

Post Seminar Update:

Hot Topic – Update on *Re Milne Estate*, 2018 ONSC 4174

Presented by: Lindsay A. Histop
November 14, 2018



Post Toolbox Seminar Update

continued...

- Following the November 14, 2018 Toolbox update on the decision in *Re Milne*, 2018 ONSC 4174 (“*Milne*”), the Ontario Superior Court rendered written reasons on a motion for directions in connection with a similar situation. In *Panda Estate (Re)*, 2018 ONSC 6734 (“*Panda*”), counsel brought a motion for directions following an endorsement by Mr. Justice Dunphy rejecting an application for probate of a primary will on the same basis of uncertainty as in *Milne*.

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- In *Panda*, Mr. Justice Penny found that a will is not a trust and therefore, the court had no jurisdiction to enquire into the question of the certainty of the trusts established pursuant to the terms of the will(s) before the probate court. His Honour noted “*Wills frequently create or otherwise employ trusts, to be sure. When they do, the three certainties will no doubt be relevant to the validity of the trust. The invalidity of the trust element of an otherwise valid will, however, is not coequal with the invalidity of that will*”.

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- Probate of the *Panda* will that was before the court could therefore proceed. *Panda* gives the estates Bar some comfort in that wills containing the so called basket clause language should not be rendered invalid by virtue of a potential finding of uncertainty of the trusts created by the will terms. However, the trust certainty issue remains outstanding. Mr. Justice Penny commented in obiter on the issue of certainty of subject matter, indicating that he did not agree with Mr. Justice Dunphy's analysis, but his Honour declined to make a finding, stating:

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“It would be inappropriate to make any determination in these Reasons about the scope and validity of the particular powers conferred on the estate trustees in this case because the issue of the scope, exercise and validity of those powers was not before me. ...These are questions, however, which do not normally arise on an application for probate (and did not arise on this application) and should be left for an occasion when they are raised in the context of a mature dispute before the Court”.

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- As the Bar waits for the Divisional Court's review of *Milne*, it is possible that, like Mr. Justice Penny, the Divisional Court judges will not render a decision on the certainty issue, it not being necessary to do so if the court finds that a will is not a trust and that questions concerning the trust powers are something to be reviewed by a court of construction where there is full argument.

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It is hard to imagine a situation where the beneficiaries of multiple wills would dispute the certainty issue unless the beneficiaries under the probate and non-probate wills are different, such that the executor's authority to allocate assets to one will or the other might result in an unfair result to one or more beneficiaries.



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Milne Decision Prompts Massive Multiple Wills Recall To Avoid Intestacy Risk

- Multiple will drafting technique seeks to avoid the 1.5% estate administration tax (EAT) on those assets which can typically be conveyed after death without probate
- Typically, closely held private company shares, private loans, and personal articles are disposed of under a secondary or “non-probate” will
- Mr. Justice Dunphy: *Milne* will clause which delegates discretion to the executors to allocate assets between multiple wills rendered the primary will void for uncertainty as to subject matter (trust assets)

Why Did the *Milne* Wills Give the Executor Discretion to Allocate Assets?

- If a third party demands probate of an asset passing under the non-probate will, EAT has to be paid on all the assets, defeating the usefulness of multiple wills
- Giving the executor the ability to pick and choose what assets pass under the probated will and the non-probate will was seen as a drafting solution to avoid EAT
- Obvious issues arise if the beneficiaries under the multiple wills are different, as it delegates to the executor, testamentary disposition powers

How is the Legal Profession Responding?

- Massive recall of multiple wills which may contain similar language to *Milne*
- Out of fear the decision may be applied broadly, concern for any language suggesting assets be allocated between the probate and non-probate will based on whether a probate is required
- *Milne* is under appeal to the Ontario Divisional Court
- Widely held view that *Milne* is flawed in its analysis and it is hoped the law will be clarified on appeal

What Might Happen on the *Milne* Appeal?

- Strong Argument that a will is not a trust such that a court of probate does not have jurisdiction to look beyond the requirements of a validly constituted Will
- The issue of whether the trusts under the wills satisfy the 3 certainties of a valid trust is a matter for a court of construction on an application for interpretation
- If the Divisional Court agrees with this argument, it may stop there, leaving unresolved the issue of whether the executor discretion to allocate assets to either will invalidates the trusts under the wills

What Might Happen on the *Milne* Appeal?

- If the appellate panel does not rule on the construction issue of uncertainty of subject matter in the *Milne* wills, what next?
- Beneficiaries want to save EAT so we will not likely see a construction application soon
- The issue is unlikely to come before a court of construction unless there are wills with different residual beneficiaries who may be unhappy with the executor's ability to allocate assets between the wills, or where an executor seeks advice and direction

What Happens Next?

- If existing multiple wills are recalled and revised, and the *Milne* wills are held valid on the principle of certainty of subject matter, there will be another round of recalls to restore the *Milne* type will language
- Probates of wills with language determining asset allocation based on whether or not probate of an asset is required, have been processed without issue by the Ontario estates courts for many years now
- There are presently many *Milne* type wills before the Ontario courts waiting probate
- Meanwhile, we wait and see ...



Questions?



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