TAB 1

Multiple Testamentary Documents

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Multiple Testamentary Documents
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Introduction

Oh what a tangled web we weave, when we practice to prepare and administer multiple testamentary documents. At first blush it may appear to be a matter of preparing one Will and then duplicating for subsequent Wills with necessary changes to grammar. Hopefully, the existence of this paper is reasonable evidence that such is not the case. Even where we define "testamentary documents" narrowly to mean only Wills, the challenges in preparing comprehensible documents and then administering them can be significant. If you include documents other than Wills in the mix, the challenges start to multiply.

The purpose of this paper is not to provide a line by line reference guide to preparing perfectly coordinated documents. Rather the intention is to highlight some of the trouble spots that exist when developing multiple testamentary documents in the estate planning process and in their subsequent administration. The focus will be on multiple Wills but some discussion of other possible forms of testamentary documents is also included.

The paper is broken down into the following main headings:

- Planning
- Administration
- Other forms of testamentary documents

Please note that the applicable law being discussed is that of Ontario unless stated otherwise.

Planning

1. Domestic (one province)

   a. Multiple Wills

      In this paper the phrase "multiple Wills" refers only to having greater than one Will for one person and should be distinguished from the use of mutual Wills for a couple which is an interesting planning strategy in its own right. A few comments regarding mutual Wills will follow in a later section.

      i. What is the authority for having more than one Will in a jurisdiction?

         There are no statutory provisions in Ontario that specifically authorize the use of multiple Wills and there is also nothing that prohibits the practice either, subject to the comments below regarding restrictions if the intention is to avoid probate fees (estate administration tax).

      ii. Why use more than one Will in a particular jurisdiction?

         There can be a range of reasons. The most common currently is to avoid the estate administration tax which is still referred to as a probate fee in some jurisdictions. Other reasons include:

         (A) Privacy

         For example, if a testator wants to provide for children of a previous marriage, and possibly a former spouse, they may not wish to have this set out in the Will that their new family will be seeing. For this arrangement to work, it may be beneficial to have separate assets that can be governed by this Will. The usual strategy of inter-connecting Wills so that gifts in one can be paid from the "estate"[1] covered by another Will could undermine the goal of privacy.

         (B) Administration of special assets such as insurance trusts

         How to properly structure testamentary insurance trusts is a recurring topic for debate and the ongoing discussion is warranted since, if the trust is not

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[1] There is some debate amongst trust and estate lawyers about whether a testator has only one estate, and separate Wills merely govern a partitioned sub-set of the overall estate, or the use of multiple Wills creates separate and distinct estates. The writer currently favours the view that there is only one estate since an estate is not just a grouping of assets but also includes liabilities. Subject to security interests in specific assets, creditors are indifferent regarding which assets are used to payout debts. Testators can prioritize the assets they want used to satisfy debts to create the perception of balance and fairness, including having debts related to assets under one Will paid from those assets, but this does not change the fact that in the end creditors cannot, or at least should not, be prejudiced by artificial divisions. In this paper, use of the terms "estate", "estates" or "multiple estates" is done to distinguish property and liabilities governed by a particular Will and does not imply a legal basis for the creation of multiple estates.

set up properly, the proceeds can be subject to estate administration tax. By using a separate Will, you accomplish a few things. One is some measure of privacy since you may need to send a copy of the whole Will to the financial institution to confirm that there is a valid beneficiary designation and trustee appointment. Another is simplicity in that the document is self-contained and can have unique administrative provisions suited to the assets or trusts being governed in that Will.

Outside Ontario, the set up of insurance trusts in a Will should be investigated carefully to ensure there are no legislative barriers. For example, Nova Scotia's *Probate Act*[2] contains language, cited below in this paper, calling into question the ability to establish these trusts in a Will and still avoid probate. Another section in the statute probably saves the strategy but it is not completely certain.

Other types of domestic property that may benefit from their own Will could include: farm or business assets; art or collectibles; recreational property and related equipment. This would allow a separate estate trustee to be appointed and administrative provisions can be tailored to meet specific needs without complicating the administration of other assets and creating potential confusion.

iii. Structuring Issues

(A) Which assets should be covered by which Will?

Regardless of how many Wills are prepared beyond one, at least one of the Wills has to capture all assets not otherwise disposed of to prevent a partial intestacy. Therefore, trying to list assets in all Wills is to be avoided. To prevent accidentally tainting a Will that was intended to be "non-probatable", the probatable Will should have a catchall phrase to capture assets not otherwise governed by a Will or testamentary instrument of the testator.

At the time the Wills are being prepared, it may not be possible to determine with certainty whether an asset will require a grant of probate to be transferred. For example, providence may be important to certain works of art. Without a grant of probate, this will be lost. Another example, discussed in more detail below, is private company shares. Real property held in the Land Titles system may qualify for an exception if the transfer is a "first dealing". This exemption can be lost if the owner mortgaged the property after the conversion from the Registry system to Land Titles and not realize the exemption was lost.

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[2] *Probate Act*, S.N.S. 2000, c. 31.

Due to this possible uncertainty, it is recommended that the non-probatable Will contain a discretionary power for the estate trustee to disclaim property otherwise stated to be governed by the Will.

