

Secondary Wills

Overview

A secondary (or dual) will is an estate planning tool for Ontario business owners and incorporated professionals. The secondary will is essentially a mirror image of a primary will, with the exception it only deals with shares of and/or shareholder loans to a private corporation. The key objective is to be able to pass on certain estate assets to beneficiaries without incurring probate fees (Estate Administration Tax).

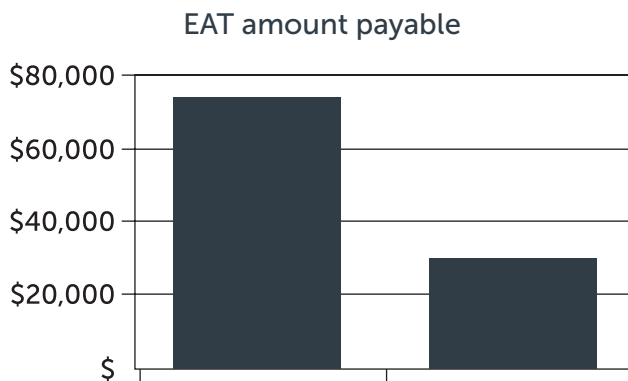
In Canada, on the death of an individual, their will is subject to probate. Probate is a process by which a court of law confirms both the validity of the will and the appointment of the estate trustees. Probate is typically required before the estate assets can be distributed to the beneficiaries. For this service, the Provincial courts charge a fee based on the value of the estate.

The origin of secondary wills dates back to a 1998 Ontario court case after a business owner drafted a secondary will to specifically deal with his significant business assets (in excess of \$25 million). His strategy was to enable his estate to avoid paying probate fees on the value of those assets, representing savings of almost \$400,000. The province objected when his executors attempted to apply this strategy, but the Ontario Supreme Court sided with his estate, thereby paving the way for the secondary will strategy in Ontario.

Since this ruling, many estate planners and lawyers in Ontario will ensure high net worth business owners are aware of this strategy to help minimize estate costs.

Quick Facts

- In Ontario, probate fees are technically referred to as Estate Administration Tax (EAT).
- EAT fees are calculated based on the value of the estate. Current costs are 0% on the first \$50,000 of value, then 1.5% on the value of assets above \$50,000.
- The assets named in a secondary will are not submitted for the probate process, so no EAT fees are charged.
- Costs exist to create the secondary will. Typically, legal fees will be the same as the cost of a primary will.
- The following illustrates the benefits of a secondary will strategy, based on an estate of \$5,000,000, including business assets of \$3,000,000:



Planning Considerations

- While a secondary will strategy can work in many situations, consideration should be made for other estate-fee minimization strategies as well.
- Ensure the appropriate beneficiary designations for all RRSP, RRIF, TFSA accounts and life insurance policies have been made.
- Consider holding property in joint name with right of survivorship – be aware there are potential problems with this strategy, particularly if the joint owner is not a spouse.
- Consider inter vivos trusts or gifts of property while alive to reduce the size of the estate subject to estate administration tax.
- When using multiple wills, wording is very important. If not done properly the wills could revoke one another if there is conflict or ambiguity. Also, it is important to ensure the appropriate assets are dealt with in the secondary will. Any probatable asset listed in error would result in all secondary will assets being subject to estate administration tax.
- Future changes to EAT regulations in Ontario could impact the effectiveness of the secondary will strategy.

Questions?

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