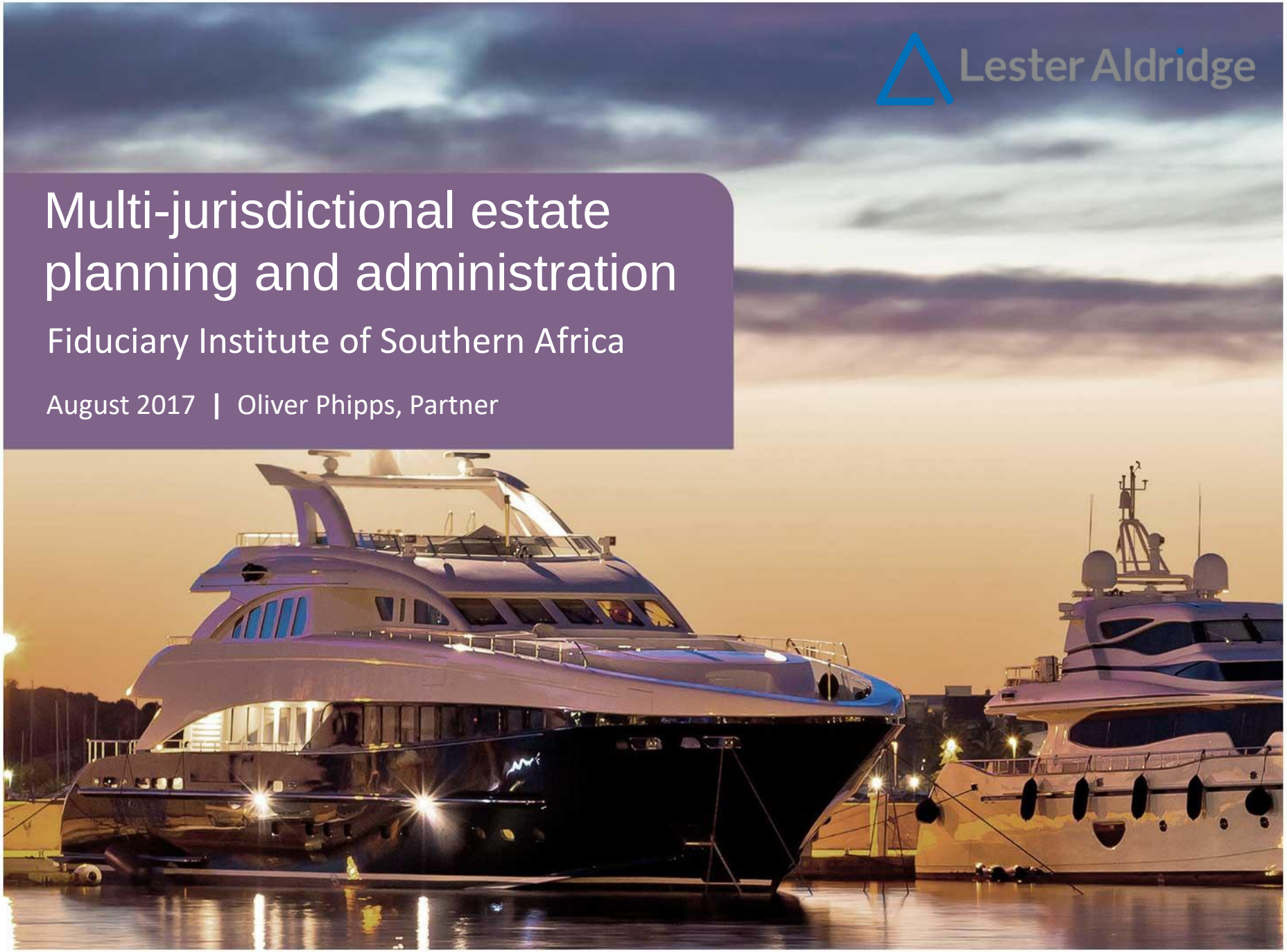


Multi-jurisdictional estate planning and administration

Fiduciary Institute of Southern Africa

August 2017 | Oliver Phipps, Partner

Introduction – a small world

- South African fiduciary practitioners regularly find that their clients or estates have an international element. Here a few common examples:

- **Diversification -** investment portfolios are usually invested on an international basis to gain exposure to foreign markets and to hedge against exchange rate volatility.