When defining what is to be included in the non-probatable Will, some thought should be given to precisely what is to be governed. There are varying opinions on the degree of specificity required. In one camp are the practitioners who prefer a defined list. The other camp is populated by those who prefer to list assets by class. For example:

- Any shares in any corporations for which a grant of authority from a court of competent jurisdiction is not required for the transfer, disposition or realization thereof. At the time of making this my Will, such corporations include:

- Any shares into which those referred to above are converted by any means provided that a grant of authority from a court of competent jurisdiction is not required for the transfer, disposition or realization thereof;

- Assets held in trust for the Testator by the corporations referenced herein whether or not expressly named;

- Any interest in any partnership or joint venture, and for which a grant of authority from a court of competent jurisdiction is not required for the transfer, disposition or realization thereof, any assets held in trust by the partnership, or money owned to the Testator by the partnership;

- Any beneficial interest of the Testator in any trust for which a grant of authority from a court of competent jurisdiction is not required for the transfer, disposition or realization thereof;

- Articles of personal property which my Trustees determine do not require a grant of probate and for which a grant of authority from a court of competent jurisdiction is not required for the transfer, disposition or realization thereof;

- All amounts owing to the Testator and for which a grant of authority from a court of competent jurisdiction is not required for the transfer, disposition or realization thereof; and

- Any other assets of any nature, other than real property situate outside of Ontario, for which a grant of authority from a court of competent jurisdiction is not required for the transfer, disposition or realization thereof.

Another drafting consideration related to which assets are to be included in which Will, is the name of the Wills. Ideally, to avoid confusion, the non-probatable Will should not be named the "corporate" Will, for example, if there is a possibility that other types of assets may be included. The writer has been involved in the administration of multiple estates where assumptions where made about the nature of each estate based on the presumption that the non-probatable, or corporate, Will governed only private company shares which was not the case.

When deciding which assets to allocate to various Wills, or other testamentary instruments, thought should be given to who the beneficiaries will be including alternate beneficiaries. Once you start dividing assets item by item, it can become difficult to maintain the original balance sought between beneficiaries. Some assets may be depleted more quickly than anticipated. Others may result in a shifting tax burden such as RRSPs and RRIFs.

Also, assets that were originally subject to, or exempt from, probate may be sold or converted prior to death into assets falling into the opposite category. This of course could have profound unintended consequences for the ultimate distribution of the testator's overall estate.

(B) Revocation

The recent *Ashton Estate*[3] case has sparked debate and controversy around the long-time use of a generic revocation clause in a single Will. Here the disputed clause attempted to revoke "all wills and testamentary dispositions of every nature or kind whatsoever made..."
With more than one Will, it is even more important that care be taken to ensure there is no conflict or unintentional revocations. Also, it may be worthwhile to state the anticipated order of execution of the Wills and that all Wills are intended to operate concurrently.

Where a testator is updating one of multiple Wills, the codicil should clearly identify the Will to which it applies. If the initial Will is being revoked and replaced, the revocation clause needs to outline specifically the Will to which it applies and should specify the other Wills that are not being revoked and are intended to still operate concurrently.

(C) Incorporation by Reference

In order for incorporation by reference to work, at it applies to documents, the document attempting to be incorporated must be validly created and existing at the time it is incorporated into another document. Therefore, the order in which Wills (and Codicils) are executed could have important implications.

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[3] *Ashton Estate v. South Muskoka Memorial Hospital Foundation*, 2008 CanLII 21421 (ON S.C.).

To avoid possible problems created by this rule, the safest option is for each Will to be as self-contained as possible. As a practical matter, in the revocation clause wording can be included that indicates the order in which the Wills are intended to be executed. The affidavits of execution should include a date and time as verification. Anecdotal evidence suggests that some estate registrars may not accept affidavits of execution that do not conform to the standard precedent. Therefore, it may be prudent to do two affidavits: one for the registrar and one for the file to prove the order of execution.

(D) Definitions

A good definition section can be invaluable in a single Will. However, with simultaneous estates operating concurrently, clarity is even more important. Any terms that may appear in multiple Wills, but are to be applied differently with respect to each estate, should reference the appropriate estate.

Some terms to consider defining can include:

a) Spouse;

b) Child, grandchild and issue;

c) Income and net income; and

d) Statutory references.

The definition section is also where the assets to be included in the respective estates can specified. In addition to the debate above about whether to list assets individually or by class, there is another debate which involves whether to define each estate's assets in all Wills. Some believe that because of the doctrine of incorporation by reference, the initial Will can refer to the subsequent Will but not conversely.

To avoid this problem, some practitioners simply include identical lists in all Wills. A practical problem raised by this strategy is that if one Will is changed later that affects the assets to be governed by it, all of the Wills have to be updated.

It is the writer's opinion that this is not the best practice and likely not necessary. By referring to another Will or estate, it is not necessarily intended to incorporate the terms. It is simply a reference to the possibility that another Will or estate may exist on the testator's death rather than incorporation by reference. If there is another Will that deals with specific property, that Will governs those assets and should be unaffected by any definition in the initial Will stating it does not include assets governed elsewhere.

A possible option for defining respective estates is the following:

In primary Will

- "Primary Estate" means the whole of my property of every nature and kind whatsoever and wheresoever situate, including any property over which I may have a general power of appointment, but excluding property comprising my Secondary Estate as defined in this Will;
- "Secondary Estate" means the whole of my property of every nature and kind whatsoever and wheresoever situate as defined in my Secondary Will, if any, but excluding property compromising my Primary Estate as defined in this Will.

In secondary Will

- "Primary Estate" means the whole of my property of every nature and kind whatsoever and wheresoever situate, including any property over which I may have a general power of appointment, but excluding my property comprising my Secondary Estate as defined in this Will;
- "Secondary Estate" means:
    - my shares, if any, in the capital of ABC Corporation and any other corporation or corporations whose shares are not publicly traded and for which my Trustees determine a grant of authority by a court of competent jurisdiction is not required for the transfer, disposition or realization thereof (in this Will collectively referred to as the "Corporations"), those of my assets, if any, which are held in trust for me by any one or more of the Corporations, and all amounts owing to me from any of the Corporations;
    - any shares into which those referred to above are converted by any means provided that a grant of authority from a court of competent jurisdiction is not required for the transfer, disposition or realization thereof;
    - any interest I have in any partnership or joint venture for which my Trustees determine a grant of authority to my

Trustees by a court of competent jurisdiction is not required for the transfer, disposition or realization thereof (in this Will collectively referred to as the "Partnerships"), those of my assets, if any, which are held in trust for me by any one or more of the Partnerships, and all amounts owing to me from any of the Partnerships;

- any beneficial interest I have in any trust for which my Trustees determine a grant of authority to my Trustees by a court of competent jurisdiction is not required for the transfer, disposition or realization thereof;
- any interest I have in any real property for which my Trustees determine a grant of authority to my Trustees by a court of competent jurisdiction is not required for the transfer or realization thereof;
- all articles of personal, domestic, household and garden use or ornament owned by me at my death wherever the same may be situate for which my Trustees determine a grant of authority by a court of competent jurisdiction is not required for the transfer, disposition or realization thereof;
- all unsecured amounts owing to me from any of my children or more remote issue; and
- any other of my assets for which my Trustees determine a grant of authority by a court of competent jurisdiction is not required for the transfer, disposition or realization thereof.

