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Guidance Provided By Ministry Of Finance In Respect Of Multiple Wills

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Estate Administration Taxes

Ontario is notorious for its high estate administration taxes. While the provincial government's most recent budget provides some relief in respect of this burden (increasing the size of estates that are exempt from payment of estate administration tax to those valued at $50,000 or less), planning to minimize or avoid estate administration tax remains a primary estate planning concern for many Ontario residents.

Multiple Will Planning

A common and effective mechanism for limiting exposure to estate administration taxes is the use of multiple wills to reduce the assets to be administered under the probated will. Typically, a Primary Last Will and Testament covers only those assets for which probate is required, often including real property, while a Secondary Will addresses the disposition of all other assets.

Re Milne Estate

Prior to its successful appeal, *Re Milne Estate*, 2018 ONSC 4174, was a source of concern for estate planners throughout the province. The decision raised the issue of the validity of multiple wills on the basis of their use of discretionary allocation clauses, which eliminate the "certainty of subject matter" required for a valid trust. The lower court's determination was made on the basis that a will is a trust in respect of which the three-certainties test applies.

In *Re Milne Estate*, 2019 ONSC 579, the Divisional Court clarified 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 of applicable fiduciary duty.

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 preparation and execution of Primary and Secondary Wills.

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 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*, RSO 1990, c S.26.

Aftermath of *Re Milne Estate*

While the Divisional Court's decision in *Re Milne Estate* supported the use of a discretionary allocation of assets between Primary and Secondary Wills based on a determination by the estate trustee for the need of probate, some uncertainty remained in respect of how far trustee discretion could go and how best to prepare multiple wills without unnecessarily exposing assets to estate administration tax.

Consider, for example, discretionary allocation clauses worded as follows:

> Primary Will:
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> *This Will applies to any assets for which my Trustees determine a grant of authority by a court of competent jurisdiction is required for the transfer or realization thereof.*
>
> Secondary Will:
>
> *This Will applies to any 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.*

Prior to the testator's death and the estate trustee's determination as to which assets require probate, it cannot be determined in respect of some assets whether they will fall under the Primary or Secondary Will. As a result, drafting solicitors may want to include dispositive clauses dealing with specific assets within both documents. For example:

> Primary Will:
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> *To the extent that this asset is governed by my Primary Will, I direct my Trustees to transfer [my house] ...*
>
> Secondary Will:
>
> *To the extent that this asset is governed by my Secondary Will, I direct my Trustees to transfer [my house] …*

However, until very recently, it was unclear whether such wording appearing in both wills would expose an estate to estate administration tax in respect of assets identified within a Primary Will (but being administered under the Secondary Will) and/or whether these assets would need to be included in the Estate Information Return.

Recent Guidance Provided by the Ministry of Finance

In response to the above scenario and proposed wording for Primary and Secondary Wills, the Ministry of Finance has shared the following position:

> The responsibility for determining whether an asset requires an estate certificate to transfer it, rests with the estate representative. The estate representative would therefore, in the case described above, make a determination as to whether the "house" requires a grant of authority in order to transfer it based upon objective criterion.
>
> If the estate representative determines that an estate certificate is not required for the purpose of transferring the house, this asset would be excluded from the Estate Information Return. Please note that pursuant to the Minister's power of audit and inspection under section 4.7 of the *Estate Administration Tax Act 1998,* the Minister may request, among other things, information, documents and records relating to the determination.

This clarification provides meaningful guidance to estate lawyers in assisting clients to create estate plans in a manner that reflects both a client's testamentary intentions and minimizes probate-related estate expenses.