



MULTIPLE WILLS AS A PLANNING TOOL

When administering an estate, an executor must often apply for a certificate of estate trustee, commonly called a probate certificate, in order to deal with the assets of the estate as the transfer of real property or a financial institution holding some assets may require it. In order to obtain probate, a fee based on the entire value of all assets distributed by the will is charged.

Probate fees are set by provincial legislation, are different in each province and are not calculated on an asset-by-asset basis. Even if just one asset requires probate, all assets that transfer through the will are required to be probated. For instance, assume an estate is valued at \$1,000,000, of which only one asset valued at \$25,000 requires probate. All assets, not just the \$25,000, will be used in calculating probate fees. In Ontario, the resulting probate fee is \$14,500 (0.5% of the first \$50,000 of the estate and 1.5% on the remainder), in British Columbia it would be \$13,450 (0.6% of the estate value greater than \$25,000 and less than \$50,000, and 1.4% on the remainder).

Probate fees are viewed by many as prohibitive. As a result, there are a number of strategies aimed at reducing the estate value and thus minimizing the probate fee, including named beneficiaries for registered and insurance products, joint ownership and gifting assets prior to death.

A solution unique to Ontario and British Columbia is the use of a secondary will to transfer some estate assets. One will, known as the primary will, is used to dispose of assets that require probate to transfer, such as bank accounts, investment portfolios and real estate. Another will, known as the secondary will, disposes of any assets that do not require probate, such as art collections, personal belongings or private company shares.

Returning to our example, assume the \$1,000,000 in estate value consists of a bank account of \$50,000 and shares in

a private company of \$950,000. By transferring the private company shares through a secondary will, the total probate fee in Ontario would be \$250 and in British Columbia, \$150 – a savings of \$14,250 in Ontario and \$13,300 in British Columbia.

In Ontario, both the primary and secondary will often name the same executor. However, in British Columbia, probate fees are charged on the gross value of all property passing to the executor. If the executor is applying for probate, he or she has a duty to list all the assets of the deceased passing to him or her. If the executor is the same in both the primary and secondary will, it means all assets would need to be disclosed and probate fees paid on them. However, there is no obligation on an executor to disclose assets passing to another executor. Therefore, in British Columbia, the primary and secondary estates must have different executors.

The use of a multiple will strategy has some limitations:

- **Contested estates:** Multiple wills are only successful where the secondary will is uncontested. If there is a concern about possible challenges to a will, for instance, from a disinherited relation, it is advisable to use some other probate minimization strategy such as creating an inter vivos trust to transfer assets outside the estate. In British Columbia, the use of a trust avoids the variation rules set out in the Wills, Estate and Succession Act.
- **Unintended revocation:** Care must be taken in the drafting and execution of the two wills to ensure that one will does not inadvertently revoke the other. For instance, use of a standard clause reading, "I hereby revoke all former wills and codicils made by me," in a secondary will may revoke the primary will.
- **Other drafting issues:** Care must also be taken in the drafting of the wills to ensure they complement each other, as unintended results may occur. For instance, in *Lipson v. Lipson*, a 2009 Ontario case, both the primary

and secondary will defined the estate transferred by the will as the whole estate except private corporation shares owned by the deceased. In other words, neither will transferred the private company shares. Although the court was able to rectify the error, it meant a court application and added expense.

Secondary wills are a tool with only one purpose – reducing probate fees. As a result of the numerous drafting issues

associated with them, it is recommended that anyone considering dual wills retain legal counsel specializing in complex estate planning. In more modest estates, the advantage may not be worth the additional cost and risk associated with drafting, especially if there are larger objectives which may be compromised by this probate planning strategy.

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