(E) Appointment of Estate Trustees and Trustees

The selection of appropriate persons to administer an estate or trust always requires careful consideration but the existence of multiple, potentially interconnected, estates warrants some additional thought. If different people will be appointed in the various estates, their ability to cooperate with each other should be taken into account particularly if there are provisions linking the estates such as the payment of debts and taxes.

This is not intended to suggest that the same people should be appointed across the board to make things simple. The existence of assets that may require special expertise to manage properly argues in favour of diversifying appointments.

While not specifically a multiple Will issue, care should be taken with the drafting language used to appoint the trustees of testamentary trusts under a Will. It is often the case that the same group that will be the estate trustees are also appointed as the trustees of the testamentary trusts. However, this can create some administrative confusion.

The following is a sample estate trustee appointment clause and then a declaration for a testamentary trust of residue to help illustrate:

> I APPOINT **TED and ALICE**, jointly or the survivor of them, to be the executors and estate trustees of this my Will.
>
> If both **TED and ALICE** should predecease me, die without having fully performed the trusts hereof, or be unable or unwilling to act, and whether or not a Certificate of Appointment has been issued, then I NOMINATE AND APPOINT **BOB and CAROL,** jointly or the survivor of them, to be the executors and estate trustees of this my Will in the place of **TED and ALICE**.
>
> I refer to the estate trustees of my Will, whether original or substituted, as my "Trustees".
>
> If my spouse, **BETSY**, is not living on the thirtieth (30^{th}) day following my death, has died in circumstances making it impossible to determine which of us has died first, has renounced the above gift, or the gift is revoked due to divorce, my Trustees shall divide the residue of my estate then remaining into a number of equal parts so that there is one part for each child of mine then living and one part for each child of mine not then living but with children then living. My Trustees shall hold each such part upon a separate trust according to the following terms…..

The first potential problem is that estate trustees cannot resign. They can renounce their appointment if they have never taken any steps in the administration of the estate, but after an estate trustee begins to act, they can only be removed with consent of the court. By contrast, a trustee can resign by written instrument subject to restrictions in the trust deed and the *Trustee Act*[4]. If the drafting language is not clear about the role the person holds, a couple of things can happen. One is that the testamentary trusts

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[4] *Trustee Act*, R.S.O. 1990, c. T.23.

are never set up as such formally and they are not distinguished from the estate.

The next potential problem is that it is not clear if a person can agree to act as the estate trustee but decline to be a testamentary trustee. It is tedious to go through the trustee appointment provisions for the testamentary trust but it can be worthwhile. This group of trustees should ideally have its own name like "Residuary Trustees".

From an administrative perspective, when advising clients, it may be worthwhile to actually get written acknowledgement of the role the person is accepting when they are appointed to multiple positions especially if the roles are not separately defined. This will assist in the wind up of the estate or trust including preparing the appropriate form of releases.

Once you have multiple Wills and estates, nomenclature can help keep everything organized. For example "my Primary Estate Trustees" and "my Primary Residuary Trustees" with similar terms for the secondary estate.

(F) Avoiding Duplication

Care should be taken in drafting multiple Wills to ensure that there is no unintended overlap. Common areas where this can potentially happen include debts and taxes as well as gifts. If the drafter uses the same generic debt clause in each Will, it is unclear how to prioritize the payment of debts between the two estates especially if there is a shortfall and abatement rules need to be applied. The distribution of the overall estate and the respective sub-estates could be altered in ways the testator did not intend.

To deal with the possibility that the character of assets may change over time, some drafters put the same listing of gifts in each Will. This is fine of the beneficiaries are the same and you are dealing with percentages of the residue. However, where the gifts are legacies, the result could be duplication where none was intended. If the gifts are bequests of specific items of property, there should be less difficulty as long as it is clear what is to happen if the particular property does not form part of one or the other estates.

One option to address a potential shortfall in one estate to fund legacies is to include a provision, in the other Will, that allows the gifts to be paid by that other estate. To avoid increasing the estate administration tax by creating a receivable in the general or primary estate, the legacies should be in the secondary or non-probatable estate. The general Will would then contain a provision, possibly in the debt payment section, stating that certain gifts in the secondary estate, if not funded there, are to be paid from the general estate. Direction should also be included to confirm the

priority of this transfer between estates if there is a concern about maintaining balance between differing sets of beneficiaries.

(G) Avoiding Gaps

This is just as important as avoiding duplication. The essential gap to be avoided of course is having assets that are governed by no Will so that there is a partial intestacy. After that, it is a matter of ensuring the provisions of each Will are tailored to suit the relevant assets and liabilities.

(H) Trustee Powers

The powers may need to be customized for each Will to ensure they are appropriate to the assets and liabilities being governed by it. For example, it may not be suitable to have an investment power requiring compliance with the prudent investor rule in a Will governing primarily private company shares since diversification is almost impossible to achieve.

