GARDINER ROBERTS

Multiple Wills - Their Use and Drafting Issues

Background

The use of multiple wills in estate planning is not a new concept. Historically, testators used multiple wills to deal with assets situated in different jurisdictions, and this is still a practice which may be advised in order to ease estate administration when a testator owns property offshore, where the language and the law may be different to that of Canada. More recently, multiple wills have become a useful tool for avoiding probate fees or estate administration tax (hereinafter "probate fees"). As the executor's authority comes from the will, and probate is simply the evidence of that authority, it is not in every situation that a probate is needed. Accordingly, where all the assets consist of, for example, shares in private corporations, or personal effects, there may be no need to probate a testator's will. Probate (in Ontario, a "Certificate of Appointment of Estate Trustee with a Will") is usually applied for because third parties require the probate in order to release assets to the executor, or beneficiary. In some cases, third party purchasers of estate assets will demand to see a probate to ensure that the title is good. Probate will protect the third party purchaser, if it is later discovered that the will was not valid, or had been revoked by a subsequent will. In the case of chattels and shares of closely held private corporations, probate of the will is often not required. The other shareholders will have personal knowledge that the testator has died, and will likely be confident in relying on the deceased's counsel's advice that the will presented is indeed the last will.

Why Two Wills?

If there are assets in an estate which can be conveyed without probate, coupled with assets that do require a probate, probate fees must be paid on the entire value of the estate. It is generally not possible to obtain an original grant of probate limited to certain assets. Accordingly, the planning technique of preparing two wills has developed in order that assets that can normally be conveyed without a grant of probate may be dealt with in a separate or secondary will (hereinafter referred to as the "secondary will") for which a probate is not necessary. The principle, main or primary will (hereinafter referred to as the "primary will") in these cases will deal with the disposition of all assets that require probate, and only the primary will is probated. Accordingly, probate fees are paid only on the assets which are dealt with in the primary will.

In theory, the use of a secondary will to avoid probate fees seems sensible and straight forward. In those circumstances where the primary and secondary wills are identical in every way, with the exception of the assets disposed of, the plan can work quite nicely. Assuming that the executors of both wills are the same people and assuming that the residual beneficiaries are identical in both wills, the administration of an estate with dual wills can be fairly straight forward. Following the decision in *Granovsky v. Ontario*[1], the courts in Ontario are required to accept a primary will for probate, without the necessity of probating the secondary will at the same time. There are, however, many pitfalls in drafting primary and secondary wills and the more complex the estate planning; the more likely there will be interpretation problems.

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[1] (1998), 156 D.L.R. (4th) 557 (Ont. Gen. Div.).

Allocating and Describing Assets under the Primary and Secondary Will

Typically, assets which do not require probate that might be disposed of under a secondary will include:

1. shares of privately-held corporations, related shareholders' loans and receivables;
2. household goods and personal effects (except those noted below);
3. assets over which the testator has a power of appointment;
4. partnership interests and related loans and receivables;
5. beneficial interests in trusts or other estates;
6. unsecured debts.

Assets which will normally be included in the primary will include:

1. assets normally requiring probate in order to be realized or conveyed on death, including publicly traded securities, bank deposits, real estate, etc.
2. special household and personal effects for which a probate may be required in order to verify the ownership and provenance;
3. private company shares where the shares are widely held, such that the other shareholders may require a probate;
4. life insurance designations, particularly where the proceeds are linked to trusts under the will (if properly drafted the proceeds should pass outside of probate) as the insurance company may require the probate of the will in order to release the proceeds.

The question of how to describe the assets to be included or excluded in the dual wills is not always straight forward. Some practitioners prefer to describe assets in the primary will, as including "all those assets not disposed of in my secondary will". As the secondary will is generally executed after the primary will, this creates a potential interpretation issue. In an effort to ensure no assets which ultimately require probate get included in the secondary will, some practitioners will refer to "all assets requiring probate" and "all assets not requiring probate". This can create future issues, particularly if the secondary will only purports to dispose of an asset for which it was assumed a probate was not needed, and it then turns out that the asset does require a probate.

