CITATION: Milne Estate (Re), 2018 ONSC 4174
COURT FILE NOS.: 01-4007/17 and 01-4006/17
DATE: 20180911

2018 ONSC 4174 (CanLII)

SUPERIOR COURT OF JUSTICE – ONTARIO

IN THE MATTER OF THE ESTATE OF JOHN DOUGLAS MILNE, deceased

and

IN THE MATTER OF THE ESTATE OF SHEILAH MARLYN MILNE, deceased

BEFORE: S.F. Dunphy J.

COUNSEL: *Clare E. Burns and Anastasija Sumakova*, for the Estate Trustees

HEARD at Toronto: June 15, 2018

REASONS FOR DECISION

[1] Is a will that grants the executors the discretion to determine what property is subject to the will a valid will?

[2] In the present case, each testator created two materially identical wills. The Primary Will settled upon the executors "all property owned by me at the time of my death EXCEPT…. [certain named assets and] *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*" [emphasis added]. The Secondary Will, expressly not revoking the first, settled upon the executors "all property owned by me at the time of my death INCLUDING … [certain named assets and] any other assets for which my Trustees determine a grant of authority by a court of competent jurisdiction is not required for the transfer or realization thereof".

[3] In my view, the Secondary Will is valid and the Primary Will is not.

[4] The Secondary Will of each testator vests in the executors all property of the testator and therefore satisfies the requirement of certainty of subject-matter. No property of the testator of any kind is excluded from the trust created by the Secondary Will even though it provides that it does not revoke the primary will. The Primary Will, by contrast, effectively vests in the executors the entire discretion to determine

retroactively whether *any* assets were vested under the will at death based upon the executors' view as to whether probate is necessary or desirable.

[5] Fortunately, there is no issue of an intestacy in this case. The Secondary Will includes all of the property of the testator of every kind without exclusion. It overlaps the Primary Will completely. There is no gap.

[6] There were two identical applications before me, one for the estate of each of John Douglas and Sheila Marlyn Milne. This decision and reasons apply to both.

Background facts

[7] John Douglas Milne and Sheilah Marlyn Milne both passed away on October 2, 2017, each leaving a Primary Will and a Secondary Will dated May 10, 2016 containing the language I have quoted above. The wills appointed their daughter Laurie Ann Milne, their accountant Sylvia Webb and their solicitor Brett D. Murray as executors.

[8] On October 17, 2017, the three named executors commenced two symmetrical "Applications for Certificate of Estate Trustee with a Will (Individual Applicant) Limited to the Assets Referred to in the Will" – one for the Primary Will of each of John Douglas and Sheilah Marlyn Milne. Each application was accompanied by an affidavit of Mr. Murray certifying that the Primary Will was in force and had not been revoked by the Secondary Will.

[9] With some (unfortunate) internal delay, the two applications came before me on January 24, 2018 and were not approved by me at that time. I endorsed the record that I required written submissions to support the applications as "I am not satisfied that the "Primary Will" can be proved absent the "Secondary Will" for so long as the Estate Trustees can determine in their discretion what assets are excluded from the Primary Will".

[10] After receiving written submissions, I determined that an oral hearing would be required to flesh out these issues and accordingly this application was heard by me on June 15, 2018.

Issues to be decided

[11] The sole issue to be decided is whether the Primary Will of each of John Douglas Milne and Sheilah Marlyn Milne are valid and should therefore be admitted to probate.

Discussion and analysis

[12] The Estate Trustees have advanced a number of propositions that do not appear to me to be contentious or to require debate:

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a. There is normally no requirement for wills to be probated;

b. There is no prohibition against the use of multiple wills;

c. Where multiple wills exist, there is no requirement that each (or either) be probated; and

d. Ontario law permits the issuance of Certificates of Appointment limited to the assets referred to in the will.

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[13] The central issue raised by this case is whether the will is a valid will if there is uncertainty as to the subject-matter of the trust created by it. The Estate Trustees submit (i) that there is no such uncertainty; and (ii) that questions of *construction* or *interpretation* of the will are no bar to probate.

[14] A will is a form of trust. In order to be valid, a will must create a valid trust and must satisfy the formal requirements of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26. There is no issue here regarding compliance with the formal requirements of the *SLRA*.

[15] As with any trust, a valid will must satisfy the "three certainties": certainty of intent to create the trust, certainty as to the subject-matter or property committed to the trust and certainty as to the objects of the trust or the purposes to which the property is to be applied.

[16] There is no evidence before the court to suggest that the testators lacked the intent to create a testamentary trust – the language used in the wills is clear and unambiguous in that regard and there is no evidence before the court to suggest that capacity of the two testators to form and express that intent is in question. By the same token, there is nothing before me to suggest a question is raised as to certainty of objects: there are a number of bequests made in the will. The validity of any particular bequest does not alter the validity of the will itself – should a bequest be found to fail for any reason, the consequences of any such failure are dealt with in the will itself (residue clauses) or by way of partial intestacy.