Other powers to be reviewed could include:

- Power of sale and retention of assets
- Even-handedness
- Guarantees and debt obligations
- Corporate powers including reorganizations
- Carrying on business
- Distributions in specie or in trust
- Resettlement or consolidation of trusts
- Early vesting

Also, while not specifically a multiple Will issue, if one of the Wills is going to contain a spousal testamentary trust, care should be taken with respect to various powers such as the ability to purchase insurance, lend trust property, or incorporate for the purposes of holding trust property. In *Balzac*[5], provisions that would seem innocuous to most practitioners where called into question as potentially permitting others to benefit from the spousal trust property during the spouse's lifetime. Rectification was used to strike those provisions from the Will.

The powers in question in Balaz were as follows:

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[5] *Balaz v. Balaz*, 2009 CanLII 17973 (ON S.C.).

(d) ***Loans to Beneficiaries****: To lend money or other assets of my estate, or to guarantee or continue any existing guarantees for loans, to any beneficiary of my Will, or any company owned or controlled by my estate or by any such beneficiary or in which my estate or such beneficiary may have an interest for such length of time, and upon such terms, and at such rate of interest or without interest, and with such security or without security, as my Trustees in their absolute discretion consider advisable.*

...

(i) ***Real Property****: To invest and reinvest any monies at any time from time to time, forming part of my estate in real property, whether or not the same shall be income producing, and so long as any real or leasehold property forms part of my estate to lease the same for such length of time, and upon such terms, covenants and conditions as my Trustees deem appropriate and to accept surrenders of leases and tenancies and to expend money in repairs and improvements and generally to manage the property with a view to the sale there of and to give any options my Trustees may consider advisable.*

...

(l) ***Power to Incorporate****: At the expense of my estate to incorporate or cause to be incorporated alone or in conjunction with any person or persons one or more corporations (any portion of the outstanding shares of which may form part of my estate) under the laws of the Province of Ontario or any other jurisdiction, which corporation or corporation may have whatever objects and undertakings and continue or carry on any business or businesses that my Trustees in their absolute discretion consider to be in the best interest of my estate and the beneficiaries there of, and my Trustees may in their absolute discretion at any time or times sell, convey or otherwise transfer any part or parts of my estate for the time being (including any business or businesses) to any such corporation at such prices and subject to such terms and conditions as my Trustees shall in their absolute discretion consider advisable and in consideration for any such sale, conveyance or transfer may accept as consideration securities (whether or not such*
securities have been issued by such corporation) or other real or personal property and any such consideration so received shall be an authorized investment under this Will.

It may not have been necessary to go such drastic measures since the provisions being attacked were discretionary. Arguably, only if the trustee misused them would the spousal trust be tainted. A possible option to address the situation would be to include wording that limits the ability of a trustee to use discretionary powers in such a way that would taint a spousal trust. This would avoid the need for two sets of powers or using powers that are too simple for other purposes in order to just have one set.

The decision in *Balaz* is disturbing on several levels but serves as a lesson in ensuring that the client is aware of provisions in their Wills and that the provisions suit the circumstances. An interesting consideration is what result would have been reached if it could have been proved that the testator did have knowledge of the impugned provisions. Without rectification as an option, presumably it would have become a question of solicitor negligence.

(I) Flexibility

This is not really a separate heading but a reminder that in structuring multiple Wills, it may be beneficial to build in options to allow for effective administration such as addressing:

a) Payment of debts and taxes by respective estates

b) Changing character of assets over time

c) Trustee powers specific to certain assets or liabilities

iv. Wills for Private Company Shares

Multiple Wills for probate avoidance often involve the secondary Will governing primarily private company shares. There are some special issues that arise in this situation. Discussed above was the potential need for investment powers to be tailored to the asset mix in a particular Will especially when there is little or no diversification possible.

Another potential problem is maintaining Canadian-controlled private corporation ("CCPC") status which is essential for a range of provisions under the *Income Tax Act* that afford preferential treatment such as the qualifying small business corporation share exemption and SRED credits.

In the *Sedona Networks*[6] case, the federal court of appeal found that a CCPC was controlled by a non-resident due to option rights granted to him. As a result, CCPC status was lost and with it SRED credits for the corporation. As this case illustrates, the financial consequences of a loss of CCPC in status would in most cases far outweigh the piffling 1.5% estate administration tax.

This case did not deal with estate trustee appointment issues; however, the general theme to take away is that it is essential not to allow shares in a CCPC to accidentally be controlled by a non-resident. On a related note, the status issue can also come up with respect to powers of attorney. For further discussion, see Technical Interpretation 9726535 involving a springing Alberta enduring power of attorney for property.

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[6] *Sedona Networks Corp. v. R.* [2007] 3 C.T.C. 237.

It is generally thought that simply doing a second Will is sufficient to shelter private company shares from probate. Unfortunately, this may not actually be the case. In Ontario, it will depend on the specific circumstances of the corporate management structure in place at the time the testator dies as well as shareholdings.

Interestingly, in Newfoundland using a secondary Will for corporate shares will likely have no benefit in terms of avoiding the estate administration tax. Section 106 of their *Corporations Act*[7] states that to transfer shares following death, letters probate are required to be deposited with the corporation.

In Ontario, where a person dies who was the sole shareholder, director and signing officer, third parties may insist on the Will governing the shares being probated. The problem that arises in this situation is that there is no authorized signing officer after the death of the shareholder. A new signing officer needs to be appointed, and the person who is entitled to make that appointment derives their authority from the Will, if there is one, or the grant of administration where there is an intestacy.

More specifically, on death in Ontario section 2 of the *Estates Administration Act*[8] vests all property of a deceased, with some exceptions, in the deceased's personal representative. Therefore, the estate trustee becomes the initial shareholder. As such, the estate trustee can, and must, appoint a director of the corporation including himself/herself. The director can then appoint a new signing officer but is not required to do so.

Third parties dealing with the estate trustee as director and any signing officer appointed by him/her are entitled to insist on proof of the person's authority. A grant of probate with respect to a Will provides this proof.

