

The Client Advisor



Are Multiple Wills Right For You?

By Emmet Connolly



Drafting more than one will for your estate could help you reduce your estate's probate fees significantly. The use of "multiple wills" is a relatively recent planning tool in Ontario, having been established in the 1998 case of *Granovsky Estate v. Ontario*, which held that a trustee is under no legal requirement to seek probate on the entire assets of an estate but can separate the estate into different wills. The case allows a first will, typically referred to as the "primary will", to handle the assets of the estate which require probate and a second will, typically referred to as the "secondary will", to handle those estate assets which do not. Under the right circumstances, multiple wills are worthwhile drafting because of the savings they can create.

Are multiple wills worthwhile in my case?

A primary factor in determining whether multiple wills are worthwhile is, of course, having assets which do not need to be probated. Assets which may be transferred or realized on death without a probated will include the following: real estate registered in the Registry system, personal and household property,

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life insurance, pension plans, RRSPPs and RRIFs for which a beneficiary is named or designated, assets held jointly by right of survivorship and shares or debt obligations of private corporations. Assets which require probate include lands registered in the Land Titles system, bank accounts, GICs, term deposits and shares or debt obligations of public corporations. The more assets of an estate which do not have to have a grant of probate to permit transfer, the greater the potential savings in setting up multiple wills.

The savings are “potential” savings as they will not occur if the secondary will is probated for any reason, despite the intention of the deceased. The courts have identified

account with a \$75,000.00 balance, (iii) shares in a private corporation with a value of \$85,000.00 and (iv) personal property worth \$30,000.00, it would be subject to probate fees in Ontario of \$7,750.00. If multiple wills were used under the same scenario, probate fees would be potentially reduced to \$625.00, because only the bank balance would be included in the primary will.

How are multiple wills drafted?

If multiple wills are considered to be worthwhile, they need to be drafted carefully. Each multiple will should expressly refer to the other and confirm that the making of one is not intended to revoke the other. Additionally, if the

beneficiaries of multiple wills are not the same, care must be taken to ensure that it is clear how the expenses of the estate are to be paid in each will. Otherwise, you run the risk of beneficiaries suing one another because it is unclear how the expenses of the estate are meant to reduce their respective entitlements.

Another drafting error with multiple wills occurs in the event that the executors and beneficiaries of an estate are not the same.

In this case, and particularly if it can be anticipated that the wills will be con-

tested, it is often prudent to include a provision in the secondary will whereby the beneficiaries will indemnify the executors if probate is not obtained. Without such an indemnity, executors will often submit a secondary will for probate to protect themselves, as they are statutorily protected from being sued by beneficiaries as long as they have acted in good faith under a probated will, but lose this protection for wills which have not gone through probate.

Conclusion:

While it is open for the provincial government to change the law and disallow the tax savings inherent with multiple wills, no steps have been taken in this regard and recent court decisions have upheld the *Granovsky* decision. As a result, when thinking about having a will drafted, consulting a knowledgeable estate lawyer to consider whether multiple wills may be of benefit to your estate is probably worthwhile.



three main scenarios whereby secondary wills are required to be probated: (i) if the estate is involved in litigation; (ii) if third parties refuse to transfer title to the assets in the secondary will or (iii) if foreign executors appointed in the secondary will intend to deal with assets situate in Ontario. If it can be anticipated that one or more of these scenarios will drag the secondary will through probate, it may not be worthwhile going to the effort of having multiple wills drafted in the first place.

On the other hand, under the right circumstances, the savings can be considerable. For example, if an estate were to have a standard will and assets of: (i) a house worth \$400,000.00 under the Registry system, (ii) a bank

