

FAQS ON U.S. LEGAL TOPICS OF INTEREST TO CANADIANS – MULTIPLE WILLS

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Practices & Industries

Canada-U.S. Cross-Border

Question: I'm about to prepare a Will with my lawyer. As a Canadian, is there anything special she and I should discuss with regard to my Florida vacation home?

Answer: That is a very good question. There are indeed important considerations for Canadians who own property in U.S. One of your most basic considerations will be whether you need more than one Will.

In order to be admitted to probate, which is required for a Will to be made valid, the Will must be determined to be the "Last Will" therefore that Will is generally the testator's only Will. For Canadians with property in the United States or another country, however, there are a number of advantages to having multiple Wills.

The principal advantage of a second Will for each country in which property is owned is that the process of admitting it to probate is quicker and more efficient than the process of securing authenticated copies of the domiciliary probate. In jurisdictions like Florida, where qualifying non-resident fiduciaries can be problematic, providing for local fiduciaries can not only avoid delays but also avoid the possible requirement that the fiduciaries post a bond, which not only is an additional expense but can further delay the opening of the estate.

Another problem avoided with a separate Will is the limited acceptance of self-proving affidavits that do not comply with local law. While the substantive elements of Wills executed in one jurisdiction historically have been honored in all jurisdictions, the procedural elements that establish a Will as self-proven have not. The benefit of a self-proven Will (a Will is self-proven by an affidavit executed while the testator is alive) is that it avoids the requirement that a witness testify after the testator's death about the execution of the Will. Although that testimony can often be taken by a local notary, the admission of the Will to probate can be delayed by several weeks or more.

When an estate plan crosses a border where the primary language is different from that of the client's domicile, having a second Will prepared in the local jurisdiction avoids the need to arrange for a certified translation. Legal terms of art, especially those dealing with real property, may not translate in the way the client intended.

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Since it is imprudent at best to draft a Will that will affect property rights in another jurisdiction without the benefit of a review by local counsel, any additional expense incurred is a wise investment that will save time and money when sensitivity to both will be at a premium.