It should be noted that where there is a surviving signing officer on record with a third party, the issue of probate may be temporarily forestalled until that person needs to be replaced. At that point, the authority of the person appointing the replacement could be examined. Therefore, there should be a corporate structure in place that does not derive its authority from a person appointed in a Will that is anticipated to avoid probate.

What is the significance of a grant of probate, now referred to as a Certificate of Appointment in Ontario? Section 47 of Ontario's *Trustee Act*[9] provides as follows:

> ***47.*** *(1) Where a court of competent jurisdiction has admitted a will to probate, or has appointed an administrator, even though the*

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[7] *Corporations Act*, R.S.N.L. 1990, c. C-36.

[8] *Estates Administration Act*, R.S.O. 1990, c. E.22

[9] *Ibid.* 4.

grant of probate or the appointment may be subsequently revoked as having been erroneously made, all acts done under the authority of the probate or appointment, including all payments made in good faith to or by the personal representative, are as valid and effectual as if the same had been rightly granted or made, but upon revocation of the probate or appointment, in cases of an erroneous presumption of death, the supposed decedent, and in other cases the new personal representative may, subject to subsections (2) and (3), recover from the person who acted under the revoked grant or appointment any part of the estate remaining in the person's hands undistributed and, subject to the Limitations Act, 2002, from any person who erroneously received any part of the estate as a devisee, legatee or one of the next of kin, or as a spouse of the decedent or supposed decedent, the part so received or the value thereof.

Expenses

(2) The person acting under the revoked probate or appointment may retain out of any part of the estate remaining undistributed the proper costs and expenses incurred in the administration.

Fraud

(3) Nothing in this section protects any person acting as personal representative where the person has been party or privy to any fraud whereby the grant or appointment has been obtained, or after becoming aware of any fact by reason of which revocation thereof is ordered unless, in the latter case, the person acts under a contract for valuable consideration and otherwise binding made before the person becomes aware of the fact.

Definition

(4) In this section, "spouse" means a spouse as defined in section 1 of the Family Law Act.

Many other jurisdictions in Canada have similar provisions to Ontario's. Attached as schedule 'A' to this paper is a table of concordance listing the related provisions across the country (other than Quebec).

Can the testator include a clause in the Will stating that probate is not required? In short, the answer is no. Third parties such as financial institutions are not parties to a Will and have not consented to this term. As a result, they would not be bound by the provision.

b. Mutual Wills

Mutual Wills represent a shared estate plan between two persons, typically spouses. The expectation is that the parties will, by agreement, prevent the other from altering their Will at any time and possibly beneficiary designations or joint ownership of assets. In particular, it is intended that the survivor will not be able to change their Will after the death of the first testator.

In order for the agreement to have a reasonable expectation of success it should be in writing. Where it is between spouses, a good approach is to use a form of domestic agreement created in compliance with the applicable provincial *Family Law Act*. Some of the traditional provisions would not be included, and the definition of separation would likely be reduced down to mean death unless of course the parties wish to address other issues while they are going to the bother of preparing a domestic agreement.

There are practical problems that arise around the use of Mutual Wills. For instance, what happens if the survivor remarries or enters in to a common law relationship that triggers financial obligations? Or, what if an adult child becomes dependant on the survivor requiring greater assistance than was anticipated? This is the source of much debate around the precise nature of the survivor's interest and at times involves a discussion of constructive trust.

Case law so far has not resolved the issue of when the constructive trust arises. Is it the death of the first or second testator? The answer can lead to very different results.

2. Cross-Border (multiple provinces or countries)

Cross-border planning raises a host of issues that are beyond the scope of this paper. However, many of the comments throughout regarding the need for coordination and clarity in drafting are equally applicable to the use of multiple testamentary documents across jurisdictions as within one. One item that is worthy of note in the context of this paper is the possibility for conflict of laws.

a. Conflict of Laws Issues

In Ontario, there are conflict of laws rules contained in the *Succession Law Reform Act*[10] ("SLRA") starting at section 34. These rules make a clear distinction between movables and interests in land which is to be expected. As a general statement, land is subject the laws of the jurisdiction where it is situate, whereas a person is subject to the law of their domicile. Conflict of laws if far more complicated than this but it serves to illustrate the need for caution when doing cross-border planning.

Section 36 of the SLRA embodies the above general statement and reads as follows:

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[10] *Succession Law Reform Act*, R.S.O. 1990, c. S.26.

36.(1)The manner and formalities of making a will, and its essential validity and effect, so far as it relates to an interest in land, are governed by the internal law of the place where the land is situated.

(2)Subject to other provisions of this Part, the manner and formalities of making a will, and its essential validity and effect, so far as it relates to an interest in movables, are governed by the internal law of the place where the testator was domiciled at the time of his or her death.

Section 37 deals with the rules for making a Will that is valid for the purposes of it being admitted to probate which is somewhat different from the rules in section 36.

37.(1)As regards the manner and formalities of making a will of an interest in movables or in land, a will is valid and admissible to probate if at the time of its making it complied with the internal law of the place where,

(a) the will was made;

(b) the testator was then domiciled;

(c) the testator then had his or her habitual residence; or

(d) the testator then was a national if there was in that place one body of law governing the wills of nationals.

(2)As regards the manner and formalities of making a will of an interest in movables or in land, the following are properly made,

(a) a will made on board a vessel or aircraft of any description, if the making of the will conformed to the internal law in force in the place with which, having regard to its registration, if any, and other relevant circumstances, the vessel or aircraft may be taken to have been most closely connected;

(b) a will so far as it revokes a will which under sections 34 to 42 would be treated as properly made or revokes a provision which under those sections would be treated as comprised in a properly made will, if the making of the later will conformed to any law by reference to which the revoked will or provision would be treated as properly made; and

(c) a will so far as it exercises a power of appointment, if the making of the will conforms to the law governing the essential validity of the power.

