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LEGAL UPDATE

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EDITOR: TERRANCE S. CARTER

DO YOU NEED TWO WILLS?

Introduction

Do I need two wills? You've got to be kidding! Strangely enough, however, if you own shares in a small private business corporation or if you are a farmer, the answer may well be "Yes". Why? A second will has the potential of saving your estate the costs associated with Court fees that might otherwise have to paid.

An Old Idea, A New Application

The idea of a person having two wills is not a new one. Residents of Ontario having assets in another country often have two wills, one for those located in Ontario, and a second for those in the other country.

The idea is based on subsection in the *Estates Act* (Ontario) which states that where an application for a Certificate of Appointment (formerly known as letters probate) is limited to only part of the property of a deceased person, it is sufficient to state in the affidavit setting out the value of the deceased persons assets only the value of the property intended to be affected by the application. The subsection obviously contemplates the possibility of more than one will.

For those persons having assets in Ontario and elsewhere, the Ontario will states that it deals only with assets located in Ontario. In the application for the Certificate of Appointment on the death of that person declares only the value of the assets located in Ontario.

The will in the other country states that it deals only with assets in that country.

The new application of this old idea is to have a second will dealing with those of your assets located in Ontario that can be dealt with by the estate trustee of your last will (formerly known as your executor) without the need of first obtaining a Certificate of Appointment. Substantial fees are paid to the Ontario Court when an application for a Certificate of Appointment is made. A second will can have the effect of saving some of these fees.

Why Is It Necessary to Obtain a Certificate of Appointment?

Why do you need a Certificate of Appointment? The answer lies in what a Certificate of Appointment is and what it does.

A Certificate of Appointment is a certificate that is issued by the Ontario Court that certifies: (1) the fact and date of death of a deceased person; (2) the name and address of the estate trustee authorized to deal with the estate assets; and (3) a declaration that the document attached to the Certificate is a true copy of the last will.

The certificate is obtained (1) to protect the estate trustee, and (2) to protect persons with whom the estate trustee is dealing.

These protections are best illustrated by an example.

Suppose:

1. a deceased person owned 10,000 shares of Bell Canada at the time of his death;

2. the last will the estate trustee knew about provided that 50 percent of his estate was to be paid or transferred to his second wife, and that the balance be divided equally among the children of his first marriage;

3. the estate trustee submitted that will to the Court in making an application for a Certificate of Appointment;

4. the estate trustee then submitted the share certificate to Bell Canada along with a notarial copy of the Certificate of Appointment with instructions to issue new certificates to the widow and children in the required proportions;

5. based on the certificate and the instructions Bell Canada did so and issued new certificates;

6. after this was completed, a later will is brought forward by an illegitimate child containing the same provisions as were contained in the first will, with the exception that it contained a bequest stating that the 10,000 shares of Bell Canada were to be transferred to that child;

7. this second will is proven to be the last will.

The discovery of a later Will does not happen often but it does happen.

On learning of this state of affairs, the Court will recall the Certificate of Appointment that it had issued to the estate trustee and then issue a new Certificate of Appointment with respect to the later will.

Where does that leave Bell Canada? Where does it leave the estate trustee? The position of the widow and children is beyond the scope of this Legal Update.

The estate trustee had obtained a Certificate of Appointment, and therefore Bell Canada was justified in acting on his instructions to issue new certificates in the names of the widow and children. It acted pursuant to the instructions of a person certified by the Court to be the person authorized to give such instructions. No action whatever can be taken against it.

The estate trustee honestly believed that the will he submitted to the Court was the last one, and the Court certified it to be the last will, therefore, he was justified in directing Bell Canada to divide the shares in the matter provided in it. No action can be taken against the estate trustee in that capacity as estate trustee. The estate trustee is protected by the same Certificate.

Any quarrel is between the beneficiaries of the first will and the illegitimate child.

The responsibility of Bell Canada and the estate trustee for the mistake would have been much different if the estate trustee had persuaded Bell Canada to transfer the shares without first requiring that he obtain a Certificate of Appointment and the widow and children were not in a position to return the shares to the estate. Both Bell Canada and the estate trustee would be responsible for coming up with sufficient money to reimburse the estate for the total value of the shares. They would have a right of indemnity against the widow and children to whom the

shares were delivered, for whatever that right of indemnity was worth. They would have to pursue such remedy against the widow and children at their own expense if the widow and children refused to return them.

The example makes obvious the reason that Bell Canada will almost always require estate trustees to obtain a Certificate of Appointment. Why should it take any risk? It has nothing to gain by so doing and much to loose.

It also makes obvious the reason for an estate trustee wanting to obtain one. He also has much to lose.

How Much Are The Court Fees?

If a deceased person has only one will (and most people need only one) and it becomes necessary to obtain a Certificate of Appointment to administer his or her estate, the law governing the payment of Court fees requires that such fees be based on the value of **all** of the assets that person owned on the date of death.

The fees are $5.00 on each $1,000.00 of value of assets up to $55,000.00. Above that the fees are $15.00 on each $1,000.00 or part thereof.

