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Private Client 2013

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A practical cross-border insight into private client work

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Group Consulting Editor
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Group Publisher
Richard Firth

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Global Legal Group Ltd.
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General Chapters:

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Chapter 3

Key Succession Issues for the Multijurisdictional Estate

O'Sullivan Estate Lawyers

Margaret O'Sullivan

I. Introduction

The world is getting smaller, not larger, with globalisation of clients and their property. Globalisation has a direct impact on estate and succession planning: increased complexity and the need to have a broad understanding of cross-border and multijurisdictional issues. Planning cannot be approached solely from a narrow domestic focus. Increasingly, advisors need a framework of reference to tackle the plethora of issues confronted when issues cross borders. It is hoped that the checklist and commentary presented in this chapter will provide such a useful and practical approach.

II. Checklist and Commentary

The following checklist is intended to identify various key issues for consideration by the professional advisor involved in estate planning for a private client who has multijurisdictional connections when developing, reviewing or modifying elements of the client's estate plan. Every client is of course, unique. It is hoped that advisors will be able to use the checklist as a guideline or aid and modify it to their individual and geographic practice settings.

Succession issues involve much more than the drafting of one's will and powers of attorney, although these elements are the foundation of most estate plans. Instead, the goal of the estate planner and associated advisory team is to develop a comprehensive plan based on an understanding of the client's personal situation and goals. To create the estate plan, the estate planner will ideally liaise with a broad group of advisors, including: financial, tax, legal, investment, and insurance advisors and including those in other relevant jurisdictions.

Special considerations apply to a multijurisdictional client which are not encountered in a purely domestic setting. The multijurisdictional client has a significant connection with one or more other jurisdictions because of such affiliations as his or her citizenship, domicile, residency, place of marriage, and/or the location of his or her personal or business assets.

Under relevant private international law rules, one or more other connections to jurisdictions outside the client's home jurisdiction can result in the application of the law of other jurisdictions to govern aspects of the client's affairs, including property rights and succession on death. The relevance of such connections and which law will apply to it will depend on the particular legal issue being considered and often involves a complex analysis including rules of more than one jurisdiction and how they interrelate (and conflict).

A. Assets, Liabilities and Personal Characteristics of the Client

1. Review and evaluate comprehensive statement of net worth of the client and related entities, including assets and liabilities and related financial disclosure, to accurately determine nature and extent of all direct and indirect ownership interests.

The net worth statement permits the professional advisor to gain an overview of the client's assets and liabilities on a given date and to ascertain their details.

If the client has business interests, the net worth statement may indicate the structure of each such interest: whether proprietorship, partnership or limited partnership, or private company or other legal entity or relationship. Unique planning considerations apply to business interests: for example, the objectives may include to plan for succession of a private business to successive generations of a family. In structuring a business succession plan, it may be necessary to liaise with corporate lawyers and tax advisors, including in multiple jurisdictions.

The net worth statement may indicate whether any assets are jointly owned by the client and other individuals. Certain jointly owned assets, i.e., those held in joint tenancy with right of survivorship, may pass outside the estate on death.

2. Determine location/*situs* of all property interests in each jurisdiction, and review financial disclosure such as title documents, bank accounts, investment accounts, corporate record sheets, life insurance policies, retirement and pension plans and beneficiary designations.

The jurisdiction in which assets are located will normally exercise primary control over them.

Life insurance and retirement and pension plans may be governed by the law of the jurisdiction where the insurer or plan administrator is located or by the law chosen in the relevant contract or other arrangement, which may differ from the client's home jurisdiction. Each should be reviewed to ascertain requirements for the transfer of interests or payments including on death. Generally, a beneficiary may be designated for a life insurance or pension plan policy document in the policy or plan documents themselves, among other methods. The estate planner or advisor may wish to compare any new designations made using other methods, such as designations in a will, with any existing designations. An individual pension plan or similar arrangements which take the form of a contract may restrict the ability of the plan holder to transfer an interest in the plan or its proceeds or on death.

3. Review and evaluate the current estate planning structure being utilised, including wills, trust agreements, and powers of attorney.

The client's current estate planning forms a substantive starting point for their future estate planning. A detailed review is important to clearly understand their situation, including any nuances or unique information. The estate planner must ensure that the client clearly understands any proposed changes to the existing estate plan to ensure the client's goals are met.

