CITATION: Milne Estate (Re), 2019 ONSC 579
DIVISIONAL COURT FILE NO.: 651/18; 652/18
DATE: 20190124

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

MARROCCO A.C.J.S.C., SWINTON & SACHS JJ.

IN THE MATTER OF THE ESTATE OF SHEILAH MARLYN MILNE, deceased **LAURIE ANN MILNE, SYLVIA WEBB, AND BRETT D. MURRAY IN THEIR CAPACITIES AS ESTATE TRUSTEES OF THE ESTATE OF SHEILAH MARLYN MILNE** **IN THE MATTER OF THE ESTATE OF JOHN DOUGLAS MILNE deceased** **LAURIE ANN MILNE, SYLVIA WEBB, AND BRETT D. MURRAY IN THEIR CAPACITIES AS ESTATE TRUSTEES OF THE ESTATE OF JOHN DOUGLAS MILNE** Appellants **– and –** **THE TORONTO LAWYERS ASSOCIATION** Intervenor	*Archie J. Rabinowitz, David M. Lobl* and *Brian E. Cohen*, for the Appellants *Ian M. Hull*, *Timothy G Youdan* and *Stuart Clark* for the Intervenor

HEARD at TORONTO: December 11, 2018

NATURE OF PROCEEDING:

[1] John Douglas Milne and Sheilah Marlyn Milne died on the same day. Each died testate having executed mirror Primary and Secondary Wills. Each Primary Will was submitted to the Ontario Superior Court along with applications for a Certificate of Appointment of Estate Trustee with a Will Limited to the Assets in the Will ("Certificate of Appointment").

[2] After calling for and considering submissions by the Estate Trustees, the Application Judge, in *Milne Estate (Re),* 2018 ONSC 4174, held that both Applications should be denied on the following basis:

- A will is a trust.
- The "three certainties" required for a valid express trust are applicable to the wills, such that the Allocation Clause found in the Primary Wills results in uncertainty of subject-matter because each clause fails to identify the deceased's property to which it applies;
- The inquisitorial jurisdiction of the Court in matters of probate allows for a declaration of invalidity to be made in such circumstances.

[3] The Appellants are the executors of each Primary and Secondary Will.

[4] The Appellants request that the Application Judge's Order be set aside and that the Estates Registrar in Ontario issue Certificates of Appointment of Estate Trustee with a Will Limited to the Assets Referred to in the Primary Will in favour of the Appellants.

[5] The Toronto Lawyers Association was granted Intervenor status in these appeals. It supports the position of the Appellants.

BACKGROUND:

[6] John and Sheilah Milne both passed away on October 2, 2017. They each left mirror Primary Wills and Secondary Wills, dated May 10, 2016. The wills named the Appellants – Laurie Ann Milne, their daughter; Sylvia Webb, their accountant; and Brett D. Murray, their solicitor – as executors.

[7] On October 17, 2017, the Appellants filed "Applications for Certificate of Estate Trustee with a Will Limited to the Assets Referred to in the Will" for each of the deceaseds' Primary Wills. These applications were accompanied by an affidavit of Mr. Murray, certifying that the Primary Will had not been revoked by the Secondary Will.

[8] The Primary Wills read:

- THIS IS THE PRIMARY WILL of me…with respect to the disposition of all property owned by me at the time of my death EXCEPT:

> (f) 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
>
> as to which I am making my Secondary Will on the same date as this Primary Will. With the exception of the said Secondary Will, I revoke all previous wills.

[9] The Secondary Wills read:

- THIS IS THE SECONDARY WILL of me…with respect to the disposition of all property owned by me at the time of my death INCLUDING:

  (f) 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

  as to the remaining assets of my Estate I am making my Primary Will on the same date as this Secondary Will. With the exception of the said Primary Will, I revoke all previous wills.

[10] The Appellants' applications came before the Application Judge on January 24, 2018 who required written submissions to support the applications, as he was "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."

[11] After receiving written submissions, the Application Judge determined that an oral hearing was required, which occurred on June 15, 2018. The oral hearing and the proceedings took place without opposition.

Decision of the Application Judge

[12] In his reasons, dated September 11, 2018, the Application Judge decided that:

- "[t]he 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";
- a will is a form of trust, which in order to be valid must satisfy the formal requirements of the *Succession Law Reform Act*, R.S.O. 1990, c. S.26 ("*SLRA*")";
- a valid trust, and therefore a will, must demonstrate "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" (i.e., the "three certainties").

