AIRD BERLIS

A Problem Crying out for an Early Resolution

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By Donald Carr

The current wholesale upset of Ontario's estates and trusts legal community over the decision in Re *Milne* is not only disturbing, but causes reflection on the origin of multiple wills in this province, as well as earnest hope for an early resolution of a huge problem.

The only NDP government in Ontario to date, under then Premier Bob Rae, decided in 1990 to increase the fees payable on obtaining probate of a will. It tripled them, so that approximately 1½% of the gross value of the assets in an estate, less only any amount owing on a mortgage of real estate, now has to be paid for services similar to those which the then Surrogate Court had been performing for many, many years.

The profession, in general, considered this a "bad thing," but resigned itself to accepting it.

My partner, Wolfe Goodman, of blessed memory, not only considered it a "bad thing." He realized that, in large estates, those increased fees were substantial and should be avoided, if possible. He determined to do something about it.

Exercising a brilliant mind – I have yet to meet his equal – he came up with a plan to avoid paying any probate fees, or to reduce them substantially.

First, he was satisfied that personal representatives obtain their rights and powers directly from a will. They do not require any confirmation by obtaining probate.

Recalling separate wills which were regularly drafted to cover assets situated in another jurisdiction, he believed that one could segregate the assets left by a testator between separate wills, even if all assets were in Ontario. One of those wills, only, could be submitted for probate and the probate fees should be charged only on the assets covered by that will.

As was his custom, he engaged other members of our firm, Goodman and Carr, to assist him in perfecting these thoughts – a teaching/learning process, that was his hallmark.

Thus, the concept of Ontario multiple wills, devised to reduce or avoid probate fees, was born.

One will would cover only those assets where a third party had to be satisfied that the document presented was the last will of the deceased and that those who purported to be the personal representatives were, indeed, in that capacity, thus permitting them to deal with those assets.

These requirements could only be satisfied by producing the court's imprimatur (Letters Probate/Certificate of Appointment). Included in this category of assets, for instance, were real estate and mortgages (the Land Titles or Registry Office systems had to be satisfied); publicly traded securities (a Transfer Agent had to be satisfied); brokerage accounts (the investment dealer had to be satisfied); bank accounts (the Bank, with all its legal requirements, had to be satisfied). That will, only, would be submitted to the court. Probate fees would be based only on the value of those assets under that will. It later became known in the profession by several different names, but "Primary" was what we called it.

Another, separate, will would cover only those assets which could be dealt with by personal representatives without the necessity of proving to anyone that the document disposing of those assets was the last will and testament of the deceased and that they were the personal representatives.

Those assets encompassed property where no third party needed to be involved in order for the personal representatives to deal with it. The list included shares in "private" companies controlled by the testator or by close relatives or friends, closely held partnership interests with associates who would cooperate, personal items, such as jewelry, etc. and, finally, assets registered in the name of a "private" company, controlled by the testator or family. That will would not be tendered for probate. Thus, no probate fees were required to be paid with respect to those assets. We called it the "Secondary Will."

As many assets as possible were to be included exclusively in the Secondary Will.

To further reduce probate fees, among the ideas then proposed was the transfer of legal title to as many assets as possible into a "private" company, the shares of which were to be held by the testator or by the testator and close family members. That company would hold those assets purely as a "bare trustee" and would enter into a trust declaration in favour of the testator, whereby the company would acknowledge that it had no beneficial interest in the assets and would follow the dictates of the testator with respect to them. Those assets included real estate, registered mortgages, bank accounts, brokerage accounts, interests in partnerships and joint ventures (with any required consents of other participants), as well as directly held securities in public companies.

Thus, the death of the testator would have no effect at all on the registered ownership of those assets. The personal representatives of the deceased, now exercising control of the "bare trustee" company, could deal freely with the assets, without any third party requiring any proof of last wills, by way of Letters Probate or a Certificate. The death of a shareholder or director of the registered company was irrelevant. So long as the company could demonstrate it had title, it was able to deal with "its" assets.

