



**eNews – May 28, 2019**  
**STEP Canada Trust & Estate Technical Committee**

**Milne Estate (Re), 2019 ONSC 579 – An Update from STEP Canada**

As many members of STEP Canada are aware, in *Milne Estate (Re)*, 2019 ONSC 579, the Divisional Court of the Superior Court of Justice reversed the decision of the Application Judge (*Milne Estate (Re)*, 2018 ONSC 4174). The Milne decisions have been previously reviewed by STEP Inside:

[https://www.step.ca/marketing/STEP\\_Inside\\_January\\_2019.pdf](https://www.step.ca/marketing/STEP_Inside_January_2019.pdf) (original decision, pages 3-7)

[https://www.step.ca/downloads/marketing/STEP\\_Inside\\_May\\_2019.pdf](https://www.step.ca/downloads/marketing/STEP_Inside_May_2019.pdf) (appeal, pages 15-16)

As a result of many discussions among and questions from STEP Canada members, the STEP Canada Trusts & Estates Technical Committee considered that it might be helpful to will drafters to provide some clarification concerning the drafting implications of the appeal decision in Milne.

This decision confirmed that the presence of an allocation clause (also known as a basket clause) does not invalidate a will. While this confirmation is very welcome to will drafting lawyers, the decision should not be read as approving the manner in which the wills in Milne were drafted. In the absence of express consideration from the Court, estates practitioners need to be very cautious when drafting multiple wills.

Multiple wills imply a host of drafting considerations (including but not limited to allocation clauses) that need to be carefully reviewed and worked through. It is of critical importance to ensure that the assets falling into each will are carefully defined, so that assets are neither missed, nor fall into more than one will. An allocation clause is helpful in this regard, but it is simply one drafting consideration among many.

Some other drafting concerns include, but are certainly not limited to, the following:

- Introductory clauses ideally clarify the estate to which the will in question applies (eg primary estate or secondary estate).
- Revocation clauses need to contemplate that a testator will have multiple wills, as otherwise one of the wills may be revoked by the later-signed will.
- Clauses regarding payment of debts, taxes and other liabilities need to be carefully drafted to ensure that these amounts are not double paid, or missed.
- All references to set dollar amounts, including legacies, compensation amounts, minimums, maximums and so on need to be structured to ensure that there is no doubling up or confusion between the primary and secondary wills.
- Some clauses will properly belong in a primary will, while other clauses are more relevant in the secondary will.
- If different executors or beneficiaries are named under multiple wills, the drafting issues and risks can increase to a very challenging level.
- As noted above, this list is not fulsome, but merely sets out some of the drafting considerations relevant to many multiple wills. Every estate has its own unique aspects, and practitioners need to carefully draft with a view to maximizing the likelihood of a clear, logical and tax-efficient estate administration.

Kind Regards,

STEP Canada Trust & Estate Technical Committee

**About STEP:**

The Society of Trust and Estate Practitioners is the leading international organization for trust and estates professionals. Headquartered in London, England, it has more than 20,000 members worldwide in 95 countries.

**STEP Canada**, founded in 1998, has 2,600 members with branches in the following cities and regions: Atlantic, Montreal, Ottawa, Toronto, Winnipeg, Calgary, Edmonton, Vancouver and chapters in Okanagan Valley, Saskatchewan, and Southwestern Ontario. STEP is a multi-disciplinary organization with the most experienced and senior practitioners in the field, including: lawyers, accountants, financial planners, insurance advisors and trust professionals. They provide domestic and international advice on trust and estates, including planning, administration and related taxes.

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