[13] The Application Judge found that the only certainty at issue was the second certainty, regarding subject-matter.

[14] The Application Judge also held that it was proper for him to examine these elements at the probate stage because the probate function of the court has an inquisitorial function that demands that it "ascertain and pronounce what documents constitute the testator's last will and testament." The Application Judge concluded that where the will, on its face, gives rise to questions of validity, the court is required to inquire into its validity. The Application Judge found that the language of the Primary Milne Wills raised issues about the certainty of the subject-matter, which went to their essential validity.

[15] The Application Judge held that the subject-matter must be definitive and ascertainable at the time of death, when the will creates a trust. The Primary Wills conferred discretion to the executors to later decide which assets would be subject to the Primary Will of each testator. The Application Judge held that the Primary Wills were not valid and could not be accepted for probate because they excluded a set of assets at clause (f), which could not be objectively ascertained.

[16] The Application Judge remarked that the Secondary Wills were valid because they applied to all the property of each testator. However, the Appellants had only submitted the Primary Wills for probate.

KEY ISSUES:

[17] The Appellants submit the following issues:

- Did the Application Judge err in holding that a will is a trust?
- Did the Application Judge err in holding that the "Three Certainties" determine the validity of a will?
- Did the Application Judge exceed the Court's inquisitorial jurisdiction?

DIVISIONAL COURT'S JURISDICTION:

[18] This Court has jurisdiction to hear this proceeding, pursuant to s. 10(1) of the *Estates Act*, R.S.O. 1990, c E.21, which provides for appeals.

STANDARD OF REVIEW:

[19] The appropriate standard of review is correctness, because the issues on appeal are questions of law arising from an order of a judge.

PRIMARY AND SECONDARY WILLS ARE A COMMONLY USED TECHNIQUE

[20] The validity of the use of multiple wills, i.e. Primary and Secondary Wills, was confirmed by Justice Greer in *Granovsky Estate v. Ontario* (1998), 156 D.L.R. (4th) 557, [1998] O.J. No. 508 (S.C.J.).

[21] The use of Primary and Secondary Wills is often used to reduce tax payable pursuant to the *Estate Administration Tax Act, 1998*, S.O. 1998, c. 34, to avoid the delay associated with obtaining a Certificate of Appointment or preserve privacy in respect of certain assets.

[22] Because a testator often executes their Last Will and Testament several years in advance of death, it is often not practical to provide a definitive list of assets which will require or do not require a Certificate of Appointment to be transferred or realized at the time the Primary and Secondary Wills are executed. To overcome this practical problem, estate planning lawyers often provide estate trustees with the power to determine whether a particular asset requires a Certificate of Appointment upon administering the will. These clauses are often referred to as allocation clauses. The use of allocation clauses is a common estate planning technique. See Martin Rochwerg, *Miller Thomson on Estate Planning*, (Toronto: Thomson Reuters Canada, 2018), at p. 2-57.

[23] The position taken by the Application Judge in the Order therefore has a significant and wide-ranging adverse impact upon the use of such clauses in multiple wills, thereby affecting the estate plans of many individuals in Ontario. For this reasons, the Toronto Lawyers Association sought and was granted Intervenor status in these appeals.

THE POWER TO ALLOCATE CANNOT BE EXERCISED ARBITRARILY

[24] The fact that an allocation clause is discretionary does not mean that the power conferred by it can be exercised arbitrarily. The power of an executor to allocate must be exercised in accordance with the standards applicable to a fiduciary. See Donovan W.M. Waters, Q.C., *Waters' Law of Trusts in Canada*, 4th ed. (Toronto: Carswell, 2012) at p. 990.

THE DECISION IN *PANDA ESTATE (RE)*, 2018 ONSC 6734

[25] The *Panda Estate* decision arose as a result of a motion for directions. The motion raised the same issues as those in the present appeal as only the Primary Will of the deceased had been submitted for probate. In response to the motion, Mr. Justice Penny granted the application for Certificate of Appointment of Estate Trustee with a Will Limited to the Assets Referred to in the Will.

[26] Mr. Justice Penny declined to follow the decision of the Application Judge in this case.

[27] Mr. Justice Penny decided to issue the Certificate of Appointment because he was not prepared to find that a will was a trust, and therefore he was not required to apply the three certainties.

