



**HULL & HULL LLP**  
Barristers and Solicitors

## Multiple Wills Revisited

In October of 2018, we circulated a [Solicitor's Tip](#) that cautioned against using multiple will estate planning strategies without adequate consideration of the impact that discretionary allocation clauses may have upon the validity of the documents after a will had been declared invalid by the Ontario Superior Court of Justice in *Milne Estate (Re)*, 2018 ONSC 4174 ([CanLII](#)), on that basis. This decision classified wills as trusts, which must comply with the three certainties (being certainty of intention, certainty as to the subject matter, and certainty as to the objects of the trust), and suggested that the use of discretionary allocation clauses was inconsistent with the certainty of subject matter, raising the issue of whether wills containing such clauses could nevertheless be valid.

Thankfully, the Divisional Court has since revisited this matter (see *Milne Estate (Re)*, 2019 ONSC 579 ([CanLII](#))) to clarify that discretionary allocation clauses are not fatal to the validity of a will (at para 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.

The Court recognized the impracticality of providing a definitive list of assets for which a Certificate of Appointment of Estate Trustee With a Will may or may not be required by the time of the testator's death, often years after the execution of Primary and Secondary Last Wills and Testaments.

The Divisional Court reviewed the issue of whether a will was, as Justice Dunphy of the Superior Court of Justice had suggested, a trust. While a will may give rise to the creation of one or more testamentary trusts, a will itself is not a trust, and, accordingly, the three certainties need not necessarily be satisfied in order for the will to be valid. To be valid, a will must instead comply with the formal requirements outlined within the *Succession Law Reform Act*.

While the practice of using multiple wills and discretionary allocation clauses in estate planning has been confirmed to be legitimate, the scrutiny of standard will clauses in this context seen in the *Milne Estate* decisions highlights several practice considerations that solicitors should nevertheless keep in mind when assisting clients in preparing wills:

- Ambiguity ought to be avoided to the extent possible to avoid potential issues relating to the validity and/or interpretation of the will;
- If the will provides a trustee with discretion, it should be considered whether the discretion can be exercised arbitrarily; and

- Care should be used when preparing allocation clauses, revocation clauses, and other terms (no matter how standard) in a multiple will scenario to ensure that the wills are capable of operating together.