Re Milne* decision has been criticized by the estates bar and estate academics as incorrect and is under appeal. It's existence and potential extreme consequences has since its release caused a flurry of anxious activity among clients and lawyers in the estates bar. Drafting solicitors and testators who have Primary and Secondary Wills in place have been grappling with the potential devastating impact of the decision. In some cases, Wills have been revised to ensure they are "**Milne-proof**" although that involves a sacrifice of the flexibility afforded by the broader wording of basket clauses and disclaimer provisions. In other cases, solicitors and their clients have opted to wait out the appeal decision, although that involves the discomfort of taking a risk until then.

[1] *Milne Estate (Re)*, 2018 ONSC 4174

In a welcomed comeback for multiple wills, the recent decision on November 13, 2018 of Justice Penny in *Re Panda*[2] directly contradicts *Re Milne*.

Justice Penny declined to follow *Re Milne* in similar circumstances with similar wills. In *Re Panda*, the Secondary Estate was defined to include "any other assets for which my Trustees determine a grant of authority by a court of competent jurisdiction in *[sic]* not required for the transfer, disposition or realization thereof" (a basket clause) and the Secondary Will also authorized the Trustees of the Secondary Will to disclaim any property which would otherwise form part of the Secondary Estate within 90 days following the death of the testator (a disclaimer).

Justice Penny states that *Re Milne* raises one procedural and two substantive issues. The procedural issue is whether on an unopposed application for probate it is appropriate to inquire into substantive questions of construction of the will or whether the inquiry is limited to "formal" validity of the will. The substantive issues are whether the validity of a will depends on the will satisfying the "three certainties" required for a valid trust and whether a testator can give his personal representatives the ability to decide which assets they will seek probate for and which they will not.

Justice Penny then addressed these issues as follows:

First — the role in a probate application is to consider whether a will meets the formal validity requirements: is it in writing and signed at its end by the testator in the presence of two or more witnesses who also signed the will in the presence of the testator; and is the document testamentary in nature i.e. does it discloses the intention to make a disposition of the testator's property on his death. The probate and construction functions of the court ought to remain separate and distinct from one another and it is not appropriate in a probate application to look at construction/interpretation questions i.e. whether the term of the will giving the estate trustees the authority to decide what assets fall into which estate (the primary or secondary estate) make it vague or problematic.

Second — there is no authority for the finding in *Re Milne* that a will is a type of trust and must therefore satisfy the "three certainties" in order to be valid. This position is incorrect as a matter of law. A will is not a trust.

Third — it is inappropriate to make any determination regarding the validity of the powers given to the estate trustees because this issue was not before the court. This issue should be dealt with by the court only when it is raised in the contest of a dispute before the court.

The state of the law now is that we have two decisions, directly opposite from each other, from the same level of Court. While only the appeal decision will finally settle the matter, *Re Panda* certainly provides a thorough, well-reasoned analysis of the issues and a solid basis on which to expect that *Re Milne* will be overturned on appeal.

Assuming that *Re Milne* is overturned on appeal, the use of basket clauses and disclaimers continue to be a question for another day, but one which would only be raised on an interpretation application brought before a court of construction. Unless it would benefit the beneficiaries of the Primary or Secondary Estates to have these provisions invalidated, the probate savings effected by these drafting techniques will likely prevent any such application from being brought in the future.

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[2] *Panda Estate (Re)*, 2018 ONSC 6734