



NOVA SCOTIA
BARRISTERS' SOCIETY

MEMORANDUM TO COUNCIL

From: Lawrence Rubin and the Professional Standards (Wills, Powers of Attorney and Personal Directives) Committee

Date: November 26, 2021

Subject: Professional Standards (Wills, Powers of Attorney and Personal Directives) Standard – Planning for Assets in Multiple Jurisdictions¹

For: **Approval** **Introduction X** **Information**

DATE	Council	Introduction
November 26, 2021		
	Council	Approval

Rationale:

The Committee is of the opinion that it is important for a lawyer, when taking instructions from a client and drafting a Will, to be aware that many clients own real estate or other assets outside the Province of Nova Scotia. The client may not be aware that laws differ in other jurisdictions and that these can impact the validity or efficiency of their estate planning. The lawyer should be alert to possible issues and discuss options with the clients, including, if necessary, a recommendation to consult with other professional advisors.

An equity lens was applied when drafting and reviewing this proposed standard. That said, concurrent with the introduction of this proposed standard for Member comment, the Committee has submitted it for review in accordance with the Society's Equity Lens Application in Policy Development guideline.

Exhibit:

Proposed Standard – Planning for Assets in Multiple Jurisdictions

¹ No number is attached to this standard at this time. This is the third standard the Committee has presented to Council for introduction. As of the date of this memorandum, the Committee has not discussed a numbering scheme or the order of the initial standards that are set out in its Workplan.

EXISTING STANDARD	PROPOSED STANDARD	RATIONALE
N/A	<p style="text-align: center;">PLANNING FOR ASSETS IN MULTIPLE JURISDICTIONS STANDARD</p> <p>A lawyer must consider whether a client would benefit in having multiple wills¹ or powers of attorney to deal with assets in other jurisdictions. The Nova Scotia will or power of attorney may or may not be effective outside the province².</p> <p>If the lawyer does not practise law in the other jurisdiction³, the lawyer should consult with or refer the client to another lawyer licensed to practise in the other jurisdiction⁴, and collaborate with that other lawyer to accomplish the client's objectives.</p> <p style="text-align: center;">FOOTNOTES</p> <p>¹ The validity of separate wills to deal with assets in different jurisdictions has been recognised by the courts. <i>In the Goods of Astor</i>, [1876] P.D. 150 (England and New York); <i>Douglas-Menzies v. Umphelby</i>, [1908] AC 224 (J.C.P.C.) (Scotland and New South Wales).</p> <p>The rationale for multi-jurisdictional separate wills was set out <i>In re Berkner Estate</i>, 2017 BCSC 619:</p> <p style="padding-left: 40px;">In a world in which individuals frequently maintain assets in different jurisdictions, the convenience of using multiple wills has long been recognized. The testator simply prepares an original will for each jurisdiction in which he or she has assets. The principal advantage is that each will can be submitted to the proper court or put into effect without any dependence on the other will(s). Where there are assets in several jurisdictions, there is no need to limit oneself to two wills. But in each case, care should be taken to ensure that the will satisfies the formalities of execution of the relevant jurisdiction. Likewise, it is necessary to ensure that one will does not accidentally deal with assets that are also dealt with under another will and thereby create a situation of conflict, presumably resulting in the provisions of the later-dated will having priority with respect to the disposition of such assets.</p>	<p>Many of our clients own real estate or other assets outside the Province of Nova Scotia. The clients may not be aware that laws differ in other jurisdictions and these can impact on the validity or efficiency of their estate planning. The lawyer should be alert to possible issues and discuss options with the clients, including, if necessary, a recommendation to consult with other professional advisors.</p>

Great care must be exercised to ensure that one of several wills does not revoke the other: See Revocation Standard.

The practice of multiple wills to deal with different assets in the same jurisdiction is permitted in some Provinces: *Re Granovsky*, 1998 CanLII 14912 (ONCA); *Kaptyn v Kaptyn*, 2010 ONSC 4293; *In re Berkner Estate*, 2017 BCSC 619. The two documents are variously referred to as dual wills, primary and secondary will, probate will and non-probate will, as well as multiple wills.

The better view is that dual wills or multiple wills (to deal with separate classes of assets within Nova Scotia and to avoid probate) will not be effective. *Probate Act*, SNS 2000, c 31, s. 87(2) applies the probate 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 intestacy”. Regulation 41(1) defines the “value of the estate” to be the gross value of the personal property of the deceased and the net value of the real estate [less mortgages and encumbrances] “that passes by a will or wills”. The Inventory includes a sworn Affidavit to the effect that it is “a true statement of all the assets of the deceased at the date of death”. The one permitted exclusion is real estate situate outside Nova Scotia.

2 Generally, the legal requirements for valid execution of a will are similar in all common law jurisdictions but some of them mandate specific forms of affidavits or certificates to prove due execution of the will in common form. Some jurisdictions (for example, Florida) may impose residence requirements for executors. Substantive law and drafting techniques may differ in regard to particular assets. Quebec is a civil law jurisdiction and wills are often executed in notarial form and the original remains in the custody of the notary. Louisiana is also a civil law jurisdiction.

There is far less uniformity in the legal requirements for valid execution of an enduring power of attorney. For example, two witnesses are required in Ontario, and the witnesses may not include the attorney’s spouse or common law partner, the grantor’s spouse or common law partner, a child of the grantor, or a person less than 18 years old. Florida also requires two witnesses. When the donor of a power of attorney is resident in Quebec and becomes incapable, the power of attorney does not become effective without a court order (homologation).

3 *Central & Eastern Trust Company v. Rafuse*, 1986 CanLII 29 (SCC), [1986] 2 SCR 147, 31 DLR (4th) 481, at [58], per Ledain, J.:

“A solicitor is required to bring reasonable care, skill and knowledge to the performance of the professional service which he has undertaken ... The requisite standard of care has been variously referred to as that of the reasonably competent solicitor, the ordinary competent solicitor and the ordinary prudent solicitor.”

4 See Code of Professional Conduct, Commentary [6] to 2.01 (2) Competence.

ADDITIONAL RESOURCES

Lindsay Ann Histrop, *Multiple Wills – Their Use and Drafting Issues*. The author highlights some of the complex drafting issues, including: (i) clear and unambiguous definition of the assets governed by each of several wills – together the multiple wills should dispose of the client’s entire worldwide estate; (ii) choice of executors – if the same, are they legally capable of acting in all jurisdictions, or if different – how will their powers and duties be coordinated? (iii) payment of debts and taxes – particularly if the wills have different beneficiaries, how will they be paid and from which asset pools? (iv) if the assets governed by one of the wills are not sufficient to pay the debts and taxes applicable in that jurisdiction, or the legacies set out in that will, can these be paid from the assets governed by the other will? (v) careful wording for revocation clauses in each of the multiple wills, to ensure that none of them is inadvertently revoked: see Revocation Standard; (vi) careful consideration of residue clauses in the multiple wills – will the remaining assets in one jurisdiction be transferred back to the executors in the jurisdiction of domicile for final distribution or directly distributed by the foreign executors?