TAX FOR THE Owner-Manager

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Uncertainty Resolved: Milne Estate Reversed

The recent decision of the Divisional Court in *Milne Estate (Re)* (2019 ONSC 579) is welcome news to advisers to owner-managers in Ontario. The court reversed the decision of the Superior Court (2018 ONSC 4174), which had refused to grant probate to wills containing a certain kind of allocation clause used in Ontario as part of planning designed to mitigate exposure to the Estate Administration Tax Act, 1998 (Ontario). (See "Milne Estate: How Should Multiple Wills Be Drafted in Ontario?" *Tax for the Owner-Manager*, January 2019.) The decision of the Divisional Court largely mirrors the decision of Penny J in *Panda Estate (Re)* (2018 ONSC 6734), which dealt with a nearly identical scenario but reached the opposite conclusion.

In *Milne Estate*, the matter at issue related to the admissibility to probate of the primary wills of John Milne and Sheilah Milne, both of whom died on October 2, 2017. Each left a primary will and a secondary will. The clauses used in allocating the assets of the estates granted discretionary authority to the executors of the primary will to allocate assets into the secondary will by exclusion from the primary will. In particular, the clauses included in the primary wills all of the property owned at death by the deceased, except "any other assests for which [the executors] determine a grant of authority by a court of competent jurisdiction is not required for the transfer or realization thereof."

Dunphy J had refused to grant probate to the primary wills on the basis that the wills were a form of trust and lacked the requisite certainty of subject matter required under trust law. He had also determined that the role of a probate court was inquisitorial, and therefore issues of construction (interpretation) could be raised at the probate stage.

The Divisional Court rejected the finding that a will is a form of trust. The court noted that the definition of "will" in section 1(1) of the Succession Law Reform Act (SLRA) does not define it as such. It then reviewed the law of wills to determine that a will may contain a trust, but that it is not a requirement for a valid will. The court acknowledged that SLRA section 2(1), which devolves the property of a deceased individual upon his or her personal representatives, uses the term "trustee." However, the court rejected the conclusion that this meant that a will was therefore a trust. It held that Dunphy J had erred in finding that the wills were a trust and, by implication, in applying trust-law principles when considering the admissibility of the primary wills to probate.

The Divisional Court also held that if SLRA section 2(1) did create a trust, such a trust would be a statutory trust and would not be subject to the requirement to satisfy the three certainties of trust law (including certainty of subject matter).

The court also held, in the alternative, that if the three certainties must be satisfied, the subject matter of the primary wills, being the only certainty in issue, was certain. Citing Eileen E. Gillese, *The Law of Trusts*, 3d ed. (2014), at 43, the Divisional Court held that the property in the primary wills was certain 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." The court concluded that the executors could allocate a deceased's property between the primary and secondary wills on an objective basis.

The court remarked in obiter that Dunphy J had exceeded his authority by considering issues of construction at the probate stage.

Although perhaps not entirely unexpected in light of the decision in *Panda Estate*, the decision is welcome. Advisers can now be confident that clauses similar to the ones used in *Milne Estate* are legally effective and that probate planning previously undertaken using such clauses will continue to be effective.

However, readers should be aware that for multiple wills to be effective, the person drafting the wills must use appropriate language. Careful testators will want to ensure that the person retained for this purpose has the necessary experience in dealing with wills of this type.

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