Publisher's Note
2019 — Release 2
Previous release was 2019–1

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Estate Administration

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Estate Administration: A Solicitor's Reference Manual is a how-to guide dealing with all aspects of estate administration in Ontario. Text is augmented by up-to-date forms, precedents, letters and checklists. Commonly used statutes and regulations are reproduced in full. All aspects of estate administration are examined, including the conveyancing of real property and the income tax implications arising upon death.

What's New in this Update:

This release updates the commentary in Chapter 1 (Administration Prior to Issuance of Certificate of Appointment of Estate Trustee); Chapter 2 (Appointment of Estate Trustee); and Chapter 3 (Realization of Assets, Settlement of Liabilities and Distribution of Estate). In addition, Authored Special Instructions have been revised and updated, and case law digests related to these Authored Special Instructions have also been added.

Highlights:

- **Multiple Wills — Validity — Three Certainties** — This recent Ontario Superior Court case, *Milne Estate (Re)*, has unsettled the law around multiple wills in Ontario causing LAWPRO to put out an alert to practitioners about

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multiple wills. This case has been appealed and a subsequent decision of the superior court *Panda Estate (Re)*, 2018 ONSC 6734, 2018 CarswellOnt 19212 (Ont. S.C.J.) *(see below)* has refused to follow it. However, the situation has caused great uncertainty in Ontario. The case involved the multiple wills of two testators, each testator having a primary and secondary will. Dunphy J. came to the conclusion that the (substantially identical) primary wills were invalid. This conclusion rested on his determination that: ''A will is a form of trust." and to be valid, in addition to satisfying the formal requirements of the *Succession Law Reform Act* (SRLA) it must satisfy the ''three certainties": (i) certainty of intent to create the trust, (ii) certainty as to the subject-matter or property committed to the trust and (iii) certainty as to the objects of the trust or the purposes to which the property is to be applied. Dunphy J found that the primary wills did not satisfy the certainty of subject-matter because they contained a ''basket" clause which provided the estate trustee with unbridled discretion in determining which assets would fall under which will. Dunphy J. opined that if multiple wills are to be employed, the property that is subject to each will must be ascertainable based upon the expressed intent of the testator without regard to discretion of the estate trustee to be exercised afterwards. Accordingly, probate of the two primary wills was denied: *Milne Estate (Re)*, 2018 ONSC 4174, 2018 CarswellOnt 15063, 41 E.T.R. (4th) 66 (Ont. S.C.J.)

- **Multiple Wills — Validity — Inquiry on Application for Certificate of Appointment** — In this case Penny J. refused to follow *Milne Estate (Re)*, 2018 ONSC 4174, 2018 CarswellOnt 15063, 41 E.T.R. (4th) 66 (Ont. S.C.J.). Reviewing that decision, Penny J. found it raised three issues — one procedural and two substantive. The procedural issue was: (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.The substantive issues were: (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.

  Regarding the procedural issue, Penny J., stated that 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. 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, are

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

Regarding the three certainties, Penny J rejected the 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. Accordingly, the validity of a will does not turn on satisfying the three certainties. Failure to establish certainty of subject matter is, therefore, irrelevant for purposes of probate.

Regarding (3) above Penny J opined that: ''the real issue underlying the concerns articulated in *Milne Estate (Re)* 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. In the ordinary course . . . '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.'": *Panda Estate (Re)*, 2018 ONSC 6734, 2018 CarswellOnt 19212 (Ont. S.C.J.)

- **Partial Intestacy — Impact of Provisions in will** — The testator died leaving a will that gave a legacy to his daughter and nothing to his son (on basis he had already been provided for at time of his mother's death). The residue of his estate was left to his second wife. His second wife and son predeceased him but the son was succeeded by children. On an application for directions, the court held that under s. 23(2)(a) of the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13, where a deceased person left no surviving spouse, the intestate estate had to be distributed to person's descendants. This was a mandatory provision that allowed no modification to accommodate a person's wishes such as those expressed by the provision specifically excluding the son: *Atrill Estate*, 2018 BCSC 350, 2018 CarswellBC 507 (B.C. S.C.)

- **Passing of Accounts — Application of *Limitations Act, 2002*** — The Estate Trustee argued that, the notice of objection, asserted a ''claim" against him because the applicant sought a ''remedy" in the passing of accounts application, i.e. a reduction in his compensation and, as a result, the objection was barred by s. 4 of the *Limitations Act, 2002* which states that ''a proceeding shall not be commenced in respect of a claim after the second anniversary on which the claim was discovered". The Court of Appeal rejected the argument that notices of objection are either a ''proceeding" or a ''claim" per s. 4 of the *Limitations Act, 2002*. The Court stated that a notice of objection is a response to a proceeding (the passing of accounts) that has already started and not a proceeding on its own. The Court also pointed to the distinction between a passing of account and other civil applications. In the

former, the Court is not tasked with awarding judgment in favour of one party or the other. Instead its purpose was to initiate a ‘‘judicial inquiry” into ‘‘the affairs of an estate” and, if appropriate, provide a remedy to the estate, rather than to the beneficiaries personally: *Wall v. Shaw*, 2018 ONCA 929, 2018 CarswellOnt 19383 (Ont. Div. Ct.)