[17] The sole issue in this case is the second of the three certainties: certainty of subject-matter.

(i) Is certainty of subject-matter a matter of construction?

[18] The applicants submit that I needn't concern myself with construction of the will and that any ambiguities regarding the property subject to the will can be dealt with in due course by way of application by the executors for directions. Citing *Feeney's Canadian Law of Wills*, (James MacKenzie, *Feeney's Canadian Law of Wills* (Toronto: LexisNexis Canada, 2000)) and *Oosterhoff on Wills* (Albert J. Ooserhoff, C. David

Freedman, Mitchell McInnes and Adam Parachin, *Oosterhoff on Wills*, 8th ed. (Toronto: Thomson Reuters Canada, 2016)), the applicants urge upon me that the probate function of the court is a separate and distinct function from the construction function. The former is concerned with the question of whether there is a will, the fact of its contents and the validity of the process of its execution. The latter concerns the interpretation of the contents of the will and the intentions of the testator with respect to his or her property.

[19] The Court of Appeal has recently reviewed and succinctly summarized the role of the court in relation to probate proceedings in the case of *Neuberger v. York*, 2016 ONCA 191 (CanLII). The jurisdiction of the court is not simply to adjudicate a dispute between parties. The court's role is inquisitorial and the court's function and obligation is to ascertain and pronounce what documents constitute the testator's last will and testament: *Neuberger* at para. 68.

[20] It follows from this that I am both required and entitled to examine the validity of the will where questions as to same arise from an *ex facie* examination of the will itself or the evidence filed in support of the application for a Certificate. If the will is invalid on its face, a Certificate may not issue. In the present case, questions as to certainty of subject-matter are raised by the language of the will itself. These are questions that go to the essential validity of the will in question. Such questions, should they arise, are appropriately examined at the probate stage.

(ii) Do the primary wills satisfy the requirement of certainty of subject-matter?

[21] The Estate Trustees urge me to find that there is no uncertainty arising from clause (f) of each of the Primary Wills because the "excluded assets are sufficiently defined in the Primary Will to permit their identification by the Estate Trustees". They submit that there is no discretion of the Estate Trustees involved because they must determine which assets do not require a Certificate and "[t]hose assets are *then* not governed by the Primary Wills".

[22] The three certainties necessary for a valid trust must be satisfied at the time the trust is created – in this case, at the time of death. It is not enough to say that the assets subject to the trust will be determined later and will then be governed by one will or the other. There is no requirement to probate a will. Whether the trustees decide that a Certificate is necessary or desirable to dispose of a particular asset is a matter of their discretion and is not ascertainable by objective criteria ascertainable in advance. Bank X may decide not to accept anything less than a Certificate in order to authorize the Estate Trustees to deal with a bank account of the deceased, for example, while Bank Y may be satisfied with a certified copy of the will appointing them.

[23] The Estate Trustees in this case urge me to find valid a will that confers upon them the discretion to determine retroactively whether any particular assets are included

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in it. Inclusion of all assets in a trust subject to the power to exclude all of them – as has been attempted here – is no different than conferring the power upon the Estate Trustees to determine which if any assets will be subject to the trust. The testator must settle upon the Estate Trustees assets that are specifically identified or are *objectively* identifiable by reference to the intention of the testator and not the subsequent decision of the Estate Trustees.

[24] It was telling that during the hearing of this application, I asked counsel for the Estate Trustees to name a *single* asset of which it could be said with objective certainty upon the death of the testator and without consulting the Estate Trustees that it is subject to the primary will and is not subject to exclusion under clause (f). She was unable to name one given the inclusive and discretionary wording of clause (f).

[25] This is not a defect that can be solved by undertaking to re-value the assets after the fact and paying any additional Estate Tax arising. This is not an Estate Tax issue as suggested, but an issue of validity.

[26] The fundamental problem with the Estate Trustee's position is that the Primary and Secondary Wills overlap entirely. Each Secondary Will applies to virtually all property of the testator. There are *no* exclusions. These could be but have not been probated. The Primary Wills seek to carve out a variable subset of the property that is and remains subject to the Secondary Will without subtracting such property from the secondary estate and to do so based upon the subsequent, subjective determinations of the Estate Trustees as to what is desirable. In my view, this cannot be done.

[27] If multiple wills are to be employed – and I fully recognize that these are a quite common and normally unobjectionable estate planning tool – the property that is subject to each must be ascertainable objectively based upon the expressed intent of the testator without regard to discretion of the Estate Trustees exercised afterwards. That is simply not the case here.

Disposition

[28] For the foregoing reasons, I find that the primary wills are invalid in that they fail to describe with certainty any property that is subject to them. I am directing the Registrar not to accept the two primary wills for probate. The Secondary Will may be submitted for probate if desired because neither suffers from this defect.

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S.F. Dunphy J.

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Date: September 11, 2018

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