The distinction between land and movables would not be so problematic if all jurisdictions used the same definition which cannot be assumed. However, another problem is that some movables are used primarily in relation to land. As can be seen from section 40 of the SLRA, this means that the applicable law governing succession of the movable is the law that governs succession to the interest in the land.

b. Strategy

   i. Separate Will or testamentary document that complies with law of jurisdiction where real property is located

   ii. Another Will or testamentary document for movables that complies with the law of the domicile of the testator

c. Moving Between Jurisdictions

   Real estate does not pose as significant a problem as movables but can still be problematic. For instance, a person who originally was living in a jurisdiction with forced heirship and retains real property there may wish to try to deal with the property differently in their new jurisdiction that does not have those rules. Unfortunately, they simply may not be able to structure succession for the land the way they want. More difficult is the situation where heirs in the new jurisdiction have rights under family laws or dependant's relief legislation that require the land to be used to satisfy the claims. It is not clear how the competing interests will be resolved generally so to the extent the conflict can be predicted, it is worth trying to plan effectively.

   With movables, changing domiciles can obliterate estate plans without anyone realizing immediately. An example is beneficiary designations on RRSPs or RRIFs. In the common law provinces, being able to designate beneficiaries is taken for granted. The laws in Quebec are different and do not apply universally to such plans as RRSPs and RRIFs. Therefore, a person living in Ontario, who takes up residence in Quebec, can have their beneficiary designations on their RRSP nullified with the proceeds forming part of their estate instead of passing to the beneficiary. If this is the same person, no problem; however, that is not always the case.

   Further complicating this issue is the fact that not all RRSPs and RRIFs have the same legal structure potentially. Some are considered contracts creating a debtor-creditor relationship. Others are considered trusts. The *Civil Code*[11] makes a distinction as to when a beneficiary can be designated. Trusts that comply with the *Civil Code* can have beneficiaries but not some forms of plans which can include RRSPs or RRIFs.

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[11] *Civil Code of Québec*, L.R.Q., c. C-1991.

Administration

1. Probating Multiple Ontario Wills in Ontario

    a. Estate Administration Tax (referred to as probate fees pre-*Eurig*[12])

    Section 1 of the *Estate Administration Tax Act*[13] defines the value of a person's estate for the purposes of the Act and reads as follows:

> *"value of the estate" means the value which is required to be disclosed under section 32 of the Estates Act (or a predecessor thereof) of all the property that belonged to the deceased person at the time of his or her death less the actual value of any encumbrance on real property that is included in the property of the deceased person.*

    Section 2 of the Act states:

> **2.**(1) A tax determined in accordance with this section is payable to Her Majesty in right of Ontario by the estate of a deceased person immediately upon the issuance of an estate certificate.
>
> **Exemption**
> (2) If the value of the estate does not exceed $1,000, the estate is exempt from tax under this Act.
>
> **Amount, certificate sought before May 12, 1960**
> (3) The amount of tax payable upon the issuance of an estate certificate for which application is made after May 14, 1950 and before May 12, 1960 is $2.50 for each $1,000 or part thereof of the value of the estate.
>
> **Amount, certificate sought before September 1, 1966**
> (4) The amount of tax payable upon the issuance of an estate certificate for which application is made after May 11, 1960 and before September 1, 1966 is $3 for each $1,000 or part thereof of the value of the estate.
>
> **Amount, certificate sought before June 8, 1992**
> (5) The amount of tax payable upon the issuance of an estate certificate for which application is made after August 31, 1966 and before June 8, 1992 is $5 for each $1,000 or part thereof of the value of the estate.
>
> **Amount, certificate sought after June 7, 1992**
> (6) The amount of tax payable upon the issuance of an estate certificate for which application is made after June 7, 1992 is,
>
> (a) five dollars for each $1,000 or part thereof of the first $50,000 of the value of the estate; and

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[12] *Eurig Estate (Re)*, [1998] 2 S.C.R. 565.

[13] *Estate Administration Tax Act*, S.O. 1998, c. 34, Sch.

(b) fifteen dollars for each $1,000 or part thereof by which the value of the estate exceeds $50,000.

Subsequently-discovered property of the estate
(7) If, after an estate certificate is issued, a statement is delivered under subsection 32 (2) of the *Estates Act* disclosing subsequently-discovered property of the estate, tax in respect of the value of the property is payable when the statement is delivered.

Payment by estate representative
(8) Tax is payable by the estate representative in his, her or its representative capacity only.

Subsection 32(1) of the *Estates Act*[14] reads as follows:

> *(1) The person applying for a grant of probate or administration shall before it is granted make or cause to be made and delivered to the registrar a true statement of the total value, verified by the oath or affirmation of the applicant, of all the property that belonged to the deceased at the time of his or her death.*

The above suggests that the whole value of the deceased's estate must be included for the purpose of calculating the estate administration tax. However, subsection 32(3) states that "Where the application or grant is limited to part only of the property of the deceased, it is sufficient to set forth in the statement of value only the property and value thereof intended to be affected by such application or grant."

Interestingly, the *Estates Act* does not set out the principle of having Wills for specified assets. Section 31 addresses the situation where a person is entitled to letters of administration and allows them to take out such letters limited to the personal estate of the deceased, exclusive of the real estate. It was the *Granovsky Estate*[15] case that popularized the planning technique of using multiple Wills in Ontario for the purposes of avoiding the estate administration tax.

It should be noted that Nova Scotia's *Probate Act*[16] is worded to prevent the use the use of multiple Wills to avoid estate administration taxes. Subsection 87(2) reads as follows:

> *87 (2) Upon any grant, the following tax on all the assets of the deceased person that pass by a will or wills or that are transferred or will be transferred to a trust under a will or wills, whether or not the trust is described in the will as being separate from the estate or that pass upon*

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[14] *Estates Act*, R.S.O. 1990, c. E.21.

[15] *Granovsky Estate v. Ontario*, 1998 CanLII 14913 (ON S.C.).