This is best understood by looking at a second example. Suppose the estate has a gross value for application purposes of $500,000.00. This is probably low where the value of a farm, including livestock, implements, and produce are included. It is also probably low in the case of an active small business corporation when the value of equipment, vehicles, shareholder loans, inventory, and accounts receivable are considered.

In this example, the Court fees would total $7,000.00 calculated as follows:

Total value $500,000.00
On first 50,000.00 fee is ($5.00 x 50) $ 250.00
On balance
450,000.00 fee is ($15.00 x450) 6,750.00
Total fee
$7,000.00

How Can A Second Will Help?

The answer to this question lies in a second question: "Who is it that requires protection?".

Let's look at another example.

Suppose:

1. The deceased person was survived by his wife and children.

2. He wanted to leave his whole estate to his wife. If she died before he did, he wanted his whole estate to be divided equally among his children. In his will, he did exactly that. In addition, he appointed his wife to act as estate trustee if she survived him. If she predeceased him, he appointed his oldest child to act.

3. He was the sole owner of all of the shares of a small business corporation that had a value of $300,000.00. He also owned many other assets, some of which were in the form of stocks and bonds having a value of $200,000.00. The transfer agent dealing with such stocks and bonds requires the production of a Certificate of Appointment to protect itself for the reasons set out earlier in this Update.

In this example, the only people at risk and in need of protection are the deceased's wife as estate trustee and in her personal capacity as a beneficiary if the deceased's wife predeceased him, the only person at risk is his oldest son as estate trustee and his children as beneficiaries.

In this example, the corporation, which stands in the same position as Bell Canada, from the earlier example is also at risk.

The question that needs to be looked at is "What is the extent of the risk?". In this example, it may be nothing. You must be the judge of the risk in your own situation. Only you have the knowledge about whether or not you have another will or whether persons who might have a claim on your estate are being concealed from your family.

The person in the example had only one will. The estate trustee had to obtain a Certificate of Appointment to deal with some of the assets (stocks and bonds). The Court fees would be based on the value of all of the deceased's assets, those Court fees would be calculated as illustrated earlier at $7,000.00.

Suppose, however, the deceased had two wills. One of them stated that it dealt only with the shares of the small business corporation. The other stated that it dealt with all assets except the shares of the small business corporation. In all other respects, the wills were identical.

In this situation, the estate trustee would consider the question of who needed protection and the risk involved in dealing with the shares of the corporation without obtaining a Certificate of Appointment. In all likelihood the estate trustee would determine that there was no risk and would not submit the will that dealt with the shares of the corporation to the Court in making an application for a Certificate of Appointment.

The shares could be transferred without production of a Certificate of Appointment.

The transfer agents dealing with the shares and bonds of other corporation would demand a Certificate of Appointment before the estate trustee could deal with them, therefore the estate trustee would of course have to obtain the Certificate of Appointment with respect to the Will that dealt with those shares and bonds.

The deceased's oldest child, if he was acting as estate trustee, would have the same considerations.

In this situation, the Court fees that would be charged on the assets having a value of $200,000.00, being the assets contained in the second Will would amount to $2,500.00.

Total value $200,000.00
On first 50,000.00 fee is ($5.00 x 50) $ 250.00
On balance
150,000.00 fee is ($15.00 x150) 2,250.00
Total fee
$2,500.00

The savings in having two wills would be $4,500.00.

It does not take much imagination to increase the scope of the assets where the person with whom the estate trustee is dealing does not require protection. These assets would include farm implements, produce, and stock, motor vehicles, household goods and furniture, registered retirement savings plans where there is a named beneficiary and registered retirement income funds, to name only some.
It is important, if you should decide to adopt this approach, to ensure that everyone in your family knows exactly what you are doing so that there are no surprises, and so that everyone agrees in advance to deal with the shares of the corporation without requiring a Certificate of Appointment.

A Word of Caution

If you should instruct your lawyer to prepare two wills, you must consider other matters. Are the debts of the estate to be paid out of the assets that are to be the subject matter of the will that will

require the Certificate of Appointment? If legacies are to be paid, are the legacies to come out of the assets that are the subject matter of the Certificate of Appointment? If the answer to both questions is "yes", can those assets be converted into sufficient money to pay the debts and legacies and leave enough after to pay anything to the residuary beneficiaries?

As a final word of caution, while it is our view that the double will system will work and has been approved in many applications for Certificate of Appointments in many Court offices and has been adopted by a number of estate planners, it has received judicial approval in only one instance. There have been no Appeal Court decisions dealing with this system. However, the state of the law in Ontario at this time would appear to acknowledge the validity of having two wills for dealing with your assets in Ontario.

In addition, it must be understood that the preparation of two wills will cost more than just one will. The lawyer preparing them will have to take a great deal of care in analyzing the assets that should go into each, as well as determining from which grouping of assets, estate debts, legacies, etc. will be paid.

Recommendation

We recommend the two will system to persons owing shares in a small business corporation, and to farmers having substantial assets in the form of implements, produce and livestock.
The two will system isn't for everyone but if you own the types of assets referred to in the earlier examples the potential savings in Court fees may make it worth reviewing the benefits of having two wills.