- **Foreign property –** it can be an attractive investment opportunity to own foreign property and benefit from the rental income or just to use for pleasure.

- **Families –** have generally become more internationally diverse with the increasing opportunities to study and work abroad.

- **Foreign nationals –** many individuals who have moved to South Africa to live may have retained assets from their country of origin.

Topics for discussion

- **Offshore Wills – one Will or two?** Considering in what circumstances a second Will should be considered.

- **Estates with foreign assets.** Practical estate administration examples considering different asset types from a range of different jurisdictions.

- **Foreign estate taxes.** Discussing when a client or an estate may be exposed to UK inheritance tax or US estate tax.

Will structuring – one Will or two or more?

- If a client owns foreign assets, a practitioner must consider whether a separate Will should be prepared to deal with them.

- The starting point for this analysis is to consider what the estate administration formalities will be to deal with the asset and then decide whether a separate Will would be best to deal with these formalities.

- To conduct this analysis the practitioner will need to know the following:

- In which **jurisdiction(s)** the assets are located. The requirements of the foreign jurisdiction – for example, civil law or common law;

- The **type of asset** and **value**.

Example 1 - foreign bank accounts

- **Certainty in one Will** - some practitioners prefer one worldwide Will when the only foreign asset is a bank account. The reason being that a worldwide Will would, depending on the foreign country, be recognised as valid where the assets are located and that one Will promotes simplicity and certainty in a client's estate planning.

- **Risk of revocation** - one worldwide Will can also reduce the risk of accidental revocation, which can occasionally happen when a client has more than one Will.

- **UK bank account example** - let us take the example of an individual domiciled in South Africa where the only offshore asset is a bank account registered in England. In this example, the person drafting the Will should consider what the formalities will be to administer the bank account in England - if the testator passes away.

Example 1 - foreign bank accounts - 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 approximately £15,000.

- So if the funds exceed the bank's 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.

- So in this example, the person preparing the Will may consider that one worldwide Will is appropriate.

- One 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 can occasionally take many months.

Bank accounts in Switzerland, Luxembourg and the USA

- In these countries, it is usual for the bank to ask for, “a court sealed copy of the court authority and Will from the country of domicile together with the apostille of the Hague Convention”.

- If an offshore Will has been prepared, this can then lead to difficult conversations with the bank’s compliance team when you advise that you can provide these documents, but there is also an offshore Will. Occasionally, the bank’s compliance team will then have to refer the case to their legal team and the requirements can become quite complex.

- So where you have a South African domiciled client with bank accounts in Switzerland, Luxembourg and the USA, I would generally recommend one worldwide Will – unless there are compelling reasons for a second Will to be prepared.

Example 2 – Foreign investment portfolios

- Another example may be a South African domiciled individual who owns a substantial share portfolio registered in Jersey.

- Although one worldwide Will is certainly an option, the advantage in having a separate Will to cover the Jersey estate would be that the two estates could be conducted simultaneously.

- Access to the share portfolio would be quicker for an executor, who would not have to wait or rely on the local South African estate to produce the required documents.

- Remember that the Jersey grant of probate would be required by the investment manager before any instructions such as sales or transfers could be made.