4. Review and evaluate all contractual and other legal obligations which may impact the estate, including shareholders' agreements, separation agreements, cohabitation agreements, marriage contracts, court orders, civil claims and actions, charitable donation pledges and commitments, potential claims under dependant's relief legislation, potential forced heirship claims under the laws of any jurisdiction providing for a mandatory scheme for succession of property on death, and other legal claims such as "*quantum meruit*" and constructive trust.

The purpose of this inquiry is to identify all existing and potential liabilities of the client's estate and prior claims on the client's assets at his or her death.

For example, a buy-sell agreement among multiple owners of a business may set out the terms for sale of the client's business interest to co-owners of the business. A domestic contract may provide the client's spouse with an option to purchase a real property owned by the client on his or her death. A separation agreement may create the obligation for life insurance to be purchased and the former spouse named as designated beneficiary in order to secure a child support obligation, or provide for periodic support payments for a period of time which is binding on the estate.

In a number of common law jurisdictions, legislation provides for a dependant's relief from the estate of a deceased whereby a court, on application by a dependant, including the spouse of the deceased or a minor child of the deceased among others if the deceased has not provided adequately for the proper support of the dependant, can order that support be paid from the estate. In addition, some common law jurisdictions permit a court to vary the distribution scheme in a will based on similar grounds.

Forced heirship claims are discussed below in consideration 11.

5. Review the client's family background, the habitual residence, citizenship and domicile of the client and of the client's intended beneficiaries.

The purpose of this inquiry is to determine which laws will likely govern succession to the client's estate and assets passing outside the estate on death, as set out in the estate planning documents and according to private international law principles, and any obligations arising in respect of the client's assets under the laws of succession, matrimonial property, or other laws. In addition, factors such as citizenship, residence and domicile are generally relevant in determining and often critical to consideration of the client's tax liability, which is discussed below. For example, determining whether a person may hold U.S. citizenship or whether their intended beneficiaries do, is key to considering their estate planning given the impact of the U.S. gift and estate tax regime on succession to their property.

In determining which law governs many succession issues, most common law jurisdictions apply the law of the deceased's domicile if the assets involved are not real estate, and local law where real estate is involved. Other countries may apply the law of the country of nationality, or of habitual residence or domicile of the decedent. Many jurisdictions allow for a choice of law in the disposing instrument, such as the will or trust agreement. It will be necessary to determine which law(s) govern succession of the client's property.

With respect to choice of the jurisdiction's law which governs succession to a deceased person's worldwide estate, note the European succession regulation, *Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession*. The European succession regulation generally applies to deaths beginning in summer 2015 (but note certain transitional provisions already in force), and to institutions in participating States in the E.U. (all E.U. Member States with the exceptions of the U.K., Ireland, and Denmark).

6. Consider the matrimonial regimes which impact on the client and his or her ability to transfer property on death, for example: is the client or their assets subject to legislation allowing a spousal claim for equalisation of property on death or for some other claim in respect of spousal or quasi-spousal rights, such as constructive trust or resulting trust claims? Is the client subject to a community of property regime?

Certain common law jurisdictions provide the surviving spouse of the deceased (or possibly, his or her *de facto* spouse) with the right to make a claim against the estate under that jurisdiction's matrimonial property regime for an equitable division of the matrimonial property. For example, under the *Family Law Act* (Ontario), generally, on the death of a married spouse, the surviving spouse may elect to share in the notional growth in the value of the deceased spouse's property acquired during the marriage to the extent it exceeds the value of the surviving spouse's property acquired during the marriage, subject to exceptions. By this election, the surviving spouse forfeits certain entitlements including under the deceased spouse's will or on intestacy, and certain amounts such as the proceeds of certain insurance policies on the deceased spouse's life are credited against the surviving spouse's entitlement.

In common law jurisdictions, it may also be possible for a *de facto* spouse to make an equitable claim for a constructive trust or resulting trust against a client's estate. For example, the constructive trust in Canada's common law provinces is an equitable remedy for unjust enrichment; it has historically been used by *de facto* spouses who lacked access to matrimonial property regimes, although there is some suggestion they may also be used along with such regimes. The requirements of a claim for unjust enrichment against the estate of the deceased include that the claimant has enriched the deceased; that the claimant has suffered corresponding deprivation, and an absence of juristic reason (such as a domestic contract) for the same. Where unjust enrichment is present between *de facto* spouses, the remedy of constructive trust may be available providing the claimant can demonstrate a causal connection between a joint family venture and the spouses' accumulation of wealth. This remedy may allow the *de facto* spouse a right of beneficial ownership in certain property subject to conditions, or a monetary remedy not limited to value received. Alternatively, the equitable remedy of the resulting trust may be available in certain common law jurisdictions; for example, where the non-titled spouse has contributed financially in a direct manner to the purchase of a real property and did not intend to make a gift or loan thereby.

