

Multiple Wills - Probate Savings Strategy

Applying for probate is the formal process of having a deceased person's Will validated by the courts. Probate may be required prior to transferring legal ownership of real estate, or upon request from a financial institution prior to the settlement of a particular asset or account.

The following article summarizes some common probate planning strategies to minimize estate costs including a discussion on the use of multiple Wills.

Some commonly used strategies to reduce probate fees¹ include:

- Holding property in joint name with right of survivorship (strategy not applicable to Quebec);
- Designating beneficiaries on Registered Retirement Savings Plans (RRSPs), Registered Retirement Income Funds (RRIFs), Tax-Free Savings Accounts (TFSA) and life insurance policies (strategy not applicable to Quebec);
- Creating *inter vivos* trusts; and
- Making gifts during your lifetime.

NOTE: Your particular situation, estate planning objectives and the overall cost of probate fees to your estate will impact the appropriateness of each of the strategies highlighted above, especially if the asset is not passing to a surviving spouse.

Another method for minimizing probate fees in Ontario and British Columbia is the use of multiple Wills. To understand how this strategy works, let us first understand the probate process.

Why is probate required?

The main purpose of probating a Will is to validate the appointment of the executor (*i.e.*, the person appointed in a Will to control and protect the estate's assets, pay off any debts, and distribute property as directed by the Will). Specifically:

- Probate may be required before a legal change in ownership of real estate property can be made; and
- Probate can protect the executor and third parties from legal liability.

¹ The term used for probate fees/taxes varies by province/territory. For example, in Ontario, probate fees are known as "Estate Administration Tax".

Third parties (e.g. financial institutions) often require probated Wills before they will accept instructions from the executor named in the Will. If probate is required, a probate fee ranging from 0% (Quebec) up to 1.695% (Nova Scotia) of the value of the estate is generally payable.

How does the multiple Wills strategy work?

This strategy involves preparing two Wills, one dealing with assets administered by third parties such as bank accounts, investment portfolios and real estate; and another designed for personally held assets such as personal effects and shares of a private company.

In Ontario, the use of multiple Wills is now accepted practice following the decision of the court case *Granovsky v. The Queen*. The judge in this case ruled that if a person dies with multiple Wills (with a common executor), the executor seeking probate is not obligated to probate all of the Wills. The executor has the option to probate whichever of the Wills of the deceased and probate taxes would apply only on the assets that were part of the probated Will. In other words, it is possible to segregate assets of an individual into multiple Wills and thereby, mitigate the application of probate to one's estate:

- A primary Will holding the assets that require the probate process and where probate fees may apply; and
- A secondary Will holding the assets that do not require probate (e.g. privately held shares or personal properties).

More recently, multiple wills with a “basket” or “allocation” clause were considered by an Ontario court in *Milne Estate (Re)*. A “basket” or “allocation” clause may be used to allow estate trustees to define which assets would be subject to the secondary Will which would typically include assets that do not require probate. The judge in this case held that the primary Will was invalid since the assets subject to the primary Will were not ascertainable at the testator's death. The judge's decision was appealed and reversed. This provides more clarity on the practice of drafting multiple wills and the use of a “basket” or “allocation” clause.

British Columbia's *Wills, Estates and Succession Act* permits B.C. residents to use multiple Wills to minimize probate if different executors are used for each Will.

Careful and considerate drafting is important in implementing a multiple wills strategy. If implemented correctly, one of the benefits of utilizing a multiple Wills strategy is lower probate fees, since provincial probate fees will apply only on the assets of the primary Will that is subject to the probate process.

Example

George, a widower with no children, lives in Ontario and wholly owns an incorporated small business. The privately held corporation is worth \$1,050,000. George owns his principal residence which is worth \$650,000 (no mortgage) and he also has \$100,000 in a non-registered investment account.

Single Will	
	Probate required
House	\$650,000
Private corporation shares	\$1,050,000
Non-registered Investment Account	\$100,000
Total Estate Value	\$1,800,000
Probate fees*	\$26,500

*Ontario estate administration tax is \$250 on the first \$50,000 of the estate value and 1.5% on the balance in excess of \$50,000.

Multiple Wills – Probate Tax Savings Strategy

What are the probate fees that will be payable on George's death if he has only one Will versus multiple Wills?

Multiple Wills		
	1 st Will - Probate required	2 nd Will - Probate not required
House	\$650,000	
Private corporation shares		\$1,050,000
Non-registered Investment Account	\$100,000	
Total Estate Value	\$750,000	\$1,050,000
Probate taxes*	\$10,750	

** Ontario estate administration tax is \$250 on the first \$50,000 of the estate value and 1.5% on the balance in excess of \$50,000.*

By using multiple Wills there is a probate tax savings of **\$15,750** (\$26,500 minus \$10,750).

Conclusion

If your goal is to reduce probate fees, using multiple Wills may be something you want to consider. However, it is important to note that probate fees are based on provincial statutes and since this strategy is based on an Ontario court decision, other provinces may specifically disallow this strategy within their own legislation. Nova Scotia, for instance, has specifically included in their probate legislation clauses that will render the use of multiple Wills an ineffective planning strategy.

It is important to weigh the costs of preparing multiple Wills against the benefits. If you reside in a province or territory that has very low probate fees such as Alberta, there may not be a need for this type of strategy. Furthermore, it is also important to understand that there are others costs and/or fees that may arise at death such as executor fees (which range typically between 2.5 and 5 per cent, depending on provincial guidelines and the complexity of the estate), legal costs and of course, income taxes.

Finally, careful drafting of Wills is critical to the successful use of this technique. In particular, care must be taken to ensure that the Wills do not unintentionally revoke each other. It is also necessary to ensure that the appropriate assets are included in each Will. If just one asset in the secondary Will requires probate (for instance, if an investment account at a brokerage is mistakenly included in the secondary Will), it may taint the entire Will. Probate will then apply on every asset in the secondary Will which the deceased wished to shelter.

While the focus of this article has been on the ability to reduce probate fees, there are other legitimate reasons for using multiple Wills. A Will submitted for probate is indexed or registered in public court records so privacy is often a reason for using multiple wills. Another example would be an individual who has assets located in different countries. In this case, the individual may want to prepare a separate Will to deal with the assets located within each country or jurisdiction.

It is imperative that you discuss the use of multiple Wills with your legal advisor to determine if this strategy is valid in your jurisdiction.

Your TD Wealth advisor can put you in touch with the appropriate estate planning specialist who can help you better understand the strategies that may suit your particular circumstances and needs.



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