CERTAINLY UNCERTAIN: 
Milne Estate (Re) and the Use of Multiple Wills

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A recent decision from the Ontario Superior Court in Milne Estate (Re)\(^1\) ("Milne"), is causing some apprehension amongst will drafting solicitors and likely has estate litigators preparing for what may be an influx of court applications involving estates with multiple wills at play.

In order to understand the possible implications of the decision in Milne, first let us review why people use multiple wills.

Multiple Wills

Comprehensive estate planning involves the creation of wills, but also considers the tax implications upon one’s death. In Ontario, there are three taxes applicable at death: (i) income tax (ii) capital gains tax and (iii) estate administration tax. Estate administration tax is commonly referred to as the “probate fee” because it is triggered during the process of submitting a will through the court-certification (aka probate) process upon death. Ontario has one of the highest rates of probate fees of the provinces at roughly 1.5% of the date-of-death value of the deceased’s assets governed by the probated will.

The use of multiple wills has been ubiquitous in Ontario since 1998 when the legitimacy of the strategy was affirmed in Granovsky Estate v Ontario\(^2\) which resulted in savings of over $300,000 to Mr. Granovsky’s estate by virtue of him having executed a second will for his private company interests which avoided the probate process and associated fees. Today, it is very common for business-owners and other professionals to utilize Granovsky’s multiple will approach, not only for the probable tax savings, but also because non-probated wills can be kept confidential (they are not registered with the court on death), and further, because of the time saved in the administration process by not having to go through the probate process.

The Milne Wills

Mr. and Mrs. Milne died on the same day. They had each executed a multiple will strategy, meaning, they each had both a primary will and a secondary will. When the primary wills were submitted to the court for probate purposes, the court found the primary wills to be invalid, but the secondary wills, valid. The result being that all of the assets of the deceased couple were subject to probate, contrary to the objective of the multiple will strategy. Justice Dunphy reasoned that a will is a form of a trust, and as such, it must satisfy “three certainties” at the time of the testator’s death. According to Justice Dunphy, the Milne wills did not possess the requisite certainty of subject-matter of a trust, mainly due to how the wills defined...
which assets formed part of the primary estate versus the secondary estate. Instead of making an order to rectify what I would consider poorly drafted definitions, Justice Dunphy declared the primary will in its entirety, invalid.

**Implications**

The offending definitions in the *Milne* wills are unlikely to be found across the majority of wills in Ontario. As many of our colleagues in the estates bar would agree, the definitions of primary estate versus secondary estate in this case were particularly unusual and to a degree, overlapped one another. But while most wills may not have the exact words used in *Milne*, it is Justice Dunphy’s analysis that is most concerning. By pronouncing that wills are a form of trust requiring certainty of subject-matter at the time of the testator’s death, Justice Dunphy may have involuntarily nullified thousands of multiple wills in Ontario.

How so? The language and definitions most commonly used by estate lawyers in a multiple will strategy do not always offer certainty of what assets fall under each distinct will. A certain amount of flexibility and sometimes, discretion of the trustee to make this determination underlies the drafting approach of many of us, until now.

**What should we do?**

If you or your clients currently have multiple wills in place, you should review the definitions of each estate and look for:

1. Clauses that provide the trustee with discretion as to what forms part of each estate.
2. Clauses that allow an estate trustee to disclaim assets from one estate and subsequently allow those disclaimed assets to fall to the other estate.
3. General basket clauses – all-encompassing language which states that the primary will includes “all assets that require a probated will” and the secondary will includes “all of the assets that do not require probate will”.
4. Clauses similar to *Milne* where the primary estate and secondary estate may overlap such that assets would be covered by both wills.

If *Milne* stands as a precedent, the use of any of the above phraseology may have significant consequences, especially if the judgements could render wills invalid altogether, resulting in an intestacy.

**Is *Milne* Correct?**

Many estate practitioners in Ontario, myself included, respectfully disagree with Justice Dunphy’s analysis in *Milne*. His Honour’s reasoning begins with classifying a will as a “trust” which in itself is a new proposition at law. Further, at paragraph 23 of the decision, he states that probate is a matter of “trustee discretion” and is therefore unascertainable at death, thereby failing to form the certainty of subject-matter of the trust. In my opinion, Justice Dunphy is wrong here as well. Probate is not a matter of trustee discretion (although it can be), it is really a matter of discretion of the third-party holding the asset of the testator. Whether probate is required for the transfer of real property is directed by the Minister of Land Titles, for financial assets, it is up to each financial institution and so on. In many cases, the decision of whether or not to probate a will is out of the trustee’s hands altogether, regardless of any discretionary power he or she may have been granted under the will. To me, whether an asset requires probate or not can be ascertained at the date of death and in fact is. Every testator dies with a defined asset list. That asset list includes assets that will require probate and assets that will not. Although the trustee establishes these facts usually days or months after the date of death, that to me is irrelevant. On the date of death there are two identifiable estates based on objective tests. If the definition of a primary estate includes “all assets for which a probated will is required” and the definition of a secondary estate includes “all assets for which a probated will is not required”, to me, you have the requisite certainty of subject matter. Justice however, would disagree.

Unless the decision is overturned on an appeal, *Milne* will stand as a concerning precedent in Ontario.
Recommendations

Before the end of October 2018, we will learn if the Milne decision will be heard under appeal. Notwithstanding the outcome however, Milne is a good reminder that estates law in Ontario is constantly evolving. As such, it is good practice to retain a qualified estates lawyer to review your wills every 3-5 years or as your life circumstances change. Regular review of your estate plan helps ensure that your wills are up-to-date with any changes in the law and that they continue to accomplish your testamentary objectives.

If you have any questions with respect to the use of multiple wills or would like to have your existing wills reviewed and refined, please contact Kavina Nagrani or another member of Loopstra Nixon LLP’s Wealth Management team.

End Notes

1 Milne Estate (Re), 2018 ONSC 4174.

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