



# Navigating the Maze: Exploring Complexities in International Will Drafting

June 2024: Fisa EC CPD Cession, Gqeberha  
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- Judge Doyle in the Cayman Islands case *Monique Hamaty-Simmonds et al v Sylvia Hamety et al* 2021:

“If there is something to learn from this case, it is that it is well worthwhile spending money on practicing lawyers qualified in the relevant jurisdiction to get things right and to ensure that testamentary documents are duly prepared, signed and attested. It is often a false economy to try and undertake important legal matters without the benefit and assistance from duly qualified independent lawyers.”



# Introduction

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- What is estate and succession planning really: a balancing act between the one that plans the patrimony transmission, the one who is in the waiting room, and the creditor
- The duty of the fiduciary practitioner is to effectively facilitate this process
- The testator is often oblivious to the potential complexities and pitfalls when his/her assets, heirs and/or creditors are situated in different jurisdictions
- Fiduciary practitioners should not under-estimate this phenomenon when drafting a Will for a client
- With jurisdictions recognising different concepts and connecting factors, such as **domicile, habitual residence, nationality, and place of marriage celebration**, as well as different laws of succession, estate administration, and tax law, estate and succession planning can become complex



# Legal systems

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There are 3 broad legal traditions in the world:

- Common-law systems: generally uncodified; largely based on precedent (*stare decisis*), meaning previous judicial decisions (UK, Wales, Ireland, US, Canada, Australia, New Zealand, India)
- Civil-law systems: codified; comprehensive legal codes, which are continuously updated (France, Germany, Netherlands, Switzerland, Italy, Portugal, Spain, Greece, Scandinavia)
- Mixed-law systems (mixture of common and civil law) (South Africa, Scotland, Louisiana, Quebec, Malta, Cyprus, Mauritius, Seychelles)

Note: religious and customary-law systems a 4<sup>th</sup> option



# General principles

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- Majority of civil- and common-law jurisdictions: the *lex situs* of fixed property governs its disposition, while the law of the testator's *lex domicilium* governs personal property (“movables follow the person, immovables follow their locality”), but with the *intent of the testator* usually trumping
- Some jurisdictions however, favours principle of unity (Germany, Italy, Poland, Greece, Spain), although subject to EU Succession Regulation
- The main factors used to determine the applicable law: **domicile** (“permanent home”), **habitual residence** (“regular physical presence which must endure for some time”), **nationality** and **situs**
- Uncertainty regarding domicile, habitual residence and nationality should be guarded against
- When the testator elects in a Will his own national law to govern his estate, the substantive validity of that Will shall be governed by the same law



# Specific principles

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- Forced Heirship: the existence, parties included, nature and extent; common phenomenon in civil-law jurisdictions; limits the freedom of testators domiciled in common-law jurisdictions
- Classes of heirs: categories and extent
- Position of surviving spouse: source of rights, nature and extent
- Heirs' successional liability: nature and extent of obligations
- Manner and time of estate transmission
- Conditions, forms and effects of dispositions made *mortis causa*
- The specific interpretation of *domicilium* and/or habitual residence in a particular jurisdiction



# Jurisdictional requirements

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- When dealing with an estate exposed to multiple jurisdictions, different requirements of the applicable domestic systems must be considered:
  - the different locations of the assets
  - the nature of the assets
  - the domicile, habitual residence, citizenship of the testator
  - the tax residence of the testator
  - the applicable matrimonial property regime
  - the law the will is designed to be in compliance with
  - the place where the marriage took place
  - succession laws
  - rules regarding cohabitation, legitimacy, adoption, human rights, divorce, maintenance claims, gender, ownership by minors, estate administration process, probate, etc



# Conflict-of-laws principles

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To determine the applicable law to apply to the Will in case of conflict of laws:

- Real estate: internal law of country where asset is situated (*lex situs*)
- Movables (including money in bank accounts, shareholdings, etc.):
  - internal law of country where the Will was executed
  - internal law of testator's *domicilium* at death
  - internal law of testator's habitual residence
  - internal law of country where testator is a national

To determine the law applicable to the matrimonial property regime:

- the particular property regime may influence the rights of parties at death





# International law

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- Estate planners and Will drafters should be aware of the basic aspects and applicability of international estate and succession law and international private law instruments, such as the Hague Conventions on testamentary disposition, on succession and on matrimonial property regimes; as well as the EU Succession Regulation (Brussels IV) and the EU Matrimonial Property Regulations
- Not all jurisdictions honour the international private law instruments they are bound to (i.e. French Civil Code & German ruling on forced-heirship); Poland case: bilateral agreement between states takes precedence before Succession Regulation in principle
- Be aware of *renvoi* principles: one jurisdiction refers to another
- National law governs beneficiaries, disinheritance, gifts, reservations, liability for debts, ownership, administration process



# Matrimonial property regimes

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- General rule: proprietary consequences governed by the *lex domicilii matrimonii*, the laws of the country where the husband was domiciled when the marriage was concluded, even if the husband subsequently acquires a new domicile
- General principle in SA: in community is an all-encompassing universal community
- General principle in Europe: limited or restricted community; only property acquiring during the marriage
- The questions to ask: (1) who owns the property acquired during the marriage and how is this property divided after the end of the marriage? (2) should the surviving spouse participate in the economic fruits of the marriage and thus be rewarded for his or her contributions? (3) should the surviving spouse participate in the deceased's estate according to the rules of succession law?
- In the absence of a marital agreement and/or a last will, most jurisdictions answer the last two questions affirmatively, but the implementation may differ substantially
- Determine the matrimonial property regime applicable to the client



