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MULTIPLE WILLS STRATEGY – BACK IN THE GOOD BOOKS

By Kavina Nagrani and Brad Morton

Our previous article published in October 2018, "[Certainly Uncertain: Milne Estate \(Re\) and the Use of Multiple Wills](#)", examined the unpopular court ruling in [Milne Estate Re. 2018 ONSC 4174](#) (the "*Milne Decision*"). The *Milne Decision* involved the death of an Ontario couple, Mr. and Mrs. Milne, who had made use of a multiple will strategy to save on probate fees, only to have it rejected by the court. Mr. and Mrs. Milne passed away, unaware that their strategy was not initially successful. The executors of the estate, saddled with an unexpectedly high probate tax bill, decided to appeal the *Milne Decision*.

Like a majority of estate lawyers across the Ontario Bar, we respectfully disagreed with the outcome of the *Milne Decision*, as noted in our first article. The appeal, adjudged by the Divisional Court in [Milne Estate \(Re\), 2019 ONSC 579](#) (the "*Appeal*"), overturned the *Milne Decision*, a result welcomed by all who had grave concerns about the precedent that the application judge's ruling would have set. The Toronto Lawyers Association intervened on the *Appeal*.

Milne Was Just Simply Wrong

In the *Milne Decision*, Justice Dunphy held that a will is a form of trust which must satisfy the following three certainties:

- (i) certainty of intent to create the trust;
- (ii) certainty as to the subject-matter or property committed to the trust; and
- (iii) certainty as to the objects of the trust or the purposes (collectively, the "**Three Certainties**").¹

On this proposition, clauses in a will that allow for trustee discretion as it relates to which estate assets are governed by the primary will versus the secondary will ("**Allocation Powers**") are problematic, as they offend the requirement of certainty of subject-matter.

Justice Dunphy was respectfully wrong on two fronts. In the *Appeal*, the Divisional Court found that although a will may contain a trust, a trust is not a requirement for a will to be valid. Moreover, a will itself is not a trust.² The Divisional Court further clarified that in the alternative, even if a will is a trust and the Three Certainties apply, the subject-matter of a will is not uncertain merely due to the inclusion of the Allocation Powers.³

How Does This Affect You?

The *Appeal* cements the use of multiple wills and Allocation Powers as flexible and legitimate estate planning techniques, particularly for private business owners, which can result in significant savings on probate fees upon death. If you have a multiple will strategy in place and lost sleep after the *Milne Decision*, you can now rest assured after the *Appeal* that you have a viable plan. If you are a private business owner and currently do not have a multiple will strategy in place, then we invite you to meet with our estate planning team to explore whether you could benefit from this solution.

¹ *Milne Estate (Re)*, 2018 ONSC 4174 at paras 15 and 22.

² *Milne Estate (Re)*, 2019 ONSC 579 at para 35.

³ *Ibid* at paras 49 and 50.

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