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When not to entrust a trust

LESLEY MAMAN

Trusts are often created to consolidate and protect assets for tax purposes and estate planning. In the case of a minor or an incapacitated adult, trusts are used as a vehicle to protect their assets and ensure they are provided for.

Strangely, many Europeans are unaware of the concept of a trust, and, in many countries, trusts do not exist and are not recognised as a special vehicle for holding assets or diluting tax.

South Africa and the United Kingdom operate under "common law" but most European countries operate under "civil law" derived from Napoleonic law. Civil law is codified and based on Roman law and the Napoleonic Codes. Common law in the case of wills and estates is based on English common law. While common law changes through judgements, precedents and legislation, civil law is codified and only changed through legislation.

This brief explanation shows how issues may arise in different jurisdictions by a simple line in a will without consideration being given to the consequences:

"I bequeath my estate to the testamentary trust…"

The issue of trust recognition is a conflict of law problem. Common law and civil law interpret ownership rights pertaining to immovable property in different ways.

Trusts are predominant in common law countries. Some European civil law countries have signed the Hague Convention – the Recognition of Trusts, 1985. Greece, for example, is not a party to this Convention. Some other European countries have created a similar entity and the concept has been adopted into their civil law codes. Israel, as an example, recognises the benefits of trusts and it is most advantageous to foreign beneficiaries particularly in regard to tax consequences. Its primary requirement is that the trustees be Israeli.

Problems arise when a civil law jurisdiction is faced with a common law trust. The common law perspective views the trust as an entity created for beneficiaries and the preservation and protection of their equitable rights. In a civil law system the most important question in inheritance cases is "who inherits what?"

In countries such as Greece, a trust, as a separate legal entity, is viewed with confusion or suspicion and even as a *"specialised foreign will, capable of taking control of your right to an inheritance"*. Trusts generally appear only as a result of a bequest being contained within a *"foreign"* testamentary trust or in a will nominating an *inter vivos* or existing trust as the sole beneficiary.

Notwithstanding the failure to take any precaution to protect assets in Greece when drawing up a South African will, the will must be registered with the relevant Greek probate authorities. However, if the will has a testamentary trust as the named beneficiary of immovable property, the debacle becomes very intriguing.

In Greece, beneficiaries to any asset in a deceased estate must "accept" their inheritance in writing through the Greek Probate Court. Once the will is registered, the named heirs follow a series of legal steps to be acknowledged as such. In some cases, in order to be recognised, named heirs become embroiled in court proceedings. The Greek Probate Court, its administrators, officials and the Tax Department will look only to a foreign will if it is presented to them to determine the heirs to the estate.

When a clause indicates the beneficiary is a trust or a similar form of devolution to an *inter vivos* trust, material problems quickly arise as the trust is not considered as a legal "entity" or "person". Both testamentary and *inter vivos* trusts have no *locus standi* in Greece.

As the Probate Court in Greece will look to the trust as the named heir, but not recognise the trust as a legal entity, the situation is frozen and finalisation of the estate delayed indefinitely. The trust is viewed by the Probate Court as a peculiar "*special purpose vehicle*" applied by foreigners eager to escape tax consequences. The trust is viewed as the "instrument" of acceptance or the means to inherit, rather than an entity that accepts, on trust, the assets to be held for the class of beneficiaries contained in its constitution. Therefore, in Greece a trust cannot inherit, be a party to any trial or court proceedings or have any tax identification.

Maman

Since the trust and its representatives are not recognised in Greek law if immovable property in Greece is placed in a *foreign* trust (created, for example, in a will) the immovable property is locked in an almost impenetrable non-existent entity. This non-existent entity is unable to follow the legal procedures necessary under Greek civil law, thereby severing right title and interest to the immovable property.

Unfortunately, many people who currently have their Greek immovable property bequeathed in their will or already in a trust may not have been informed that Greek law does not recognise trusts and they therefore have no rights. Any immovable property placed into a trust could, therefore, damage the right, title and interest of the ultimate beneficiary. The trust severs the title to the land and devalues the property the settlor was attempting to protect for his beneficiaries.

Consequently, attorneys may be unaware that they could be harming their clients by including their Greek immovable property in a testamentory or *inter vivos* trust. Similarly, Greek lawyers, who do not utilise trust vehicles in estate planning, may register into the Greek legal system wills containing a trust without realising the eventual impact even within an *inter vivos* trust document and despite a referral to the law of the country in which the trust is controlled, as the controlling law will have little effect.

Immovable property owned in Greece should be excluded from any trust and defined separately to secure the right, title and interest in it. This will save beneficiaries from the ensuing legal fees resulting from the attempts to free property from an unrecognised trust through multiple applications to courts in Greece. This is similarly applicable to other countries in Europe where trusts are not recognised.

There is a haughtiness attached to the assumption that all legal entities are accepted and recognised in all countries. Once a testamentary trust is filed with the court in a country where trusts are not recognised, it may take a long time to resolve. And it is only on the rare occasion, with assistance of experienced counsel, that it may be successfully challenged through careful examination of the constitution of the trust. ◆

Maman is managing partner of Maman Attorneys and a FISA member.

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