CITATION: Panda Estate (Re), 2018 ONSC 6734
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SUPERIOR COURT OF JUSTICE - ONTARIO

IN THE ESTATE OF RATNALABH PANDA, DECEASED

RE: ASOK PANDA AND SUNITA RAJAK, Applicants

BEFORE: Penny J.

COUNSEL: *Patrick Aulis* for the Applicants

HEARD: October 11, 2018

ENDORSEMENT

Overview

[1] This is a motion for directions by the named Estate Trustees of Ratnalabh Panda who died with a will on December 14, 2016.

[2] The estate trustees applied, as is the usual custom under Rule 74.04, in writing for a Certificate of Appointment of Estate Trustee With a Will Limited to the Assets Referred to in the Will. The application was unopposed.

[3] The motion came about as a result of the endorsement of The Honourable Mr. Justice Dunphy rejecting the application. The endorsement reads:

> I am not satisfied that the Primary Estate constituted a valid trust in the absence of the Secondary Estate due to lack of certainty of subject-matter. The executor/trustee cannot retroactively exclude assets from the estate and certainty as to what is in the estate *ab initio* is lacking. If this is to be proceeded with, a motion and argument is needed.

[4] This motion for directions came before me on October 11, 2018. I granted the application and issued the appointment with reasons to follow. These are those reasons.

Background

[5] The deceased executed two wills: a Primary Will and a Secondary Will. The estate trustees and the beneficiaries are the same in both wills.

[6] The Secondary Estate is defined in both wills to include shares in two numbered companies which did not require probate to be transferred.

[7] The Secondary Estate is also defined to include "any other assets for which my Trustees determine a grant of authority by a court of competent jurisdiction in not required for the transfer, disposition or realization thereof."

[8] The Secondary Will also authorizes the Trustees of the Secondary Will to disclaim any property which would otherwise form part of the Secondary Estate within 90 days following the death of the testator. Any property so disclaimed is to form part of the Primary Estate to be dealt with under the Primary Will.

[9] Although the handwritten endorsement rejecting the original application submitted in writing is understandably cryptic, given the circumstances, the reasoning of Dunphy J. in a published decision in another case (in which similar language was employed in the wills), *Milne Estate (Re)*, 2018 ONSC 4174, appears to be applicable.

[10] In *Re Milne Estate,* as in this case, Dunphy J. received an unopposed application for a Certificate of Appointment of Estate Trustee With a Will Limited to the Assets in the Will. There was a primary and a secondary will. As noted, there were provisions in these wills employing language similar to the language used in the Panda wills; language with which he took issue. In his construction of these provisions, Dunphy J. framed the issue as: 'whether the will is valid if there is uncertainty as to the subject-matter of the trust created by it.'

[11] In answering this question in the negative, Dunphy J. began his analysis with the proposition that "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." Dunphy J. went on to acknowledge that there was no issue with formal validity under the *SLRA*. The issue, he said, was that, "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 purpose to which the property is to be applied." The three certainties must be satisfied, he said, at the time the "trust" is created – in this case, the time of death. In the circumstances of *Re Milne Estate*, he found that the only issue was certainty of subject matter.

[12] Dunphy J. concluded the requirement for certainty of subject matter was not satisfied in *Re Milne Estate* because the language used in the wills conferred a discretion on the estate trustees to assign a given asset to a given will depending on whether probate was required in order for the estate trustees to deal with that asset. It is not enough, he wrote, to say that the assets subject to the trust will be determined later and then be governed by one will or the other. This is a matter of the trustees' discretion and "is not ascertainable by objective criteria ascertainable in advance." "The testator," he concluded, "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."

Analysis

[13] The decision in *Re Milne Estate* raises one procedural and two substantive issues. The procedural issue is:

(1) whether, on an unopposed application for a certificate of appointment as estate trustee, it is appropriate to inquire into substantive questions of construction of the will or whether the inquiry is limited to "formal" validity of the will for purposes of probate.

[14] The substantive issues are:

(2) whether the validity of a will depends upon the testamentary instrument satisfying the "three certainties" which govern the test for the valid creation of a trust; and

(3) whether, apart from the questions of the validity of the will itself, a testator can confer on his or her personal representatives the ability to decide those assets in respect of which they will seek probate and those in respect of which they will not.