Example 3 – Foreign property (land)

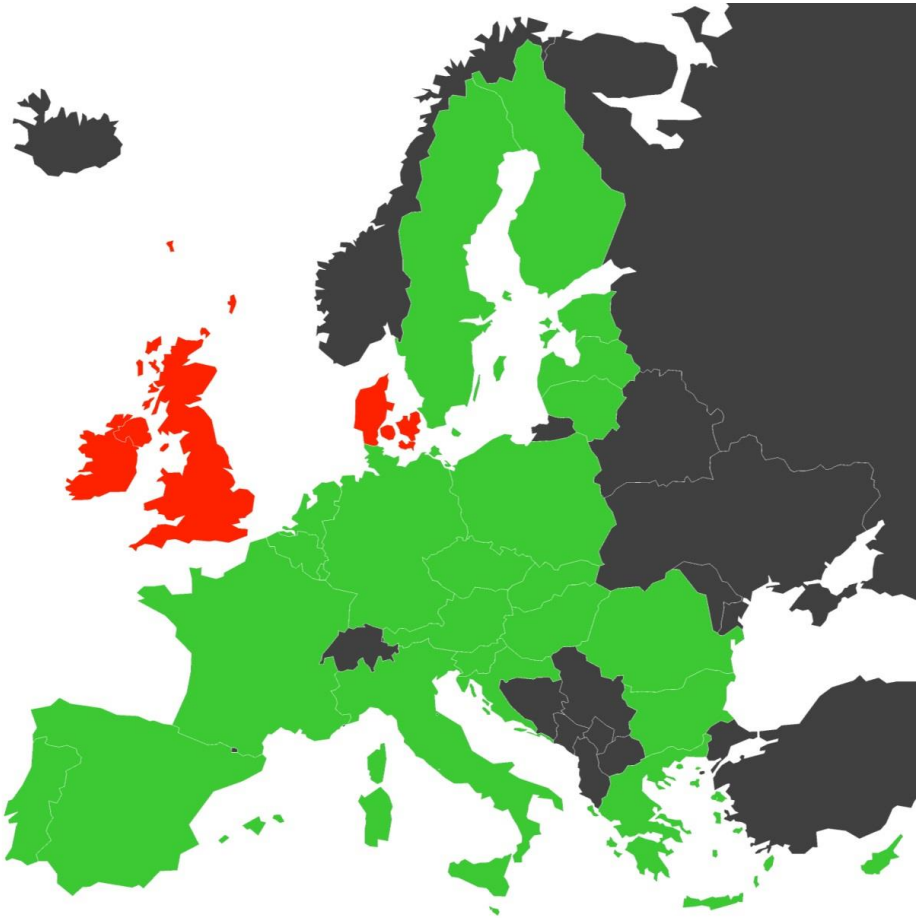
- When an individual owns foreign property (land), it is wrong to assume that one Will is adequate. Foreign property is a good example of when a second Will is almost always recommended.

- Let us take the example of a South African individual who owns property in England. A validly executed worldwide South African Will would be recognised in England. However, in accordance with private international law, property situated in England will pass in accordance with English law.

- So in this example, many practitioners would argue that best practice is either to have a separate English Will or at least to take legal advice in England to check whether the provisions contained in a worldwide Will would work and if the dispositions are efficient for UK inheritance tax purposes.

Example 4 – European Assets

Planning opportunities afforded by the new European Succession Regulation



Example 4 – European assets

- Many countries in Europe, such as France, Spain, Germany and Italy have “forced heirship” rules, which can potentially provide statutory or fixed shares to certain family members and restrict testamentary freedom. So in some cases, a South African individual with assets in certain countries in Europe may be restricted as to whom they can gift their assets.

- However, where a South African individual owns assets located in the European Union (apart from the UK, Ireland and Denmark), the European Succession Regulation (also known as Brussels IV) presents a very useful planning opportunity as an individual can elect for the law of their nationality to apply to the succession of their assets. This can, potentially, be a convenient way to avoid the forced heirship rules and, for a South African national, ensure that South African law applies to the succession of the European assets.

- Making an election in accordance with the European Succession Regulation is not always straightforward and it is recommended that a professional with knowledge of these rules is consulted to advise on the complex considerations.