[28] I agree with Mr. Justice Penny's reasons and conclusion in this regard.

[29] Although not necessary for his decision, Mr. Justice Penny also indicated at paragraph 31 of His reasons that he was not inclined to the view that a direction from the testator about how the estate trustees should decide whether or not to seek probate in respect of two or more wills dealing with particular components of the deceased's property created an uncertainty sufficient to invalidate the will. However, it was His honour's view that resolution of this question should occur in a case where the issue was raised "in the context of a mature dispute".

[30] Mr. Justice Penny also decided that the role of the court on an application for Certificate of Appointment as Estate Trustee with a Will is to determine whether the document presented is the testator's last will, which requires that the document is:

- in writing,
- signed at its end by the testator in the presence of two or more witnesses who subscribed the will in the presence of the testator, and
- testamentary, i.e. that it discloses an intention to dispose of the testator's property upon his or her death.

[31] It was Mr. Justice Penny's view that broader questions of interpretation and the validity of powers of appointment or other discretionary decision-making conferred on estate trustees are matters of construction and not necessary to the grant of probate.

A WILL IS NOT A TRUST

[32] At paragraph 14 of the Application Judge's Reasons, he states as follows:

> 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*.

[33] The Application Judge cited no authority in support of the statement that a will is a trust. I agree with Mr Justice Penny that this is an error of law.

[34] A will is an instrument by which a person disposes of property upon death. See Albert H. Oosterhoff et al., *Oosterhoff on Wills*, 8th ed. (Toronto: Thomson Reuters, 2016) at p. 107. There are of course formalities of execution, but they are not raised in this appeal.

[35] A will may contain a trust, but this is not a requirement for a valid will.

[36] The definition of a "will" in s. 1(1) of the *Succession Law Reform Act* does not state that a will is a trust. Section 1(1) provides that:

> "will" includes,
>
> (a) a testament,
> (b) a codicil,
> (c) an appointment by will or by writing in the nature of a will in exercise of a power, and
> (d) any other testamentary disposition.

[37] Further, the nature of a beneficiary under a will confirms that a will is not a trust. See C.H. Sherrin et al., *Williams on Wills*, 9th ed. (London, U.K.: LexisNexis Butterworths, 2010) at para. 1.8:

> Although the title to the assets vests in the personal representative …the property comprised in residue is not held in trust for the beneficiary under the will so as to invest any equitable interest in him. It is in fact a fallacy to seek a separate existence of the equitable beneficial interest in the assets during the period of administration. [Emphasis added]

[38] In *Commissioner of Stamp Duties (Queensland) v. Livingston* (1964), [1965] A.C. 694, [1964] 3 All E.R. 692 (Australia P.C.) at 712, Viscount Radcliffe makes the same observation:

> When the whole right of property is in a person, as it is in an executor, there is no need to distinguish between the legal and equitable interest in that property, any more than there is for the property of a full beneficial owner. What matters is that the court will control the executor in the use of his rights over assets that come to him in that capacity: but it will do it by the enforcement of remedies which do not involve the admission or recognition of equitable rights of property in those assets.

[39] Section 2(1) of the *Estates Administration Act* vests all real and personal property of a person who has died in the deceased's personal representative, which is precisely the situation contemplated by Viscount Radcliffe.

[40] Specifically, section 2(1) provides as follows:

> 2(1) All real and personal property that is vested in a person without a right in any other person to take by survivorship, on the person's death, whether testate or intestate and despite any testamentary disposition**,** devolves to and becomes vested in his or her personal representative from time to time as trustee for the persons by law beneficially entitled thereto, and, subject to the payment of the person's debts and so far as such property is not disposed of by deed, will, contract or other effectual disposition, it shall be administered, dealt with and distributed as if it were personal property not so disposed of. [Emphasis added]

[41] I appreciate that section 2(1) states that the deceased person's property is vested in the personal representative "as trustee". Waters' *Law of Trusts in Canada*, 4th ed., at 3.II.A.3 provides a helpful explanation of why executors seem to have been conflated with trustees which I accept:

