Seeking the Court's Opinion, Advice and Direction

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In Ontario, testators can execute more than one will, thereby creating a more complicated estate plan. The advantage of estate planning in this way is that typically only assets in the primary estate will need to be probated and be subject to estate administration tax. Even though secondary wills are not probated, parties may still seek the court's opinion, advice, and direction regarding these testamentary instruments, as demonstrated by Justice Valente's recent decision in *Kurt v Kurt and Sullivan, 2023 ONSC 6599*.

In this case, two spouses died within a month and a half of each other, leaving behind four wills in total. First the husband passed away, leaving a primary will and a secondary will. 42 days later, the wife died, also leaving a primary will and a secondary will.

One of the couple's daughters applied to the court for direction regarding a bequest left to her in the husband's secondary will worth $800,000. The daughter had already inherited a bequest worth $800,000 from the wife's secondary estate, composed of a property in Kitchener worth $422,750, plus a cash bequest of $377,250. Both the wife's secondary will and the husband's secondary will contained essentially the same bequest for the daughter – that she was to receive $800,000, minus the value of the Kitchener property "being transferred to her" through another will clause. The daughter claimed that she was entitled to a further $800,000 from the husband's secondary estate.

The daughter's application was opposed; other parties interested in the husband's estate argued that the $800,000 bequest was intended to be a gift-over that would only be honoured if the husband was predeceased by his wife. Because the wife had survived the husband by more than 30 days, they argued that the wife inherited the entire residue of the husband's secondary estate.

The court application was also necessary because there were a number of drafting errors in the husband's secondary will. For example, the secondary will did not dispose of the residue of the husband's secondary estate. Rather, both the husband's primary will and his secondary will disposed of the residue of his primary estate, leaving it to the wife. Notwithstanding this drafting error, all of the parties agreed that the wife was the proper recipient of the residue of the husband's secondary estate.

There was also a drafting error in the will clause containing the $800,000 bequest to the daughter from the husband's secondary estate. While the clause indicated that the bequest was to be made up of cash and a property being transferred to the daughter pursuant to another will clause, the will clause referenced therein disposed of the residue of the husband's primary estateand did not dispose of the Kitchener property. The will clause disposing of the Kitchener property was actually located in the husband's primary will, rather than the secondary will, and only left the property to the daughter if the wife did not survive the husband for 30 days.

Due to the errors in the husband's secondary will, Justice Valente held that it was appropriate to read both the primary will and the secondary will together, as one, to determine the husband's testamentary intentions. In reaching this conclusion, Justice Valente relied on Justice Patillo's decision in *Lipson v Lipson, 2009 CanLII 66904*(Ont. S.C.J.), another case dealing with primary and secondary wills, where the court found that it was appropriate to read both a primary will and a secondary will together as one when there are apparent mistakes in one of the wills, read on its own.

Reading both the primary will and the secondary will together, Justice Valente concluded that the husband's secondary will did not accurately express his intention. Since the Kitchener property was not transferred to the daughter by the husband's primary estate, the court held that the will clause with the $800,000 bequest was inoperative. The husband had intended to leave both his primary and secondary estates to his wife, should she survive him for more than thirty days, and only intended the legacy to the daughter to be paid and for the Kitchener property to

be transferred to her in the event that the wife did not survive him.

This conclusion was also supported by the language used in the $800,000 bequest, which referred to the Kitchener property "being transferred" to the daughter. Justice Valente held that this phrase made it clear that the daughter was only to receive the $800,000 legacy from the husband's secondary estate if the Kitchener property was also transferred to her under his primary will.

Since the daughter did not inherit the Kitchener property from the husband, the $800,000 bequest failed.

The court's decision in this case is useful in confirming that the court has the power to provide direction regarding a will, even if it is not submitted to probate, and also provides guidance as to how to approach the interpretation of multiple wills. If there is an error in either the primary will or the secondary will, they are both to be read together as one to determine the testator's intent, similar to how a will is to be read as a whole when interpreting a specific will clause.

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