Offshore Wills – cautionary tales

- **Jointly owned bank accounts and investment accounts**

- **The principle of survivorship** - it is worth mentioning that care should be taken when preparing a Will for a South African client who jointly owns a foreign bank account or investment account. In these circumstances, depending where the account is registered, if one joint owner passes away, the deceased's share may not pass through their estate and may pass automatically to the surviving joint owner. This is known as the, "principle of survivorship".

- The principle of survivorship operates in the UK, Ireland, Jersey, Guernsey, the Isle of Man and many other countries throughout the world. So, for example, a husband who jointly owns a bank account in England with his wife, should not try and make a specific gift in his Will of his share in the joint account to somebody other than his wife, as this could lead to a dispute.

Offshore Wills – cautionary tales

- **Does your client own foreign assets?** Some clients may be shy in disclosing what they own abroad, so it is important to gather this information. Remember that a South African worldwide Will may not always dispose of foreign assets in the way that you wish.

- **Does your client already have an offshore Will?** Always double-check this so that you can agree with your client on the territorial scope of the Will that you are drafting. It could produce quite unfortunate results if your Will accidentally revokes an existing offshore Will – remember to tailor revocation clauses where appropriate.

- **Where are the foreign assets 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 preparing a Will limited to the United Kingdom when your client holds assets in one of the Channel Islands, such as Jersey or Guernsey.

Estate administration and foreign assets

- **The first steps** – write to the foreign institution to check what their requirements are. The requirements will outline if the South African estate documents will be recognised of if a local court authority or notarial declaration is required.

- **Your initial letter** – institutions throughout the British Isles will generally recognise a certified copy of the death certificate – certified by an attorney or notary public. If the institution is located in mainland Europe or the USA (as examples), it is usual for the asset holder to request both a notarised and apostilled copy of the death certificate.

- **Language** – this may sound obvious, but it is recommended to write your initial letter in the language of the receiving country. Otherwise, this may cause a significant delay in receiving a response to your letter.

- **Requirements** – once you know the requirements, you will then be able to make a judgement as to whether foreign legal expertise is required.

England - releasing assets informally

- **Informal requirements** - throughout the British Isles, there is no equivalent of an 18.3 administration. A bank or investment institution will either provide informal requirements to release the asset or ask for a local court authority, also known as “probate” or a “confirmation” in Scotland.

- **Thresholds** are set by the individual asset holder’s compliance teams.

- **England**

  - Under the Administration of Estates (Small Payments) Act 1965 any asset worth less than £5,000 may, at the discretion of the asset holder, be paid out without a grant. Note that the rule allows the asset holder to pay out the funds. The provision is permissive, not mandatory.

  - In practice, asset holders have differing approaches to their compliance and will usually set this threshold well above the £5,000 level.

Jersey - releasing assets informally

- If a person dies domiciled outside Jersey owning assets in Jersey, in their sole name, article 19 (1) of the Probate (Jersey) Law 1998 provides that a Jersey grant must be obtained. Article 19 (2) of the 1998 law provides that a Jersey grant is not required if the value of the Jersey asset is less than £10,000.

- However, it is left to the individual institution's discretion whether they insist on a Jersey grant. In cases where a person dies domiciled outside Jersey, Jersey institutions will often still insist on a Jersey grant being obtained.

Estate administration in the United Kingdom

- Two key differences between an estate administration in the UK compared to SA:

- **The UK inheritance tax account** has to be submitted and inheritance tax paid (if applicable) before the court will issue a grant of representation;

- **The estate accounts** are prepared privately by executor(s) and agreed directly with the beneficiaries. So the involvement of the UK court is generally over once the grant has been issued – unless there is a dispute.

Investment portfolios and foreign estate duties

- **Exposure to foreign estate tax** - when an estate contains a nominee investment portfolio, the executor will be obliged to analyse if there are any foreign investments and, if so, whether there is an exposure to any foreign estate tax.

- The two common foreign estate taxes that may be encountered are UK inheritance tax and US estate tax.