Some practitioners prefer to make a detailed list of the assets that will be disposed of under the secondary will and excluded from the primary will. This may be preferable in terms of certainty, but it can also be problematic unless there is language which will trace the assets in a different form, for example, where a private corporation undergoes an amalgamation, or name change. More generic language, as in "all shares in private corporations owned at death", can also create unexpected results if the testator holds shares in a widely held private corporation for which it turns out a probate is necessary. In such a case, the plan would be defeated as the secondary will would require probate, and the value of all the assets in the estate would be included in calculating the probate fees payable. As every testator's situation is different, it is generally impossible to anticipate all types of assets the testator might own in the future, and the drafting, therefore, cannot always be fail proof.

Great care must be taken to ensure that the directions and bequests contained in the dual wills actually relate to the assets passing under the will. For example, in *Kaptyn Estate, Re*[2] the primary will provided instructions regarding the disposition of a luxury vacation home which was actually owned by a corporation disposed of under the secondary will (and secondary codicil). Attention to detail where two wills are utilized is imperative, but these situations are not always avoidable. If, after the date of execution, the testator purchases a new vacation property through a private corporation, it is easy to imagine how the mischief that arose in *Kaptyn* might occur.

Adopting a plan with a secondary will in an attempt to avoid the necessity of probate on certain assets may be prudent. It does not guarantee, however, that probate (and the probate fees) will be avoided on the assets passing under the secondary will. All may go smoothly, for example, until executors move to sell a business owned by the deceased's private corporation and the third party purchaser requires probate to ensure good title. Provided the will drafting is sound, there is generally no downside to using dual wills, but the expectations of the testator and the beneficiaries must be realistic.

Choice of Executors

While it may make good sense to have different executors for the primary and secondary will, doing so creates a host of issues that may result in difficulties administering the estate. While there may be two wills, there is only one estate.

Where there are two separate sets of executors, some issues which might arise include:

1. division of executors' duties, such as which executors file the tax returns;
2. the allocation and size of the executors' fees;
3. communication between the primary executors and the secondary executors, and communication and consistency in exercising discretion;
4. duty to account, to the beneficiaries of both wills or one will only, as well as the duty to account to the other executors, and consistency in the accounting format;
5. allocation of testamentary expenses, debts, and taxes, as between the assets of both wills unless the wills direct clearly how this is to done;
6. possible conflict, for example, over funeral arrangements, and the need to have a mechanism for avoiding conflict.

Where it makes sense to have special executors to deal with different assets, consider naming the same executors for the primary and secondary wills, but appointing special trustees to administer the assets requiring a trustee with specialized knowledge.

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[2] 2008 CarswellOnt 6071, 43 E.T.R. (3d) 219 (Ont. S.C.J.).

Payment of Debts and Taxes

It will normally be advisable to include precise directions as to how the debts, taxes and testamentary expenses should be allocated as between the assets passing under the primary and secondary wills. The problems that might arise include circumstances where:

1. the beneficiaries of the primary and secondary wills are different so that there will be differing views as to what pool of assets should bear the expenses;
2. legacies and bequests under one will may abate if the debts are paid from the assets of one will as opposed to the other will;
3. there is no clear indication as to which assets are to be liquidated to pay the debts and taxes;
4. if tax liability arises from assets specifically bequeathed, or assets subject to a beneficiary designation, is the tax liability payable out of the residue of the primary or secondary estate;
5. if the secondary will assets are all non-liquid entities such as private corporation shares, or personal effects specifically bequeathed, does the primary will authorize the executors to "pour over" assets disposed of under the primary will to satisfy taxes payable in respect of assets passing under the secondary will.