1. Scope of Review at Probate Stage

[15] The role of the court on an application for a certificate of appointment as estate trustee with a will is to determine whether the documents presented are the testator's last will. The document must satisfy certain technical requirements – that is, the document must be in writing and signed at its end by the testator in the presence of two or more witnesses who subscribe the will in the presence of the testator.[1] The court must also, as a matter of substance (or "construction"), determine whether the instrument is testamentary in nature; in other words, does it disclose an intention to make a disposition of the testator's property upon his or her death?

[16] Broader questions of interpretation which involve ascertaining the meaning of the testamentary documents, whether the testamentary dispositions relate to assets owned by the testator at the time of his or her death, or the validity of powers of appointment or other discretionary decision-making conferred on the estate trustees, are matters of construction not necessary to the grant of probate authorizing the applicant to act as the deceased's personal representative.

[17] It seems to me, although law and equity are now fused in the Ontario Superior Court of Justice, it remains nevertheless important to keep the probate and construction functions analytically distinct, if for no other reason than to align the scope and nature of the review being undertaken with the specific judicial function being exercised at that stage of the proceedings: Oosterhoff on Wills, 8th ed. The distinction is also important because the rules that govern the admissibility of evidence differ in the two courts. A probate court may admit direct evidence of the testator's intention when proving the will. But, apart from limited circumstances, a court of construction does not admit such evidence: see pp. 244 - 246.

[18] In my view, the question of the validity of the conferral of the authority to decide under which of two wills (the probated will and the non-probated will) the property of the deceased will be administered, and the effect of the answer to that question on the administration of the estate,

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[1] *SLRA* ss. 3 and 4.

are matters of broad construction which ought not to be dealt with in the context of an application for probate *per se*.

2. *The Three Certainties*

[19] I must respectfully part company with Dunphy J. over his assertion that a will is a form of trust and that, in order for a will to be valid, it must create a valid trust. No authority was cited for this proposition. I believe it is incorrect as a matter of law.

[20] Not one of the authoritative texts on wills asserts that a will is a trust. Not one of these texts, when setting out the criteria for a valid will, cites the necessity to satisfy the requirements for the creation of a valid trust; that is, the "three certainties." Rather, to establish validity for purposes of probate, a will must conform to certain formal requirements (noted above), provide for distribution or administration of property and take effect upon death. Nor am I aware of any judicial precedent which concludes that a will is invalid because it, being a trust, failed to satisfy the three certainties.

[21] A will is a unique instrument. A will shares some of the attributes of a contract and some of the attributes of a trust but it is neither; a will is its own, unique creature of the law.

[22] Wills frequently create or otherwise employ trusts, to be sure. When they do, the three certainties will no doubt be relevant to the validity of the trust. The invalidity of the trust element of an otherwise valid will, however, is not coequal with the invalidity of that will.

[23] Similarly, the *SLRA* creates a statutory trust in favour of those who become beneficially entitled to property when vested in the deceased's personal representative. However, that does not happen by virtue of the will but, as Professor Oosterhoff has pointed out, "in spite of" the existence of the will.[2]

[24] In conclusion, a will is not a trust. The validity of a will, therefore, does not turn on satisfying the three certainties required for establishing the validity of a trust. Failure to establish certainty of subject matter is, therefore, an irrelevant consideration in establishing formal validity for purposes of probate.

[25] If we skip ahead, from the "probate" to the "construction" function, the question may still remain – what is the scope of the power a testator may confer upon his or her personal representatives to determine whether an asset shall be administered under the primary (probated) will or the secondary (un-probated) will? This, however, is not a question of the validity of the will itself but a question of the validity of the powers devolved on the estate trustees to administer the estate effectively. I will turn to this issue in the following section of these Reasons.

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[2]Albert H. Oosterhoff, "What is a Will and What is the Role of a Court of Probate?" August 26, 2018

3. *Estate Trustees' Authority To Administer the Estate*

[26] It seems to me that the real issue underlying the concerns articulated in *Re Milne Estate* is not the validity of the will itself but the validity of the direction from the testator to the estate trustees to determine whether a "grant of authority by a court of competent jurisdiction" is or is not required for the "transfer, disposition or realization of" the testator's property, and directing them to act accordingly in their administration of the estate. In the ordinary course, as I have set out above, one would not expect an issue like this to come up on an application for probate, since it involves an issue of the construction of a particular instruction to or power conferred in the will on the estate trustees.

