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Court Confirms Multiple Wills As Valid Probate Planning Device

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By Ed Esposto

For months now, estate planning lawyers in Ontario have been dealing with the uncertainty caused by the decision of the Ontario Superior Court of Justice in **Re Milne Estate**[1]. In that decision, Mr. Justice Dunphy called into question certain techniques used by lawyers to reduce probate fees for clients. Those techniques typically involved drafting "multiple wills", that is, one will for assets that require probate and a separate will for assets that do not. The fundamental issue at the core of Mr. Justice Dunphy's judgment was his belief that a will is itself a trust. As such, it was his position that it was not possible to give the executors of multiple wills the ability to determine whether a particular asset of the deceased required a Certificate of Appointment of Estate Trustee (i.e., "Probate") or the power to allocate the assets between the probate and non-probate wills. In this analysis, such a power would invalidate a will because it creates uncertainty as to what property is dealt with it.

To the great relief of many lawyers, yesterday a panel of three judges of the Divisional Court of the Ontario Superior Court of Justice **issued a judgment**[2] overturning Mr. Justice Dunphy's decision. The Divisional Court confirmed that drafting multiple wills remains a valid probate planning device (which was not invalidated in the original decision). Furthermore, the Divisional Court held that the key part of Mr. Justice Dunphy's judgment was incorrect. The Divisional Court concluded that a will is not itself a trust and, hence, Mr. Justice Dunphy's concerns were unfounded. Furthermore, even if a will were to be considered as a trust, the Divisional Court found two different reasons why the will in question would not be invalid. First, there are statutory provisions[3] which resolve any possible uncertainty. Secondly, there was no uncertainty as to the property to be dealt with by each will, due to the manner in which the executors were obliged to carry out their duties. The Divisional Court found that the property of the will can be clearly identified "because there is an objective basis to ascertain it; namely whether a grant of authority by a court of competent jurisdiction is required for transfer or realization of the property"[4]. Since the executors were required to carry out the allocation of assets between the wills in accordance with the standards applicable to a fiduciary, and there was, therefore, an objective standard to apply, no uncertainty can arise.

While this judgment of the Divisional Court resolves many of the fundamental issues that were called into question by Mr. Justice Dunphy, it should be noted that great care is still required to ensure that multiple wills are drafted in a manner that avoids possible invalidity.

We welcome you to contact your lawyer at Aird & Berlis or a member of our Estates & Trusts Group if you have any questions.

[1] 2018 ONSC 4174
[2] Milne Estate (Re), 2019 ONSC 579
[3] Section 2(1) of the Estates Administration Act of Ontario
[4] Paragraph 49

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