The most complex situations generally arise where the executors of the two wills are different and the residual beneficiaries of the two wills are also different. In such will plans, precise instructions must be included in the wills to avoid conflicts over the payment of legacies, debts and taxes. Furthermore, where there is no "pour over" clause, allowing debts arising in respect of assets gifted under the secondary will to be paid out of assets of the primary will, the administration will most likely result in an application to court for advice and direction.[3]

Legacies and Abatement

Problems may arise where legacies are directed to be paid in the primary will or the secondary will and there are insufficient assets to satisfy the legacy. In such circumstances, the legacy could abate, or possibly adeem. If it is uncertain as to whether there will be sufficient assets to fund legacies in the primary or secondary will, legacies may be included in both wills with a direction that the intent is that they only be paid once and that the trustees may determine in their discretion from which assets and in what proportions the legacies are paid. An alternative approach is to include a "pour over" clause which provides that legacies provided in the primary will, for example, may be paid out of the assets passing under the secondary will. Where the residual beneficiaries of both wills are the same, as a practical matter, the payment of legacies out of the assets passing under one will or the other may not be an issue, but there is always a possibility that the residual beneficiaries will object to satisfying a legacy under the primary will, for example, out of assets passing under the secondary will, unless the executors are directed to do so.

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[3] See for example, the discussion of the *Kaptyn* decision in Schnurr, Brian, Youdan, Timothy, and Rabinowitz, Archie, "Problems Which May Arise In Connection With The Administration of Estates Consisting of Dual Wills", Advanced Round Table in Estates Law 2009, Law Society of Upper Canada, May 14, 2009.

Residue Clause

Where the residual beneficiaries under the primary and secondary wills are the same, the estate administration under the primary will and secondary will is generally routine. However, where the residual beneficiaries are different, great care is required in directing the payment of debts, taxes and testamentary expenses. This will be particularly important where the assets under the secondary will are not liquid, or are specifically bequeathed, leaving no assets passing under the secondary will to pay debts and taxes. Consideration must also be given as to which pool of assets any legacies are to be paid, as well as whether there should be a "pour over" clause so that if assets under the will which provides for the legacies are insufficient, the shortfall can be made up from assets passing under the other will. Where a hotchpot clause is included in the will, consider whether the hotchpot clause should appear in the primary and/or secondary will. Generally, it will appear in only one will if the residual beneficiaries are the same so that the adjustment is not made twice, to the detriment of the beneficiary. If the residual beneficiaries are different, hotchpot clauses may appear in both wills, as may be appropriate.

Revocation and Codicils

Where multiple wills are to be executed, it is important that the subsequently executed will not revoke the first will signed. This can be effected by having the primary will revoke all prior wills, whereas the secondary will does not contain a revocation clause; but it is critical that the primary will is not executed last. Reference can be made to revocation of only primary wills or only secondary wills, but uncertainty arises where there are no pre-existing primary or secondary wills at the time. Some practitioners prefer to revoke only those wills (or portions of a will or wills) disposing of primary assets, or secondary assets as defined in the will. Regardless of the technique adopted, the revocation of prior wills must be clear so that the last will signed does not inadvertently revoke all prior wills. Additional language in the secondary will to the effect that "for greater certainty, I do not revoke my primary will signed this day. . ." may be useful in confirming the testator's intention.

Great care must also be taken in preparing codicils where there are dual wills. Codicils typically state: "in all other respects I hereby confirm my said Will", republishing the will as of the date of the codicil. If the codicil is made to the primary will only, the primary will typically revokes all prior wills, and so, the effect will be to revoke the secondary will when the primary will is republished. Either the codicil to the primary will should confirm the primary will, with the exception that it does not revoke the already existing secondary will, or a codicil to the secondary will should also be executed contemporaneously with the primary will codicil so that both wills are republished at the date of the codicils.

A Third Will?

There are occasionally assets for which it is not clear whether probate will be required or not. One example is real estate (where local law may allow a conveyance without a grant of probate)[4]. Also, the law may change or circumstances occur where probate might be required. There is a risk that including the questionable asset in the secondary will may require probate of the secondary will. By executing a third will, which deals with the assets for which probate may or may not be necessary, it eliminates the risk of "tainting" the probate free status of the secondary will. Other grey area assets that could be dealt with in a third will include such things as royalties, and trademark and copyright interests.

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[4] In Ontario, Ministry policy permits a transmission of interest in real property without probate where the property interest was previously registered under the *Registry Act*, and converted to Land Titles, if it is the first dealing with the property since the conversion.

Conclusion

While the administration of estates where there are multiple wills can be complex, the advantage of avoiding unnecessary probate fees is obvious. The tax savings, however, may be insignificant in terms of the costs incurred in resolving dual will interpretation issues.

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