[27] In addition, in the present case there is no suggestion of controversy over the scope of the authority of the estate trustees. Indeed, there is no suggestion that the estate trustees exercised any of the powers conferred upon them to determine whether a grant of authority by a court of competent jurisdiction was required for the transfer, disposition or realization of any estate property or to disclaim any property.

[28] It would be inappropriate to make any determination in these Reasons about the scope and validity of the particular powers conferred on the estate trustees in this case because the issue of the scope, exercise and validity of those powers was not before me.[3]

[29] The estates bar is not of one mind on how to draft provisions that facilitate reduction of estate administration tax by placing one set of the testator's assets under a will intended for probate and leaving another set of assets to be administered without the need for probate. While, as some commentators argue, detailed lists are preferable in terms of certainty, they can become problematic when certain assets take on a different form between when the wills are drafted and the testator's death. To deal with this problem, some suggest consideration be given to adopting language of the very kind used in this case. This would balance the desire to maximize opportunities for reducing estate administration taxes with the desire to avoid language which is "circular" or "too vague" (such as describing non-probate assets as "those not requiring probate at the time of death").[4]

[30] Where the detailed list approach is used, others recommend, to deal with the situation where an asset in the non-probate will turns out to require probate, including a clause that entitles the estate trustees of the secondary will to renounce their interest in that asset, causing it to fall into the general will with respect to which probate will be sought.[5]

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[3] This is another reason to restrict the scope of review on a probate application to what is strictly necessary to decide the issue before the court.

[4] See for example, Hislop, *Estate Planning Precedents: A Solicitor's Manual* (Scarborough, Ontario: Carswell, 1989) at 6.1 Commentary (f) Multiple Wills: Drafting Issues.

[5] Darren Lund and Jane Martin, "Meshing Not Messing Multiple Wills" (*The Annotated Will*, Continuing Professional Development Course delivered at the Law Society in Toronto, Ontario, January 12, 2017, at pp. 1-117 to 1-118). A clause of this nature, however, contributed to the

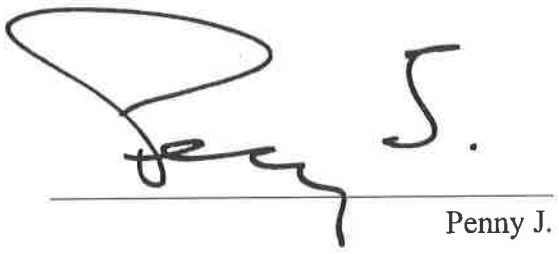
[31] In the circumstances of this case, it is not at all clear to me that a direction from the testator about how the estate trustees should decide whether or not to seek probate in respect of two or more wills dealing with particular components of the deceased's property, is any more extreme or "uncertain" than other, well-established discretionary choices frequently conferred on and exercised by estate trustees. Directing the estate trustees to determine whether a grant of authority by a court of competent jurisdiction is or is not required for the transfer, disposition or realization of property, and to act on that determination in their administration of the estate, arguably provides to the estate trustees an objective, ascertainable basis for the exercise of whatever "discretion" is embedded in that conferral of authority.

[32] These are questions, however, which do not normally arise on an application for probate (and did not arise on this application) and should be left for an occasion when they are raised in the context of a mature dispute before the Court.

Conclusion

[33] In conclusion, I respectfully decline to follow the decision of Dunphy J. in *Re Milne Estate*. A will is not a trust. The validity of a will for purposes of an application for probate falls to be decided upon the application of a clear set of criteria which do not include the need to satisfy the "three certainties" required for a valid trust and, specifically, the certainty of subject matter. The testator's direction in the will to his personal representatives - to administer certain property under the secondary will where a grant of authority by a court of competent jurisdiction for the transfer, disposition or realization is not required - does not, in any event, render the will itself invalid or "uncertain."

[34] The application for a certificate of appointment of estate trustees is granted.



Penny J.

Date: November 13, 2018

"uncertainty" which caused Dunphy J. to conclude that the primary will in *Re Milne Estate* was invalid and to reject the original application in this case as well.