Most civil law jurisdictions provide for some form of community of property. The titled spouse may not have full ownership of the property if it is subject to community property rights and may not have the right to effect a gift of all of the property in his or her name on death.

B. Probate and Construction, Validity and Effect of the Will

7. Consider the need to obtain probate in each jurisdiction where assets are located, the time frame, costs and legal processes involved, including court fees and legal fees based on the nature and value of the assets for which probate may be required.

In common law jurisdictions, a grant of probate or equivalent confirms the testamentary authority of the executors and trustees and requires that the will be proven as to its authenticity generally to a court of competent jurisdiction and withstand any challenges made at that time. Ancillary probate of the same will may be granted in another jurisdiction following probate in order to deal with assets located there. A confirmation by resealing may be available from the court in a Commonwealth jurisdiction to give effect to a grant of probate from another Commonwealth jurisdiction.

Probate may be required in jurisdictions where the client holds assets as a practical matter to confirm the authority of the executors and trustees to manage certain assets, such as bank accounts, or to deal with local authorities on behalf of the estate. Probate fees or equivalent are generally required to be paid at the time of probate.

Probate may not be required for the executors and trustees to manage certain types of assets such as private company shares, interests in a partnership or sole proprietorship, private loans, and personal effects or household effects.

Civil law jurisdictions typically do not require probate. Instead the heir or heirs generally acquire the legal position of the deceased with respect to his or her assets and debts, if they do not repudiate the inheritance subject to conditions. An appropriate person may manage the deceased's assets in his or her own name and right.

8. Determine any particular requirements necessary to secure a grant of probate in the foreign jurisdiction, including those relating to qualifications of the executor and trustee (e.g. residency/nationality), need for a foreign executor to post a bond in order to secure a foreign grant, bonding requirements, and the costs involved.

Obtaining probate in a foreign jurisdiction can be involved and costly, and requirements to secure a grant of probate may vary.

When creating an estate plan, it is advisable to liaise with local legal counsel in the foreign jurisdiction who are familiar with the requirements for probate in that jurisdiction to ensure the appointments made in the will are appropriate. There may be restrictions on the ability of a court in the foreign jurisdiction to appoint one or more executors who are non-resident in the jurisdiction where probate is sought. In addition, an executor non-resident in the jurisdiction where probate is sought may be required to post a monetary bond to the Court.

9. Establish and evaluate how the foreign court would recognise the principal will. Consider language/translation problems and formalities for making a valid will, as well as whether the foreign law will give effect to the terms of the will.

The purpose here is to ensure that, where possible, the foreign court will give effect to the client's testamentary intentions.

To make a valid will, some jurisdictions have unique execution requirements, i.e. the need for more than two witnesses typically required in the common form will used in most jurisdictions based on English law. The will may be invalid and ineffective to deal with assets in the foreign jurisdiction if it does not meet local rules for execution or other formalities. It is advisable in creating the estate plan to have the formalities of the will reviewed by local legal counsel in the foreign jurisdiction to ensure its validity and effect.

10. Establish whether local law will give effect to the substantive terms of the will. Does it offend local law in any way? For example, is it in breach of the foreign jurisdiction's rule against perpetuities or accumulations of income?

As with the formal requirements, the substantive requirements of each jurisdiction with respect to provisions in a will may differ. Provisions in the will may be invalid and ineffective to deal with assets in the foreign jurisdiction if they do not conform with local substantive law. In common law jurisdictions which have not modernised the legal doctrines known as the rules against perpetuities (which prohibits the creation of a future interest in property which may not vest within a given time period, often that of a life-in-being at the time the interest is created plus 21 years or a fixed period of years such as 80 or 100) or accumulations of income (which prohibits the income of a trust to be accumulated and capitalised in the trust beyond a certain period), a provision in a will which offends the rule against perpetuities may be void or voidable, and a provision which offends the rule against accumulations may be wholly or partly invalid, creating unintended consequences.

In addition, the law of the foreign jurisdiction may have a different approach from the home jurisdiction to questions of construction and interpretation of a will, resulting in unintended consequences.