[16] *Ibid.* 2.

intestacy is payable by the personal representative of the estate from the assets of the estate to the registrar:

(a) in estates not exceeding $10,000, $77;
(b) in estates exceeding $10,000 but not exceeding $25,000, $193.61;
(c) in estates exceeding $25,000 but not exceeding $50,000, $322.21;
(d) in estates exceeding $50,000 but not exceeding $100,000, $902.03;
(e) in estates exceeding $100,000, $902.03 plus an additional $15.23 for every $1,000 or fraction thereof in excess of $100,000.

It will be interesting to see if Ontario enacts similar legislation to thwart the potential slide in revenues from the use of multiple Wills.

The wording about transfers to trust under a will, whether or not the trust is described in the will as being separate from the estate, raises questions regarding insurance and other forms of trusts for plan proceeds such as RRSPs or RRIFs. Section 84A of the *Probate Act* should resolve worries about insurance trusts as it specifically excludes insurance proceeds from the estate administration tax, albeit without reference to the possibility that they may form part of a testamentary trust contained in a Will. The safe option would be to do a separate insurance trust deed that is not a Will.

b. What Forms to File?

   i. Rule 14.05(1) of the *Rules of Civil Procedure*[17] states that the originating process for the commencement of an application is a notice of application and lists several prescribed forms, or an application for a certificate of appointment of an estate trustee and again lists several prescribed forms although not all of them.

      It should be noted that Rule 14.05(3) states that a proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed falls into the list of items (a) through (g). None of those items deals with the proving of a Will or grants of probate or administration (now the issuing of Certificates of Appointment). The latter issues are reserved expressly to Rules 75 and 74 respectively.

      A key reason for differentiating the estate related items in Rule 14.05(3) from those addressed by Rule 74 is that the former applications are inter-party matters. An order issued in those circumstances would only bind the parties to the proceeding. However, an order issued pursuant to Rule 74

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[17] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

being called a Certificate of Appointment, is *in rem* and, therefore, binding on the world. As a result, there is a prescribed process for obtaining the issuance of a Certificate of Appointment. Even an order under Rule 75 proving a Will in solemn form does not replace probate. It simply determines which Will may be submitted to probate and an application under the appropriate portion of Rule 74 would then follow unless third parties waive the requirement for probate.

ii. Rule 74.04 is the appropriate rule where you wish to apply for a limited grant of probate or a Certificate of Appointment of Estate Trustee with a Will Limited to Assets Referred to in the Will. The form of application is either 74.4.1 or 74.5.1 depending on whether the applicant is an individual or a corporate entity.

iii. The materials to accompany the application are listed in Rule 74.04. What is not specifically stated, but presumably covered by (i) on the list (such additional or other material as the court directs) is an affidavit of the applicant setting out the following details:

1. Confirmation that the Will submitted remains in force has not been revoked and governs the disposition of assets enumerated in it;

2. The existence of any concurrent Wills and the value of assets governed by them.

The items in point 2 are not specifically required based on the decision in *Kerzner Estate*[18]; however, the author has experienced estate registrars insisting that the information be provided. The existence of other Wills is not objectionable but the value of the assets governed by them is, on privacy grounds, since they are not part of the particular probate application.

It should also be noted that there may be situations where there are multiple Wills being submitted to probate with each covering different assets and having different estate trustees. Such was the case in *Goushleff Estate*[19]. The case confirms that it is possible to obtain multiple simultaneous grants of probate. Again an affidavit similar to the one discussed above would be needed and the draft Certificates should clearly identify the respective Will on its face.

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[18] *Kerzner Estate (Re)*, 2008 CanLII 42020 (ON S.C.).

[19] *Goushleff Estate (Re)*, 2008 CanLII 53131 (ON S.C.).

2. Cross-Border Probate

This is one area where multiple Wills, or testamentary documents, may actually make things easier. Isolating assets that will require probate in a foreign jurisdiction avoids issues such as:

a. Probating a Will in the home jurisdiction first before obtaining a resealing in the foreign jurisdiction or ancillary grant of probate;

b. Needing an opinion from the originating jurisdiction as to compliance with the formalities of making the Will;

c. Exposing assets in the home jurisdiction to fees and taxes in the foreign jurisdiction that would otherwise not be necessary;

d. Exposing assets in the home jurisdiction to forced heirship rules or other claims in the foreign jurisdiction that may not otherwise apply; and

e. Loss of privacy.

3. Estate Accounting Issues

Maintaining good records is essential and legally required of all estate trustees regardless of the number of Wills. Buttressing this requirement is the right of persons with a financial interest in an estate to bring a motion to pass accounts[20] which makes record-keeping a prudent exercise in managing liability. Increasing the number of Wills does not change an estate trustee's obligations but it does complicate matters. The following is a list of some suggested practices:

a. Read the Wills carefully and make a summary of the relevant terms including assets to be governed by each Will, payment of debts and taxes, executor compensation, paying amounts or gifts from the other estate;

b. Keep separate records of each estate and prepare them in court passing format from the start;

c. Get the opening inventory right. Do not make any assumptions about which assets belong in one estate or the other. It may not be clear at the time of administration whether certain assets were intended to be included in one Will or the other. For example, if a Will says the assets to be included are all those not requiring probate, how do you treat a tax refund or the CPP death benefit? More likely, is the situation of a "non-probatable" Will that does not include miscellaneous provision to catch these types of items because there is only an enumerated list of assets. If necessary, the estate trustee should apply to court for directions;

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[20] *Rule 74.15(1)(h).*

d. Ask suppliers and service providers to render separate accounts or provide detail regarding which amounts apply to one estate or the other. For example, an accounting firm preparing the terminal return and corporate tax return might render one invoice. If this is the case, the expenses have to be apportioned between the relevant estates.