- For this final part of the presentation , I will consider the following :

  - An example of an investment portfolio owned by a South African;
  - Key principles for UK inheritance tax and US estate tax;
  - How the double taxation conventions work between SA and the UK + SA and the US;
  - Why nominee portfolios are transparent for taxation purposes in the UK and the US;
  - Discussing the issue of whether the foreign tax should be paid – if the foreign tax authority has not requested the tax.

Case Study – Holly's investment account

- Holly is resident and domiciled in South Africa and she owns an investment account, which is registered in Switzerland. Holly has not lived in the UK and is not a US citizen.

- The Swiss investment account was once registered in joint names with her late husband, Ben, but his name was removed when he passed away. The investment account is a nominee account registered in her sole name.

- Holly would like to leave the investment account to her children and she has heard that she may be exposed to foreign death taxes and wishes to consult with a professional to see if there is a potential liability.

Case Study – Holly's investment account

- The following investments are held in Holly's account:
  - GBP cash funds = £10,000;
  - UK government bonds £200,000;
  - UK registered shares and listed on the London Stock Exchange = £650,000;
  - UK registered shares and listed on the UK Alternative Investment Market = £100,000;
  - UK unit trusts and shares in UK open-ended investment companies = £200,000;
  - US cash funds = $10,000;
  - US registered shares and listed on the New York Stock Exchange = $650,000;
  - Shares in an investment fund registered in Guernsey = £200,000.

Key UK inheritance tax (IHT) principles

- UK domiciled individuals are liable to IHT on their worldwide property.
- “Domicile” can either be the English common law meaning or the artificial “deemed” or fiscal domicile imposed by tax legislation.
- Those who are non-UK domiciled are only liable on the property which is situated in the UK. For SA domiciled individuals, this is also modified by the double-taxation convention between SA and the UK.
- IHT is currently charged at two rates: £0 - £325,000 is charged at 0% (“the nil-rate band”). The amount above £325,000 is charged at 40%.
- For a married couple (or civil partnership), the nil-rate band can potentially be transferred to the survivor – doubling the nil-rate band for the survivor to £650,000.
- Unlimited spouse exemption if both the married couple are domiciled outside of the UK.

Case Study – Holly's investment account

- **Investments excluded from UK IHT:**

- **UK bank account** – is excluded property if it is denominated in a foreign currency and the account holder is an individual who is not resident or domiciled in the UK.

- Sterling/ GBP accounts held in the UK may be excluded from UK IHT under the double taxation convention between SA and the UK.

- GBP funds held in a bank registered outside of the UK = excluded property.

- **UK government securities** – subject to a number of conditions, may be excluded property.

The Double Taxation Convention (DTC)

Between SA and the UK (SI 1979 No 576)

- **Case Study – Holly's investment account**

- Under the DTC, shares are to be taxed on the basis of locality.

- The shares listed and registered in the UK would be subject to assessment in the UK, but currently fall below the taxable threshold here of £650,000.

- The AIM listed shares may qualify for business property relief – if they have been held for over two years and meet a number of qualifying criteria.

Case Study – Holly's investment account

- **Excluded property** - there are several types of asset which, if specific conditions are satisfied, are classed as excluded property and not subject to UK IHT.

- **Authorised funds** – a holding in an authorised unit trust or a share in an open-ended investment company is excluded if the owner is not domiciled in the UK.

- **Authorised unit trust** – is a unit trust scheme approved under section 243 of the Financial Services and Markets Act 2000.

- **Open-ended investment company (OEIC)** – has the meaning given in section 236 of the Financial Services and Markets Act 2000.

- **Foreign situs assets** – property which is situated outside of the UK is excluded property if the beneficial owner is not domiciled in the UK. However, non-doms will soon be unable to escape IHT on UK residential property owned through the use of structures that include offshore companies, partnerships or trusts.