# Recent case law

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- *D.B v M.B* (10019/2014) [2014] ZAWCHC 178 (2 December 2014)
  - applicant Philippine citizen and respondent German citizen
  - they met in Singapore
  - lived in SA
  - signed in SA in 2004 a notarial agreement regulating spousal relationship
  - married in SA in 2006 with no contract
  - divorce proceedings in 2014
  - respondent argued unsuccessfully *lex domicilii matrimonii* as Germany
- *L.E v L.A* (1884/2018) [2024] ZAGPJHC 104 (9 February 2024))
  - husband was domiciled in Romania at date of ceremony, which is also where the wedding took place (both *lex domicilii matrimonii* and *lex loci celebrationis*)



# Variety of regimes

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- **Germany:** separation of property, community of accrued gains (the default system, meaning separation of property during the marriage and equalisation of gains accrued during the marriage once the property regime has ended)
- **Scotland:** no matrimonial property regime, but spouse has right to communal home, the furniture and a sum of money (protected rights)
- **UK and Wales:** no matrimonial property regime and no reserved portion for surviving spouse
- **France:** legal community, contractual community, separation of property, net additions participation
- **Austria:** separation of property (default regime), notarial contract
- **Turkey:** participation in acquisitions (default regime), separation of property, separation of property with distribution, separation of property, community of property
- **Australia:** no matrimonial property regime (separate property concept), with deferred property regime at death
- **Spain:** community of property for foreigners, subject to EU Matrimonial Property Regulation



# Tips when foreign element present

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- Holistic estate planning: assets, testator, spouse, legatees & heirs
- Determine all connecting factors that may impact testamentary disposition and/or succession
- Familiarise with all applicable jurisdictions and its impact
- Familiarise with relevant documentation: prenup, post-nup, divorce order, other contracts
- Consider separate Will for each jurisdiction where assets are located
- Consider advisers in foreign jurisdictions (especially fixed property)
- The applicability of each separate Will must be clearly defined as well as the scope and the execution date
- Make sure all legal requirements for foreign Will are adhered to
- Make sure that Will does not unintentionally revoke another
- Prevent *renvoi* by electing applicable law in Will
- Address inconsistencies between the separate Wills
- In case of EU connecting factor determine whether the parties entered into a matrimonial property agreement after 29 January 2019



# Tips continue

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- Consider the *nexus* with a particular jurisdiction, the potential tax consequences, forced heirship rules, the existence of applicable double tax agreements, binary agreements, and the legal requirements and consequences of the applicable jurisdiction
- It may be necessary for a separate debts and taxes clause in each Will to address the tax liabilities
- Determine whether any trusts are involved and its impact on estate and succession (EU Succession Regulation does not include trusts)
- Determine whether probate will be applicable
- Determine any limitations on appointment of executors or administrator by law of the *situs* and the powers of such an appointee
- Determine whether any international instruments are applicable (EU Regulations, etc)



# What to consider in applicable Will(s)

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- Make a separate Will for each and every jurisdiction
- Alternatively, a Will for South African assets and another Will for offshore assets
- Stipulate in each Will which jurisdiction is covered by it
- State in each Will what is excluded
- Take the contents of prenup, post-nup, divorce order, other contracts, etc, in consideration
- Take the applicable matrimonial property regime in consideration
- If possible, align the property regime with the succession jurisdiction
- Consider the impact of the various *lex situses* in relation to the applicable property regime
- State the limitation of revocation or variation intended by the Will
- Elect domicile and habitual residence (or nationality where applicable)
- Elect the particular law to be applicable for interpretive purposes
- Elect the particular law to be applicable to the wishes
- Nominate an executor in each will and refer to security
- Grant the power to nominate an offshore attorney or agent to assist
- Specify which debts, costs and expenses may be discharged from each estate
- Indicate in which jurisdiction each Will is signed
- Identify and correctly apply all legal requirements for foreign or worldwide Wills



# Proposed clauses

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1. I am married to John, and although he was domiciled in Germany at the time of our marriage and the ceremony took place in Mauritius, it was registered in South Africa, subject to its matrimonial property regime, out of community of property, in terms of an antenuptial agreement, dated 7 January 2010, read with an explanatory Memorandum of Agreement dated 20 November 2021.
2. I confirm that this Will deals with all my assets situated anywhere in the world; or, this Will is applicable only to my assets situated in the Republic of South Africa.
3. I confirm that this Will was prepared, drafted and executed in South Africa and in consonance with South African Law and should be interpreted in terms of South African law.





# Proposed clauses

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4. My domicile and habitual residence for the purposes of succession and the administration of my estate is the Republic of South Africa.

5. I hereby revoke all previous Wills, codicils and any other testamentary dispositions made by me concerning any assets situated in the United Kingdom, with this Will only being applicable to my assets situated within the jurisdiction of the United Kingdom on the date of my death; or,

I hereby revoke all previous Wills, codicils and any other testamentary dispositions made by me regarding my South African assets, with this Will only being applicable to my South African assets as at the time of my death.

6. I elect for all immovable property situated anywhere in the world to devolve in accordance with the law of their *situs* and all movable assets with the law of my domicile.



# Proposed clauses

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7. I nominate and appoint **PSG Trust (Pty) Ltd** (1993/005950/07), a trust company duly registered in South Africa, to be the executors of my estate, with the right of assumption, and direct that they may apply for a Grant of Probate from an applicable forum, while being exempted from having to grant security for the due fulfilment of their duties anywhere in the world.
  
8. I direct that my nominated executors may appoint qualified fiduciary practitioners, legal representatives, attorneys, accountants, financial advisors or agents anywhere in the world to assist them with the administration of my estate.



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**END** | thank you

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