

January 31, 2019

## ARTICLE

# Multiple Wills

For almost two decades, Ontarians have been using "multiple wills" to minimize the amount of tax ("Estate Administration Tax", or "EAT") their estates pay for obtaining a probated will. Although technically wills are effective without probate, many institutions, including banks or brokers, will only release assets after a will has been probated. It is also often necessary to obtain probate to sell real property, like a house or cottage. When a will is submitted for probate, the estate must pay a tax of approximately 1.5 per cent of the date of death value of the assets governed by the will submitted for probate. With multiple wills, one will (often called a "Primary Will") is submitted for probate; it governs only those assets for which probate is needed. The other will (often called the "Secondary Will") is not submitted for probate; it governs those assets that can be administered without probate, most commonly shares and debts in a private corporation. EAT is paid only on the assets governed by the Primary Will, and not on the assets governed by the Secondary Will.

### Basket Clauses and the *Milne Estate* Decision

The use of multiple wills was approved by a [1998 decision of an Ontario court](#). Since that time, Ontario lawyers have developed techniques to make the strategy more useful. One problem they faced is that it is sometimes impossible to accurately foresee which assets will need to be included in a probate application, so many lawyers began to include a "basket" or "allocation" clause in multiple wills. These clauses typically include under the Secondary Will "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". In short, any asset where probate is not needed falls under the non-probate or Secondary Will.

Such clauses were widely used and generally accepted as valid until Justice Dunphy of Ontario's Superior Court of Justice released his 2018 decision in [Milne Estate \(Re\)](#). Justice Dunphy reasoned that a will is a form of a trust, and a trust is valid only if it is certain what assets it governs. He further decided that with a basket clause, it is not possible to objectively determine which assets do and do not require a grant of probate. It follows that because the assets of the primary and secondary estate overlap, the deceased's Primary Will with a basket clause is invalid and cannot be admitted to probate, with the result that the Secondary Will is the only valid will and must be submitted for probate.

### *Panda Estate* decision

*Milne* was subject to some criticism, and it was shortly followed by an opposing decision of another judge of the Superior Court of Justice. In [Panda Estate \(Re\)](#), Justice Penny declined to follow the reasoning in the *Milne* decision. Justice Penny concluded that a will is not a form of a trust, and therefore is not subject to the rule of certainty of assets. The validity of the allocation clause was a "[matter] of broad construction," and irrelevant when deciding whether a will should be admitted to probate. Justice Penny also said that the language of the standard allocation clause provides an objective basis for determining which assets fall into the probate estate. The result of his decision was that the Primary Will with the basket clause was admitted to probate, and the Secondary Will did not have to be submitted for probate.

### *Milne Estate* appeal

With both *Milne* and *Panda* decisions of the Ontario Superior Court, the conflict left the law uncertain. But a recent [unanimous decision of the Divisional Court](#), an appeal of the *Milne Estate* decision, has resolved the diverging decisions. In reversing the Superior Court's *Milne* decision, the Divisional Court followed much of the reasoning in *Panda Estate*. The court held that although a will may contain a trust, it is not itself a trust. Therefore, wills are not subject to the rule requiring certainty of subject matter (in other words, requiring objective identification of the assets governed by the will). The court also said that, even if a will is a trust, the allocation clause offers an "objective basis" to ascertain what assets are subject to the Primary Will; it is objectively determinable whether a grant of probate was required to deal with any particular asset. Finally, the court decided that any issues over the actual operation of a basket clause were irrelevant on a probate application and were to be dealt with at a later stage by a "court of construction", which would be better placed to interpret the terms of the will.

### Conclusions

It is possible that an interested party will choose to appeal the Divisional Court's decision in *Milne*. Assuming that no appeal is brought, the following conclusions can now be drawn:

1. There is no longer any doubt that Primary Wills with basket clauses like the one in *Milne* are valid and can be submitted for probate in Ontario.
2. The basket clause remains a useful tool for reducing the EAT that has to be paid by people's estates, and we anticipate that it will continue to be widely used.
3. The litigation over basket clauses has highlighted the potential for issues to arise in the administration of estates over what assets are governed by which will. It may be better to be cautious using basket clauses when the Primary Will has different beneficiaries than the Secondary Will, when beneficiaries may have an incentive to fight about what assets fall under which will. They also might be avoided for estates where the testator anticipates there is a high likelihood of a will challenge.
4. The government of Ontario, which benefits from the EAT, may have an incentive to raise this issue in determining whether it received sufficient EAT in connection with a probate application. For this reason, Estate Trustees may want to document how they decide which assets do not require probate. Testators who prefer certainty over tax savings might therefore decide to avoid the use of a basket clause.

---

By: Arthur Fish, Michael Rosen

Services: [Private Client Planning](#), [Tax](#)

---

Tax

Private Client Planning