Satisfied that the concept of the combination of a Primary Will, a Secondary Will and the bare trustee corporation had been achieved, we began utilizing those processes in our practice.

Then, some time later, on the death of our first client to die after adopting this estate planning mode, we tendered his Primary Will alone for probate and paid probate fees solely on the value of assets covered by it…and held our breaths.

With a huge sigh of relief, the Primary Will alone was accepted for probate, with no problems. The probate fees on a greatly reduced amount of assets had been gladly paid and accepted.

Another client with multiple wills died. Again, there was no problem probating only the Primary Will and paying probate fees solely on the assets governed thereby.

Then, in late 1995, our client, Philip Granovsky, died. (As the issues relating to the effect of multiple wills are a matter of public record in the reported decision of *Granovsky Estate v. Ontario* 156 DLR (4th) at 557, and as the Primary Will is a public record in the Court, I can refer to these matters relating to our late client.)

I was one of the named executors and we tendered only the Primary Will for probate.

This time, Madam Justice Greer was concerned that the Province might have some argument for including both wills for probate and for including all assets covered by both wills to calculate probate fees. She advised us that she was issuing a limited Grant of the Primary Will, on condition that we bring an Application before the Court to determine the status of the two wills. The issue before the Court was whether the Secondary Will was required to be submitted to probate and whether probate fees were also to be paid on the value of the assets governed by it, as well as those under the Primary Will.

My partners, Wolfe Goodman and Archie Rabinowitz, and one of our associates, Neena Gupta, argued the Application. The Crown delivered strong opposition. It argued, primarily, (a) that Section 53 of the *Estates Act* provided for fees to be paid on the "whole estate," (b) that there can only be one estate, (c) that an applicant is obliged to submit all testamentary papers to the Court for determination of what constitutes the will of a testator, (d) that they form, in the aggregate, one will and (e) that probate fees were to be paid on all assets.

The decision rested primarily on Madam Justice Greer's acceptance of the argument that Subsection 32(3) of the statute clearly permitted an application and a grant to be "limited to part only of the property of the deceased" and that it was "sufficient to set forth in the statement of value only the property and value thereof intended to be affected by such application or grant." She held that there was no requirement to file the Secondary Will and that probate fees were to be calculated only with reference to the assets under the Primary Will.

The Province filed a Notice of Appeal.

However, when it had not perfected the appeal shortly before the "deadline," I was asked by counsel for the Crown if we would waive a claim for costs if it withdrew the appeal. With some reluctance(!), we agreed and the appeal was withdrawn.

Thus, the practice of having multiple wills, tendering only the Primary Will for probate and paying probate fees (now Estate Administration Tax) only on the value of those assets under it, became established in Ontario and the various court forms were, after a while, adapted to provide for such circumstances.

In those early days, the definitions of assets in the Primary Will and those in the Secondary Will were very specific. There was no room for decisions to be made by the personal representatives as to what assets might fall within one or the other will. The wills, themselves, made clear, specific, immutable delineations.

Over time, with the intent of providing testators with less rigid definitions, practitioners have expanded the "flexibility" of the definitions of the assets, which are included in each of the multiple wills. Thus, for instance, provisions were added so that where probate is not required in a "first dealing" of a piece of real estate under the Land Titles system at the time of death, real estate can then be "shifted" by the personal representatives into the will not tendered for probate.

These so-called "basket clauses" have been expanded so that they often provide that assets, which in the opinion of the personal representatives will not require a Court Certificate to enable a transfer or realization, can be moved, protected from Estate Administration Tax, into the Secondary Will.

Suddenly, this September, the case of *Milne Estate (Re), 2018 ONSC 4174* burst onto the scene.

The Primary Wills of a deceased husband and wife – "mirror images" of each other – had been submitted for probate and the Estate Administration Tax paid had been limited to being calculated only on the assets affected by those wills – a "standard" state of affairs.

With no opposition to probate, other than his own, Mr. Justice Dunphy refused probate.

He ordered a hearing. He held that both Primary Wills were invalid.