USA

USA

US shares and investments – a stumbling block for SA investors

- **Case Study – Holly's investment account**

- For South African investors wishing to access global markets and hedge against volatile exchange rates, externalising assets offshore can present great opportunities. International trading platforms allow South African investors to access the US stock market with ease.

- This part of the presentation considers the possible US estate tax implications for South Africans owning US shares.

- The double taxation convention between SA and the US (No 103, 1947) ("the DTC") applies to deaths on or after 15 July 1952.

- The DTC has not been updated since the 1950's and unfortunately contains provisions that have the potential to impede international investment between the two countries.

USA

US shares and investments – a stumbling block for SA investors

- **Case Study – Holly's investment account**

- South Africans investing in US stocks should tread very carefully as the implications for poor estate planning could be severe.

- US tax law will consider a South African domiciled individual who is also a non-US citizen as a "non-resident alien" ("NRA"). The threshold (estate tax exemption amount) for an NRA is set dangerously low at only $60,000 with a top estate tax rate set at 40%. The SA and US DTC operates so that the US will have the privilege of taxing stocks in companies that are registered in the US.

- The result is that, if a South African who is considered as an NRA, passes away owning US stocks valued at over $60,000, a punitive tax could be levied. To compound this punitive tax, unlike the unlimited spouse emption offered in the UK, the US does not offer the equivalent exemption. So even if the US shares pass to a lawful spouse, there is no spouse exemption – unless the surviving spouse is a US citizen.

USA

US shares and investments – a stumbling block for SA investors

- **Case Study – Holly's investment account**

- In this example, the US cash funds that are held would not be subject to US estate tax.

- Although the nominee investment portfolio is registered in Switzerland, this does not shift the situs/ location of the US stocks. For the purposes of US tax law, Holly is still considered to own $650,000 of US stocks at death.

- In these circumstances, there will be no spouse exemption and US estate tax will be levied on the US stocks in accordance with a unified rates schedule for the date that Holly passed away.

Federal transfer certificates

- If clearance is required, the executor will be obliged to complete “Form 706-NA”, which is a complex form. “NA” is an abbreviation for non-resident alien.

- If US estate tax is payable, the tax becomes due nine months after the date of death. Punitive penalties and interest are payable if the nine month deadline is missed.

- Frustratingly, it can then take up to 12 months for the Internal Revenue Service (“IRS”) to process the application and to provide clearance - although currently the timescale is between six – nine months.

- For estates of US citizens, there is an obligation to report the value of the worldwide estate to the IRS irrespective of the domicile of the deceased, but usually only if above the prevailing threshold. US citizens currently (2017) enjoy exemption from US estate tax if the estate is valued below $5,490,000.

Nominee investment portfolios

Transparent for tax purposes

- **Case Study – Holly's investment account**

- Holly was informed that the portfolio of investments in the Swiss nominee account are not exposed to UK IHT or US estate tax as the portfolio is registered in Switzerland and is considered a Swiss asset.

- This is a common misconception. As the portfolio is held in a nominee capacity only, the beneficial ownership of the UK and US investments remain in Holly's personal estate and would still be subject to assessment for tax in the UK and the US.

Should the tax be paid?

A conundrum for South African executors

- **Case Study – Holly's investment account**

- In Holly's case, if she were to pass away and the South African executor identifies that US estate tax is payable, should the estate tax be paid?

- Historically, some investment managers will recognise the letters of executorship and release the assets without requesting tax clearance certificates. If tax clearance certificates have not been requested, should the executor offer the tax to the foreign tax authority, or would this be a breach of an executor's duty?

- The decision is made for the executor when tax clearance certificates are first requested before they will release the assets. We have recently seen investment banks in Switzerland asking for US tax clearance first – where the US investments are valued above $60,000.

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Oliver is an English solicitor specialising in the administration of cross-border estates and estate planning for individuals with assets in multiple jurisdictions. To complement his specialism, Oliver is a practising notary public and a member of the Fiduciary Institute of Southern Africa.

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