> However, there is also an historical reason for the similarity of the rules applicable to trustees and personal representatives. The administration of deceaseds' estates was originally handled in England by the ecclesiastical courts. For a short time, the common law courts took over this task, and then in the eighteenth century the Court of Chancery assumed control. The law of trusts was still in its early formative stage at this time, and therefore the law governing both trusts and the administration of deceaseds' estates developed together from that point in the same court. There were and there remain distinctions between the two, a good example of which exists in the personal right of the legatee to trace the deceased's assets into the hands of third parties, a right which the trust beneficiary may not have to the same extent. But by and large, though nineteenth and twentieth century statutes have now drawn some further small distinctions, for example, as to the powers of personal representatives, Jessel M.R.'s words still remain true: "In modern times the Courts have not distinguished between … executors and trustees, but they have put them all together and considered that they are all liable under the same principles." It is with regard to the liabilities of the two that the offices so closely approximate today. (citations omitted)

[42] In conclusion, the Application Judge erred in finding that the will was a trust.

[43] However, even if section 2(1) creates a trust in favour of those persons beneficially entitled to the deceased person's property by law, the trust is created by statute not by the will. Indeed, section 2(1) applies whether or not the deceased left a will.

[44] Finally, if section 2(1) creates a trust, that trust is statutory and not subject to the "three certainties."

IF THE THREE CERTAINTIES APPLY THE SUBJECT-MATTER OF THE PRIMARY WILLS IS CERTAIN

[45] If I am wrong and the will is a trust and the three certainties must be satisfied for the trust and the will to be valid, the subject matter of the Primary Wills is certain.

[46] As indicated, in the circumstances of this appeal the only issue was certainty of subject-matter. Even if the "three certainties" apply, the subject matter of the Primary Will is certain and therefore the subject-matter of the trust created by it, assuming a trust is created by it, is certain.

[47] In *The Law of Trusts*, 3rd ed., (Toronto: Irwin Law, 2014), at p. 43, Justice Eileen E. Gillese provides the following definition concerning certainty of subject-matter:

> The certainty of subject matter requirement has two components. First, a trust must have property that can be clearly identified as its subject matter. Second, the terms of the trust must define the portion each beneficiary is to receive or must vest the discretion to so decide in the trustees.

[48] Obviously, we are concerned with the first component.

[49] The property in the Primary Wills can be clearly identified 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. As a result, the Executors can allocate all the deceased person's property between the Primary and Secondary Wills on an objective basis.

[50] The personal representatives are instructed to ascertain if a Certificate of Appointment is required in order to transfer or realize the asset (which can be done by consulting the institution concerned), and then categorize the asset in one of the wills according to that objective criterion.

[51] Finally, if the Executors mistakenly allocate property due to a misunderstanding concerning the necessity of obtaining a Certificate of Appointment, their error is unrelated to the description of the property that is to be the subject-matter of the trust.

[52] Accordingly, I am satisfied that the subject-matter of the Primary Wills is certain.

THE SCOPE OF PROBATE REVIEW

[53] As indicated, it was Mr. Justice Penny's view that broader questions of interpretation and the validity of powers of appointment or other discretionary decision-making conferred on estate trustees are matters of construction and not necessary to the grant of probate. While I am inclined to agree with Mr. Justice Penny's view and reasoning in this regard and I am

satisfied therefore that Mr. Justice Dunphy exceeded his jurisdiction, such a conclusion is not necessary to decide this appeal.

Conclusion

[54] This appeal is allowed.

[55] An order will go allowing the appeal and setting aside the orders of the Application Judge. There will also be an order that the Estates Registrar in Ontario issue, in favour of the appellants, the appropriate Certificates of Appointment.

[56] Neither the appellants nor the Intervenor seek costs and accordingly there will be no order concerning costs.

_____
MARROCCO A.C.J.S.C.

I agree _____
SWINTON J.

I agree _____
SACHS J.

Released: 20190124

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MARROCCO A.C.J.S.C., SWINTON & SACHS JJ.

BETWEEN:

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

LAURIE ANN MILNE, SYLVIA WEBB, AND BRETT D. MURRAY IN THEIR CAPACITIES AS ESTATE TRUSTEES OF THE ESTATE OF SHEILAH MARLYN MILNE

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

LAURIE ANN MILNE, SYLVIA WEBB, AND BRETT D. MURRAY IN THEIR CAPACITIES AS ESTATE TRUSTEES OF THE ESTATE OF JOHN DOUGLAS MILNE

-and-

THE TORONTO LAWYERS ASSOCIATION

REASONS FOR JUDGMENT

MARROCCO A.C.J.S.C.

Released: 20190124