4. Operation of Estate Accounts

Where you have multiple Wills, and only one has been probated, financial institutions will generally expect that only assets governed by the probated Will are going to fall into the estate account (or proceeds of sale of those assets). Depending on what is disclosed when an estate account is opened, financial institutions may require a custom declaration from the estate trustee limiting the operation of the account such as restrictions on the source of funds that can be deposited at least without the notice and consent of the institution. From a practical standpoint, trying to run two estates through one account can be a nightmare especially if there are different beneficiaries or debts and taxes are to be apportioned differently between the two estates.

One option to avoid the issue may be to open a secondary account in the names of the estate trustees personally. This could either be done with the knowledge and consent of the financial institution in which case they will likely want declarations and indemnities. Alternatively, a little less information might be provided to third parties. However, for the protection of the estate trustees where there is more than one, it is recommended that they consider an agreement between themselves and a declaration of trust confirming that the funds are estate funds and governed by the terms of the applicable Will.

The difficulty with the latter strategy is what happens if an estate trustee subsequently dies or must resign (with court approval of course). Presumably the account will be set up as joint with rights of survivorship since it is not intended that the funds actually pass to an estate trustee's estate. If the terms of the Will are such that only the survivors are contemplated as acting, this is fine. However, it is not unusual for there to be provisions for the appointment of alternate estate trustees. If the financial institution is already aware of the circumstances and waived probate, it would be hoped that the successor could just sign the same form of declaration and indemnity with the former estate trustee continuing to be liable most likely although they may have negotiated a cross indemnity from their co-estate trustees.

If the financial institution is not aware, having a new person added may not be as simple. They might start to ask questions about the purposes of the account. Also, with the new anti-money laundering rules persons holding funds in trust have disclosure obligations. More stringent than these rules are those from IIROC (Investment Industry Regulatory Organization of Canada)[21].

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[21] For more information, visit www.iiroc.ca.

As a side note, thought should also be given to account structuring even where you have only one estate but there are testamentary trusts. These trusts are separate from the estate. Once the administration of the estate is complete, the estate account should be wound up and new accounts opened for the respective trusts. The estate trustees are often also the trustees of these trusts but by clarifying the role, it can simplify administration including the ability of these trustees to resign or name replacements. The rules are different compared to those for estate trustees: most significant being that estate trustees cannot resign without court approval which is not always forthcoming as demonstrated by the *Gonder*[22] case. In that case, there were extreme factors of hardship being suffered by the estate trustees and they were kept dangling for want of a replacement or a plan by the court for the administration of the estate in their absence.

Other Forms of Testamentary Documents

The writer thanks the chair of this CLE program, Suzana Popovic-Montag, for establishing a topic capable of broad interpretation. It could have been called simply "Multiple Wills" but Multiple Testamentary Documents is much more thought-provoking. Leaving aside the question of what constitutes a testamentary instrument, even in broad terms the title of this paper is a reminder that Wills are not the only document that can govern the distribution of a person's property on death. There can be:

- Powers of appointment (general or specific) contained in other documents
- Inter vivos trusts with testamentary trust provisions
- Beneficiary designations
- Joint property with rights of survivorship
- Contracts such as shareholder agreements with buy-sell provisions for mandatory sale to surviving shareholders

What does constitute a testamentary document? The writer has yet to see a comprehensive definition or analysis. The *Succession Law Reform Act*[23] is not illuminating and defines a Will at section 1 to include a testament and any other testamentary disposition.

The issue of what can be considered testamentary came up in the *Desharnais v. Toronto Dominion Bank*[24] case where the court found that a beneficiary designation is testamentary. The asset in question was an RSP account and, therefore, the contract would be the testamentary document. Unfortunately, there was not much discussion of the hallmarks of a testamentary

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[22] *Gonder v. Gonder Estate*, 2010 ONCA 172 (CanLII).

[23] *Succession Law Reform Act*, R.S.O. 1990, c. S.26.

[24] *Desharnais v. Toronto Dominion Bank*, 2001 BCSC 1695 (CanLII).

document beyond stating that the designation under consideration was dependant on death for its vigour and effect.

This movement away from only Wills being considered testamentary has significant ramifications. Clear drafting is more essential than ever and greater due diligence is needed from beginning to end in both the estate planning and administration processes.

SCHEDULE 'A'

Concordance with Trustee Act, R.S.O. 1990, c. T.23, § 47: Effect of Revocation of an Erroneous Grant

		Validity of payments/acts	Expenses	Fraud	"Spouse" Definition
Ontario	*Trustee Act*, R.S.O. 1990, c. T.23	§ 47(1)	§ 47(2)	§ 47(3)	§ 47(4)
British Columbia	*Estate Administration Act*, R.S.B.C. 1996, c. 122	§ 22(1)	§ 22(2)	§ 22(1)	*
Alberta	*Administration of Estates Act*, R.S.A. 2000, c. A-2	§§ 1, 35(1) & (3)	***	***	*
Saskatchewan	*Administration of Estates Act*, R.S.S. 1998, c. A-4.1	§§ 27, 29	§ 45(1)	***	*
Manitoba	*Trustee Act*, R.S.M. 1987, c. T 160	§ 83(1)	§ 83(2)	§ 83(3)	**
New Brunswick	*Executors and Trustees Act*, R.S.N.B. 1973, c. E-13	§§ 13, 14	§ 15	§ 16	*
Nova Scotia	*Probate Act*, R.S.N.S. 2000, c. 31	§ 39(1), (2)	***	***	*
Prince Edward Island	***	***	***	***	***
Newfoundland & Labrador	*Judicature Act*, R.S.N.L. 1990, c. J-4	§ 128	***	***	***
Yukon Territory	*Estate Administration Act*, R.S.Y. 2002, c. 77	§ 22(1), 23	§ 22(2)	***	*
Northwest Territories	***	***	***	***	***
Nunavut	***	***	***	***	***

* the term "spouse" is not defined because it is not mentioned in the included legislative section(s)

** although the term "spouse" is used in the included legislative section(s), neither the legislation nor the appropriate regulation(s) define the term

*** unable to find comparable sections in any of the provincial legislation