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Wills & Estates

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MULTIPLE WILLS: A LITTLE WORSE FOR WEAR BUT STILL WORTHWHILE

by Mary Wahbi and Kathryn Balter

Mary Wahbi
Partner

t: 416.864.7629
mwahbi@foglers.com

Kathryn Balter
Associate

t: 416.864.0112
kbalter@foglers.com

Following a handful of disconcerting endorsements in a number of probate applications culminating in the recent decision in the *Milne Estates*[1], an issue has been raised respecting the validity of the use of multiple wills in Ontario.

The technique of using multiple wills became the standard among estate planning solicitors as a method of limiting the amount of probate fees (now called Estate Administration Tax) payable by an estate following the landmark case of *Granovsky Estate v. Ontario*[2] in 1998. The technique involves segregating the assets of the estate into two pools: the first pool consists of assets that require probate for their administration and are governed by a "**Primary Will**" which is submitted for probate, and the second pool consists of those assets that do not require probate for their administration and are governed by a "**Secondary Will**" which is not submitted for probate. The result is a savings of the probate fees (approximately 1.5%) on the value of the assets governed by the Secondary Will. In *Granovsky*, Justice Greer examined this technique and focused on the longstanding ability to seek a limited grant of probate under the *Estates Act*, R.S.O. 1990, c. E. 21 and its predecessor from 1897, being *An Act Respecting Executors and Administrators*, R.S.O. 1897, c. 337. Although the Crown appealed the decision, it later abandoned its appeal. For the past twenty years, the technique has become an acceptable and entrenched part of probate practice, so much so that the Court's probate application forms were amended to adapt to the practice.

So what happened to put all of this into jeopardy? In *Granovsky*, the Secondary Will dealt with the deceased's shares in his private corporation, amounts receivable from certain private corporations and any assets held in trust for the deceased by such corporations. Using the rationale of Granovsky, over the past twenty years the carve out of assets excluded from the Primary Will and included in the Secondary Will has been expanded by estate planning solicitors to capture as many of the assets that may not require probate for their administration as possible. Since whether or not a probated will is required for the administration of an asset may depend on a number of factors that are only ascertainable after the death of the testator, various provisions have been utilized to permit the estate trustees to determine which assets fall into each will after death based on whether such assets require a probated will for their administration. It is this expanded language that came under scrutiny in the decision in the *Milne Estates*.

On September 11, 2018, Justice Dunphy released his decision in the matter of the *Milne Estates*. John and Sheilah Milne each had double wills which used a "basket clause" to determine (amongst other criteria) what would fall into the primary will and

[1] *Milne Estate (Re)*, 2018 ONSC 4174.
[2] 1998 CanLII 14913 (Ont Sup Ct J) *[Granovsky]*.

what would fall into the secondary will. The language that Justice Dunphy found problematic, was as follows:

> "any other assets for which my Trustees determine a grant of authority by a court of competent jurisdiction is not required for a transfer or realization thereof"

According to Justice Dunphy, a will is a trust and a trust requires three certainties, one of which is certainty of subject matter i.e. certainty of assets. This certainty, according to Justice Dunphy, must be in existence as of the date of death. Justice Dunphy held in the *Milne Estates* that the Primary Wills did not form valid trusts because the language of the basket clause permitted the estate trustees to retroactively determine which assets were included in the Primary Wills and the assets governed by the Primary Wills was therefore not certain as of the date of death. For this reason, he found the Primary Wills to be invalid. Luckily, due to a drafting error in the Secondary Wills[3] the Secondary Wills were held to be valid and an intestacy in the *Milne Estates* was avoided. Instead, the result was that the probate fee savings was lost on the assets intended to be governed by the Secondary Wills.

The trusts and estates bar in Toronto generally disagrees with the reasoning employed by Justice Dunphy in this case. Albert Oosterhoff has written an excellent summary of the issues with Justice Dunphy's reasons: http://welpartners.com/blog/2018/09/what-is-a-will-and-what-is-the-role-of-a-court-of-probate/

The decision is being appealed to the Divisional Court. However, until the decision is reversed on appeal, distinguished or overruled, the fact is that this is a decision of the Ontario Superior Court of Justice and it may affect a number of existing multiple wills and in some cases could potentially result in an intestacy. The prudent course of action is to remove basket provisions similar to those used in the *Milne Wills* as well as any disclaimer provisions which allow the estate trustees of the Secondary Will to disclaim assets so that they fall into the Primary Will.

Testators with multiple wills are well advised to review their Wills as soon as possible with their estate planning solicitors to determine if their wills are vulnerable and if so, to amend them accordingly.

The use of multiple wills is alive and well, notwithstanding the *Milne Estates* decision. It is still an excellent technique for reducing what can be significant Estate Administration Tax. In addition, it can afford privacy respecting the assets governed by the Secondary Will, can avoid the requirement for valuations of certain assets such as furnishings and personal effects, and it can provide speed and efficiency in the administration of assets governed by the Secondary Will. The preparation of multiple wills has always required careful drafting, see: https://www.advocatedaily.com/mary-wahbi-beware-of-traps-with-multiple-wills.html

While the *Milne Estates* decision presents another challenge in the preparation of multiple wills, it by no means requires abandoning the practice.

[3] rather than restrict the Secondary Wills to the assets excluded in the Primary Wills, they governed all property including such assets

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About the Authors:

Mary is a Partner with the firm's wills and estates group. Her practice focuses on estate planning (including business succession, estate freezes, creation of trusts), and the preparation of wills, insurance directions and trusts, powers of attorney for property and powers of attorney for personal care, and the administration of the estate of deceased persons.

Kathryn is an Associate with the firm's wills and estates group. Her practice is focused on helping clients achieve their estate-planning goals by providing advice on wills, trusts, the transfer of assets, powers of attorney, and estate administration.