Case involving multiple wills has spinoff effects

'There are broad estate law implications'

BY PATRICIA CANCILLA, LAW TIMES

Pia Hundal says issues involved in a recent Ontario Superior Court of Justice case 'are of great importance to estates lawyers and our clients who may be impacted by the decision.'

A CONTROVERSIAL case involving multiple wills has been appealed.

As reported in the Sept. 24 issue of *Law Times*, the Sept. 11 decision in *Milne Estate (Re)*, 2018 ONSC 4174 caused concern for lawyers who said the decision could possibly nullify wills across Ontario.

Justice Sean Dunphy, with the Ontario Superior Court of Justice, found that one of two nearly identical wills in the case was invalid because in leaving the assets to the discretion of the trustees, it failed to "describe with certainty" any property that is subject to the will.

The case, argued by WeirFoulds LLP lawyer Clare Burns and Anastasija Sumakova, formerly of WeirFoulds, involves a couple, John Douglas Milne and Sheilah Marlyn Milne, who died in October 2017 and left their daughter, accountant and lawyer as executors of the estate. There were two wills for each of the deceased, a primary will and a secondary will, which Dunphy called "materially identical" save for specific language.

The case involves the use of a basket clause, which is a way of drafting multiple wills to enable the trustees to determine which assets fall into either will, rather than enumerating each asset in one of the wills.

Basket clauses have been used in cases of multiple wills accepted for probate since 1998, says Pia Hundal, a partner at Dentons Canada LLP and chairwoman of the Ontario Bar Association's Trusts and Estates Law section, who was not involved in the case.

"The issues in the appeal in *Re Milne Estate* are of great importance to estates lawyers and our clients who may be impacted by the decision," Hundal told *Law Times* in November.

A notice of appeal has been filed in the Superior Court of Justice (Divisional Court) in the matter of the estates of the Milnes by the executors of the estates. The appellants are asking that the orders declaring the primary wills of the deceased invalid be set aside on the grounds that the judge erred in his decision, according to court documents.

"I cannot say whether or not Justice Dunphy's decision will be overturned, but I think that the appellants raise several cogent grounds for appeal in their notice of appeal, particularly where the decision seems to depart from the established law," says Hundal.

"In my view, the appellants persuasively assert that the lower court erred by failing to consider the definition of 'will' under the Succession Law Reform Act and erred in holding that a precondition to the validity of a will is that the will be a valid trust."

Hundal also says that "the appellants also argue that the lower court erred by holding that it is a precondition to the validity of a will that the testator dispose of property in the will. There are circumstances where it may be necessary to have a will admitted to probate, even if there is no dispositive provision — for example, an insolvent estate or to deal with the burial/funeral arrangements for a deceased person."

At the centre of *Milne*, wrote Dunphy, was the question: "Is a will that grants the executors the discretion to determine what property is subject to the will a valid will?"

The disputed language in the primary will said the executors were in charge of "all property owned by me at the time of my death EXCEPT... [certain named assets and] 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." The wording in the secondary will said "all property owned by me at the time of my death INCLUDING... [certain named assets and] 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," with emphasis added by Dunphy.

In the decision, Dunphy referred to an affidavit from the lawyer executing the estate who certified that the primary will was in force and had not been revoked by the secondary will.

The trustees argued that the probate function of the court is "a separate and distinct function" from the construction of the will, the decision said. However, the judge ultimately decided that the secondary will was valid and the primary will was not valid.

"The Secondary Will includes all of the property of the testator of every kind without exclusion. It overlaps the Primary Will completely. There is no gap," Dunphy wrote.

He concluded that using the opinions of the trustees to determine what is desirable to include in each will "cannot be done."

"There are broad estates law implications to Justice Dunphy's decision and I believe most lawyers who practise in this area will be paying close attention to the appeal in the Divisional Court," says Hundal.

Daniel Paperny, an associate at WEL Partners in Toronto, says the reason why the ruling "rocked estate planners and will drafters so much is because it has become such a widely adopted practice to draft primary and secondary wills with basket clauses like those found in the Milne wills."

"It puts these previously drafted wills, that incorporate similar clauses, in jeopardy," he says. "There could be wills already drafted that, depending on how the appeal goes could be invalid."

But Paperny says he thinks "most lawyers are not panicking yet" and they are "not rushing to re-draft previously executed wills that incorporate basket clauses," waiting instead until the Divisional Court has heard the appeal. In November, *Law Times* reached out to both lawyers who originally tried the case, but they provided no comment.

To complicate matters, an Ontario Superior Court of Justice judge recently granted the appointment of estate trustees for a will, going against Dunphy's decision. Lawyers say the new decision means that the estates bar is stuck between diverging judicial viewpoints within the same level of court on the validity of primary and secondary wills.

The Nov. 13 decision, *Panda Estate (Re)*, 2018 ONSC 6734, involves the estate trustees of a will requesting a certificate of appointment.

The judge, Justice Michael Penny, granted the application, breaking from the September 2018 decision by Dunphy that invalidated a similar set of wills.

"The situation you have now in the law is that the law is unsettled on this point. You actually have precedent going each way. You have a situation in which one judge has said, 'These primary and secondary wills may fail,'" Patrick Aulis, principal lawyer at Aulis Law Firm PC in Toronto, who acted on the *Panda* case for the applicants, Asok Panda and Sunita Rajak, told *Law Times* in early December.

Lawyers say the pair of diverging decisions raises a legal question that could affect thousands of wills, if a will is a type of trust. Dunphy's September decision said a will is a form of trust. Penny said in the *Panda* decision that he disagrees with the assertion that a will is a form of trust. The wills in the *Milne* case left the discretion to the trustees. The *Panda* wills used "similar language" to the *Milne* wills Penny wrote, although Aulis says the *Panda* wills did not have the same type of discretion granted to trustees.

Stephen O'Donohue, principal at O'Donohue & O'Donohue Barristers & Solicitors in Toronto, told *Law Times* in early December that his understanding of the law is in line with Penny's decision, but he says he still awaits the clarification from the Divisional Court on the *Milne* appeal. Until the Divisional Court weighs in, neither Penny's nor Dunphy's decision is binding on other cases within the same level of the Ontario Superior Court of Justice, Jordan Atin, counsel at Hull & Hull LLP, who was not involved in the case, told *Law Times* in early December.

"A lot of primary and secondary wills have the same sort of basket clause that says the trustee has discretion, so a lot of them are vulnerable — most of them are vulnerable," says Aulis. "Ultimately, we are all sitting around waiting for the appeal.... Most estate practitioners are hoping that the *Milne* case is overturned; probably that's quite likely."

— with files from Anita Balakrishna