The basis for his decision rested upon his view, based on decisions where there was opposition to applications for probate, that the court's role "is not simply to adjudicate a dispute between parties. The court's role is inquisitorial and the court's function and obligation is to ascertain and pronounce what documents constitute the testator's last will and testament" [Paragraph 19].

Not restricting himself to determining if the wills met the requirements of the *Succession Law Reform Act*, the judge stated that he was required to construe or interpret the documents proffered for probate.

He held that a will is a form of trust. [Paragraph 14] A trust requires, at inception, the "three certainties" – certainty of intent to create a trust, certainty of the subject matter and certainty of the object [Paragraph 15].

He found that two of the certainties were present – those of intent to create a trust and who were the objects to be benefitted.

However, he held that the requirement of certainty of subject matter had not been fulfilled. The ability of the personal representative to determine what assets would fall into which will was fatal, as "the wills fail to describe with certainty any property that is subject to them" [Paragraph 28].

Fortunately, it was held – following the Granovsky decision – that normally there is no requirement for a will to be probated, that there is no prohibition against using multiple wills and that Certificates of Appointment can be limited to assets referred to in a will [Paragraph 12].

A Notice of Appeal has been filed.

Re Milne has caused havoc among estate practitioners in this province.

I would venture to suggest that many, many millions of dollars have already been expended in dealing with Re Milne. Lawyers have been tortuously busy attending to a myriad of matters affected by it.

Prudence – as well as the position taken by negligence insurers – requires lawyers to contact clients and former clients with multiple wills, with a view to ascertaining whether or not they offend the Milne decision. Testators have to be advised about the effect of the Milne decision on those wills. With lawyers' advice, those testators have to decide whether or not they should sign new wills, or codicils, changing the type of "basket clauses" disapproved in Milne. But, does the testator still have the capacity to execute a new will? Should the testator wait until the appeal has been decided? What if he/she dies, or becomes incapable of making a will, before that? What if the appeal upholds the decision? If new wills or codicils now change the "offensive" wording, the estate of the client will be exposed to greater Estate Administration Tax. Having changed the will, what should the testator then do if the appeal reverses Re Milne? It would be in a testator's best interest to return to the flexibility originally provided. What if former clients cannot be reached? Changes of address are not unheard of. What if letters advising of Re Milne are returned? Does one have to search online? One has to report that to one's insurers. Would lawyers who originally prepared multiple wills with the "offending" clauses be found to be negligent in doing so?

There have been many articles and client notices written about Re Milne. I have not yet seen one which agrees with the decision. Included among those articles is one by venerated former academic and author of respected texts, Albert Oosterhoff.

It is not the intent of this article to proffer bases of an appeal.

However, one cannot help but raise at least three obvious questions:

1. What of the provisions of Subsection 2(1) of the *Estates Administration Act,* ignored in Re Milne?:

"All real and personal property that is vested in any person … on the person's death … devolves to and becomes vested in his or her personal representative … as trusteefor the persons by law beneficially entitled thereto…."

It creates a trust by statute. Such a trust requires no examination of the "three certainties."

2. What law holds that a will is a trust? Trusts may be provided for in a will, but, surely, no will, in and of itself, is a trust. The decision cites no law for that proposition.

3. Is there not a distinction between the powers of the court, acting as a Court of Probate, with no opponent to the Application, and those of the court when it is acting as one of interpretation in an adversarial matter? This decision was made in the absence of any opposition to the wills' probate. Should not the only questions asked have been whether the documents conformed to the requirements of the *Succession Law Reform Act?* Nothing in the decision indicates any failure to conform to those statutory requirements.

Unfortunately, the urgent, harassing activities undertaken by multitudes of Ontario lawyers have to continue unabated. There are – and will be – thousands upon thousands of hours of lawyers, assistants and other staff members expended in tracking down clients and former clients and explaining the effect of Re Milne, not to mention fees which will have to be paid by clients who decide to change their wills.

The appeal of the decision in Re Milne needs to be heard and decided as quickly as possible.

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