Offshore wills - an international dilemma

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Offshore wills

If an individual owns foreign (offshore) assets, the question arises as to whether more than one Will is required.

The reason for this is that the provisions in a Will made in one jurisdiction may not necessarily be recognised in another jurisdiction where the offshore assets are registered. Also, even though one Will could be used, there may be practical advantages in having more than one Will.

Broadly speaking, the options for dealing with offshore assets are: a single Will, which governs the worldwide estate; a Will limited to the jurisdiction where the offshore asset is situated; or a Will dealing with worldwide assets outside the country of domicile (permanent residence). Each of these options has its own advantages depending on the nature of the offshore assets and in which jurisdiction they are situated.

The starting point for analysing how the Will(s) should be structured is to consider what formalities will have to be followed in the foreign jurisdiction to facilitate the succession, as shown in the following examples:

1. Case for one worldwide Will

The first example is where an individual is domiciled in South Africa and the only offshore asset is a bank account registered in England. In this instance, the Will draftsman should consider what the formalities will be, if the testator passes away, to administer the bank account in England.

Each bank in England has their own threshold in which they will release the funds without wishing to see an English court authority and, on average, this is GBP10,000. So if the funds are over the bank's relevant threshold, an English court authority will be required. In these circumstances, there is a fast track procedure called 'resealing' whereby the English court could formally recognise and give effect to the South African letters of executorship.

In this case, the Will draftsman may consider that one worldwide Will is appropriate.

The only drawback is that the South African administration and English administration cannot be conducted simultaneously. Before the letters of executorship can be resealed, court sealed and certified copies of the letters of executorship will first have to be obtained, which may take many months.

However, the draftsman may consider that the slight delay in administering the English account is not worth the trouble of preparing two Wills.

2. Case for a domicile Will and Will outside of the jurisdiction

The second example is that of an individual who is domiciled in South Africa, but also owns unit trusts in Jersey, a bank account in the Isle of Man and stocks and shares in England.

In this example, the assets are located in four different jurisdictions. Preparing four Wills could be quite a messy and dangerous exercise and not appropriate in these circumstances.

A practical solution would be to have the domicile (home) Will, limited to South Africa only.

In addition, there should be an offshore Will, which applies to all jurisdictions outside of South Africa.

The offshore Will could then be used to administer the assets in Jersey, Isle of Man and England.

3. Case for a worldwide Will and separate Will limited to one jurisdiction

A third example is where an individual is domiciled in South Africa, an Italian national, and owns a holiday home in Italy, which is a civil law jurisdiction.

In this example, alarm bells should be ringing for the Will draftsman in South Africa as there may possibly (depending on the family) be forced heirship issues to consider. Also, where immovable property (such as land and houses) is owned abroad, an offshore Will is almost always advisable and, where forced heirship might arise, necessary. This may be because the foreign jurisdiction will only recognise a local Will to dispose of property in their jurisdiction or because an offshore Will can be given authority and used in a more timely fashion, which will then enable the executor to deal with the property more efficiently.

In this example, it would be appropriate for the South African Will draftsman to prepare a worldwide Will excluding Italy and, at the same time, advise the client that they must have an Italian Will dealing with their Italian estate only.

Obtaining advice

Cross-border estates require careful planning and it is always recommended that a professional, such as a qualified FISA member, is consulted to advise on the most appropriate Will structuring.

Tips for individuals:

1. Always advise a Will draftsman if you own foreign assets. Do not assume that a South African Will can adequately dispose of foreign assets in the way that you wish.

2. Always advise a Will draftsman if you already have an offshore Will. If you do not mention this, a later Will may accidentally revoke your offshore Will, which is already in existence.

3. Look carefully at which jurisdiction your assets are registered. For example, remember that the United Kingdom comprises England, Wales, Scotland and Northern Ireland only. The Republic of Ireland, Isle of Man, Jersey and Guernsey are separate jurisdictions. So it is no good asking for a Will limited to the United Kingdom when you hold assets in one of the Channel Islands, such as Jersey or Guernsey.

4. Where you own immovable property abroad, it is almost always essential to have a local Will in place to deal with the succession of the property. In this case, it is usual practice to obtain advice from a lawyer in the jurisdiction where the property is situated.

5. Remember that if you are a foreign national of a civil law jurisdiction, there may be forced heirship (compulsory shares to family members) to consider.

6. When an offshore Will is signed in South Africa, depending in which jurisdiction the offshore Will is to be used, there are specific signing formalities that need to be followed and a professional, such as a member of FISA, should advise on these formalities.

This article was written by FISA member Oliver Charles Phipps, a Solicitor in England with Lester Aldridge LLP.

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