Planning with multiple wills

SUSANNAH ROTH REVIEWS THE RECENT OVERTURNING OF *RE MILNE* AND ASSESSES ITS IMPACT ON DRAFTING MULTIPLE WILLS IN ONTARIO

KEY POINTS

WHAT IS THE ISSUE?
A recent case regarding multiple will planning in Ontario, now overturned on appeal, cast doubt on the ability to include a discretionary power to allow executors to allocate assets between wills.

WHAT DOES IT MEAN FOR ME?
Advisors with clients who have assets in Ontario should be aware of local probate-fee minimisation strategies.

WHAT CAN I TAKE AWAY?
Where clients might benefit from a probate-fee minimisation strategy, consideration should be given to multiple will planning and what discretion executors should be given.

ANY PRACTITIONER OUTSIDE Ontario whose practice includes complex planning for high-net-worth clients would have felt fortunate not to be practising in the province in late 2018. It is rare indeed for a court decision to have such an unexpected and dramatic impact on estate planning, and rarer still for it to garner attention outside the trusts and estates profession.

However, both of these occurred with the unpredictable case of *Milne Estate (Re)*,[1] heard by the Ontario Superior Court of Justice in September 2018.

BACKGROUND: EAT

Much of the saga relates to Ontario's estate administration tax (EAT, also known simply as probate fees). EAT is paid to probate a will in Ontario at a rate of approximately 1.5 per cent[2] on the fair market value of the estate assets of the deceased at the time of their death. Certain assets are excluded under court rules from the calculation of EAT, for example:

- joint assets with right of survivorship;
- assets with a direct beneficiary designation (such as life insurance and retirement plans); and
- foreign real estate.

For ancillary or resealing Grants of Probate, where original probate was granted in another jurisdiction, only Ontario assets would be subject to EAT.

Due to the potential for a significant amount of EAT to be payable on the filing of an application for probate, a common planning technique in Ontario is to minimise EAT through multiple will planning. In Ontario, there is no requirement for an executor to obtain probate. However, as a practical matter, the executor will often require probate in order to administer certain assets held by third parties, such as financial institutions that will not release assets to the executor without one.

Assets for which an executor typically will not require probate to administer include the following:

- personal effects;
- shares of private corporations controlled by the deceased or their close family members; and
- family loans.

In many cases, by executing two wills, one for assets that may require probate, and one for those that typically do not, the EAT burden on the estate may be reduced significantly.

MULTIPLE WILLS: ISSUES

However, wills are often executed many years before death and the assets, which will require probate to administer, may change over time. Many estate planning lawyers in Ontario therefore use a 'basket' or 'allocation' clause in multiple wills to allow the executor to allocate assets

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between each will, based on whether probate is required to administer them.

EAT savings are potentially much greater when such a clause is used, but use of the clause also avoids tainting the 'non-probatable' will by inclusion of an asset for which a Grant of Probate is ultimately necessary.

The use of basket clauses and their effect on the validity of the will was the central issue in *Re Milne*. In the case, Mr and Mrs Milne both died having executed multiple wills with basket clauses. Their executors applied to court to probate their 'primary wills', which were intended to govern their assets that required probate. The application judge determined, on his own initiative, that the basket clauses were problematic and requested submissions from counsel for the executors with respect to their operation and the validity of the primary wills.

The application judge determined that the primary wills were invalid, stating in his written reasons that:

- a will is a trust and, therefore, in addition to the formal requirements for a valid will under Ontario law,[3] to be valid it must satisfy the 'three certainties' required for a valid trust: certainty of intent to create a trust, certainty of subject matter (property) and certainty of objects (beneficiaries or purposes);
- it is within the jurisdiction of the court of probate to examine the validity of a will beyond formal requirements; and
- the inclusion in the primary wills of basket clauses created a lack of certainty of subject matter, as it could not be objectively determined which assets fell under the primary wills at the time of death.

The application judge made this finding as he was of the view that a subsequent discretionary decision by the executors of whether probate is required for an asset to be transferred or realised was not an objective standard for such determination.

A quirk in the drafting of the multiple wills in question resulted in there being no intestacy with respect to any assets, a fact that the judge found relevant.

FALLOUT

The decision caused an immediate uproar among Ontario's trusts and estates professionals and, given the serious consequences of the potential invalidity of thousands of wills, was discussed and reported on both within the legal community and in the popular press. In the ensuing chaos, many wills were updated to remove basket clauses, pending an appeal court providing legal clarity on the issues.

Fortunately, the appeal was heard in short order. The Ontario Divisional Court (the Appeal Court) allowed the appeal and reversed the decision of the lower court. The issues on appeal were summarised in the decision[4] as follows:

- Did the application judge err in holding that a will is a trust?
- Did the application judge err in holding that the 'three certainties' apply in determining the validity of a will?
- Did the application judge exceed the court's inquisitorial jurisdiction as a court of probate?

The Appeal Court found that the application judge did err with respect to the first two points, and determined that it was unnecessary to decide the third for the appeal. It therefore declared that the primary wills were in fact valid and directed that Grants of Probate be issued to the executors in respect of them.

In its decision, the Appeal Court noted that, in Ontario, multiple will planning is often used for a variety of reasons, including to reduce EAT and to preserve privacy, and that forms of basket clauses are commonly used in multiple will planning. Therefore, the application judge's decision had a 'significant and wide-ranging adverse impact' that affected 'the estate plans of many individuals in Ontario',[5] which the Appeal Court found relevant.

THREE CERTAINTIES

While the Appeal Court determined that a will is not a trust and that the 'three certainties' do not apply to the validity of a will, it went on to state that, if its finding was in error, it was satisfied that the subject matter of the primary wills was certain.

Certainty of subject matter requires two components: property that is clearly identified and a clear definition of the portion each beneficiary is to receive, or a vesting in the trustees of the discretion to make such a determination.

Only the first component was at issue, and the Appeal Court found that the property in the primary wills could be clearly identified because the language of the basket clauses (namely whether probate was required in order to transfer or realise an asset) was an objective basis on which to determine the property governed by the primary wills.

The Appeal Court's confirmation that basket clauses are valid, and its recognition of the reasons for their use, provides great comfort and the benefit of clear judicial authority that did not exist before. Given the potentially negative consequences that might arise from not using basket clauses, going forward they should be considered in every multiple wills mandate in Ontario.

CONCLUSION

For those with clients who have assets in Ontario, multiple will planning should be considered, in conjunction with a variety of other techniques, due to the possible exposure to EAT on clients' estates. This is especially true where no Grant of Probate will be obtained in another jurisdiction. An original probate application in Ontario could result in unexpectedly significant EAT for an estate, because the deceased's worldwide personal property, including bank accounts and investments in other jurisdictions, is included in calculating EAT. In such circumstances, it is particularly wise to consider planning to reduce EAT exposure.

1 2018 ONSC 4174 (Superior Court of Justice) **2** EAT is calculated on a dollars-per-thousand basis, rounding up to the nearest thousand. **3** Pursuant to Part I of the *Succession Law Reform Act* **4** 2019 ONSC 579 (Divisional Court) **5** para.23

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