



## **Offshore structuring for multi-jurisdictional families**

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# Structuring tools

- Will – most basic form
- Joint accounts – roll over on death of first dying
- Diversifying by acquiring assets outside SA
- Life insurance to cater for estate costs and needs of beneficiaries
- Buy and sell agreements & insurance for business owners
- Keyman policies
- Trusts – inter vivos or testamentary
- Trust and company structure
- Special trust
- Philanthropy

# Wills: orderly distribution of assets

Avoiding intestacy

Example: spouse and 2 minor children

estate consists of immovable property, shares, cash

spouse inherits greater of R250,000 or child's share

Practical challenges

Immovable property - registered on minor's name

Disposal or mortgage - Sec 80 of Administration of Estates Act = consent of Master or court

Proceeds of property - Guardian's Fund

# Wills: Freedom of testation

Natural person with testamentary capacity may make a will and leave assets to whomever he or she wishes

Limitations:

<b>Common law</b>	<b>Statutes</b>
Not unlawful	Maintenance of Surviving Spouses Act 27 of 1990
Not against public policy	Pension Funds Act 24 of 1956
Not impractically vague	Wills Act 7 of 1953
Not impossible to fulfil	Subdivision of Agricultural Land Act 70 of 1970
Maintenance of children	Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965
	Matrimonial Property Act 88 of 1984

# Wills: forced heirship

- Certain portion of individual's estate should pass to protected heirs
- Protected heirs = children, surviving spouse and other relatives
- Rules apply irrespective of terms of deceased's Will
- Part of succession law of most civil law and Islamic jurisdictions
- Exact rules differ depending on jurisdiction, but generally applies to immovable property

# Wills: forced heirship example

## Mauritius

- Follows French civil code of forced heirship.
- Complex rules - reserved portion and unreserved portion

Reserved portion	Unreserved portion
1 child = 1/2 of estate	Freedom of choice
2 children = 2/3 of estate	
3 or more children = 3/4 of estate	

Surviving spouse is not a protected heir but entitled to lifetime right of usufruct over matrimonial home and its furniture. This right cannot be altered in any way

Rules apply equally to Mauritian citizens and foreigners with fixed property in Mauritius or who are considered domiciled in Mauritius at time of death

# Trusts: benefits

- Continuity – trust survives life of an individual (donor /trustee/beneficiary) and can span multiple generations
- Protection – heirs without capacity, insolvency, matrimonial and relationship disputes
- Custodianship of assets - preventing assets from being squandered
- Management and control of trust assets – e.g. several owners of same asset who cannot agree on how to manage asset
- Tax benefits - correct distribution of income and capital gains
- Estate duty - minimised or capped

# Trusts: history

## Ancient Roman law: fiducia

Contract between two parties where one transfers property to another for security reasons in a time of danger, under condition that it would be restored or further administered under instruction

*Fiducia cum amico* = agreement between *fiduciant* and a *fiduciarius* to record that property entrusted to *fiduciarius* by the *fiduciant* is not owned by *fiduciarius* but instead administered according to terms set out by *fiduciant*.

## 12<sup>th</sup> Century England: Crusades

Person conveys ownership of his lands to another who would manage estate and pay or receive any feudal dues required. Ownership to be conveyed back to him on his return.

# Trusts: legislation

## Trust Property Control Act 57/1988

“the arrangement through which **ownership** in property of one person is by virtue of a trust instrument made over or bequeathed-

- (a) to another person, the **trustee**, in whole or in part, to be administered or disposed of according to the provisions of the trust instrument for the **benefit of the person or class of persons designated** in the trust instrument or for the achievement of the object stated in the trust instrument; or
- (b) to the beneficiaries designated in the trust instrument, which property is placed under the control of another person, the trustee, to be administered or disposed of according to the provisions of the trust instrument for the benefit of the person or class of persons designated in the trust instrument or for the achievement of the object stated in the trust instrument.....”

Basic but fundamental concept of discretionary trust is separation of ownership and benefits.

# Trusts

Civil law has doctrine of numerus clausus = concept of property law which limits number of types of right that courts will acknowledge as having character of property.

Such jurisdictions would not recognise principle of a separated protected fund owned by a trustee which was segregated from the rest of an estate owners' patrimony.

## Hague Convention on Recognition of Trusts 1985

- Ratifying Convention typically means relevant country has no obligation to carry concept of trusts into its domestic legislation, but it must in principle recognise existence and validity of trusts governed by foreign law as a matter of private international law as long as the designated law is not inconsistent with the mandatory rules of the law applicable in that country
- Some civil law countries ratified eg Malta, Monaco, Italy, Netherlands, Switzerland
- France signed but has not ratified
- Even though ratified it might mean that the relevant country does not have tax law rules as to how to tax benefits from trusts or how to deal with taxation of assets in that country belonging to a foreign trust

# Multi-jurisdictional families

Sources of information on emigration from SA:

- Stats SA
- UN International Migrant Stock database
- National Statistics offices of foreign countries

Top 8 countries	Numbers (2021)	Ratified Hague Convention
UK	217,180	Yes
Australia	206,730	Yes
USA	139,332	No
New Zealand	71,382	No
Canada	51,590	Partially
Netherlands	27,466	Yes
Ireland	15,886	Yes
Portugal	10,630	No

# What does this mean in practice?

Typical high net worth SA client has:

- SA assets
- Business interests
- Non-SA assets – sometimes in joint accounts
- Trusts
- At least 1 child not in SA

# Practical example

Client & wife in SA

Assets in SA and overseas

Trust with BVI trustee and proper law

Wife died unexpectedly

1 Son in SA

1 Daughter emigrated to UK with 1 grandchild

1 Daughter emigrated to South Korea with 1 grandchild

All 5 made loans to the trust

## **Considerations:**

Wife's loan bequeathed to husband, increasing his asset base

Lenders must consider charging interest on loans

UK recognises trusts but has strict tax laws relating to distributions from trusts

Trustee must be careful when acquiring UK assets as it could be punitive from a tax point of view

South Korea has deemed interest rate similar to SA but not much legislation relating to taxation of trust benefits

Client must consider practical implications when drafting his will

# Possible solutions & considerations

- Use will to bequeath SA assets to SA heirs and non-SA assets to heirs not in SA  
**BUT beware of forced heirship rules**
- Use a trust  
**BUT some jurisdictions do not recognise trusts and tax beneficiaries on a look through basis;**  
**BUT some jurisdictions tax foreign trusts if it holds situs assets**
- Use combination of will and trusts
- Consider tax residency of beneficiaries
- Consider whether beneficiaries are still SA residents for exchange control purposes
- Take tax advice in country where assets are situated
- Take advice from expert in succession law in relevant country where assets are situated
- Beneficiaries to take advice in their country of residency



## Questions?

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