If assets in a foreign jurisdiction are to be administered under a will as part of the client's estate plan, it is often advisable as part of the client's estate planning to have the substantive terms of the will reviewed by local legal counsel in the foreign jurisdiction.

C. Issues Arising with Respect to Civil Law Jurisdictions

11. Most civil law jurisdictions do not allow for complete testamentary freedom and impose a required distribution of property on death among family members. Will the will be given effect in view of these entitlements or result instead in a claim under the foreign law by the heirs to enforce these entitlements?

The purpose of this inquiry is to determine which assets are the client's to dispose of freely upon death or prior thereto.

As an example, in France, a proportion of a decedent's assets, called the "*reserve héréditaire*" is set-aside for his or her children and failing children, for ascendants. The decedent is free to bequeath the remaining portion, called the "*quotité disponible*". Some jurisdictions providing for forced heirship may also take into account *inter vivos* gifts in calculating the share of the deceased's notional property which is reserved for the forced heirs.

It may be possible to estimate the probable amount and manage the risk of a claim by a forced heir against the client's estate.

12. Most civil law jurisdictions do not recognise the concept of a trust. This factor will have to be considered if the planning strategy involves holding assets on trust where the property is located in a civil law jurisdiction. Will the trust be enforced and how will the trustee's rights to deal with the property be recognised? What alternative strategies are available?

The purpose of this inquiry is to ascertain whether any trust used as part of the estate plan will likely be effective for the purposes envisioned: which may include asset protection, tax planning, probate fee minimisation, and/or property management during incapacity. When a common law trust comes into contact with a jurisdiction which does not allow or recognise trusts, difficulties and uncertainties may arise, including with respect to: the trustees' status and powers; the legal nature of the property held in trust and of the legal interests in that property enjoyed by various persons; and the roles of the trustee, settlor and beneficiaries.

Civil law jurisdictions which do not provide for trusts may have existing legal concepts according to which they can analyse trust interests, for example, the German *Treuhand* arrangement, which confers rights under an agreement between two persons to hold property on specified terms. Several jurisdictions including Canada and the United Kingdom and a small number of civil law jurisdictions have ratified the *Convention on the Law Applicable to Trusts and on their Recognition*, the purpose of which is to provide for recognition of trusts and their primary elements in non-trust jurisdictions, and several Canadian provinces and the U.K. among others have implemented the Convention. The Convention applies generally to both *inter vivos* and testamentary trusts provided certain requirements are met and provides among other things for choice of law rules relating to the validity, construction, effects and administration of the trust.

It may be advisable to consult with local legal counsel in the particular civil law jurisdiction who are familiar with local law and customary modes of holding property, and with how a trust may be treated under the law of the foreign jurisdiction.

D. Taxes and Fees and Structuring of Assets

13. Based on the foregoing considerations, evaluate the relative advantages/disadvantages of using one will, versus multiple wills to dispose of assets on death in multiple jurisdictions.

A multijurisdictional will governs succession to assets which are located in several legal jurisdictions. A separate *situs* will governs succession to assets located in only one jurisdiction, and is generally executed in accordance with local formalities.

As part of an estate plan, the client may wish to create one or more wills: a multijurisdictional principal will in respect of his or her worldwide estate or a portion thereof, and, possibly one or more separate *situs* wills to govern assets, if any, which may be located in certain foreign jurisdictions at the date of his or her death.

14. Consider the advantages/disadvantages of using multiple wills in view of the impact of foreign death tax regimes and to prevent possible double taxation of assets. Consider administrative efficacy of separate wills and separate estates in dealing with foreign taxing authorities.

By use of a separate *situs* will, on death the client can create a small, discrete estate in a foreign jurisdiction governing assets in that jurisdiction. The relatively smaller size and complexity of the separate *situs* estate when compared with the testator's worldwide estate, and the independence of the separate *situs* will from any probate process in the testator's home jurisdiction, contributes to efficiency, speed and general ease of administration. Probate fees which may be levied on the basis of the value of assets passing under the separate *situs* will applying local rates may be less than if a multijurisdictional will governing a greater portion of the testator's worldwide estate were submitted to ancillary probate or resealing in the foreign jurisdiction.

15. Consider tax treatment of an inheritance by beneficiary in his or her taxing jurisdiction and seek foreign advice with respect to structuring the inheritance.

Generally, tax on assets which pass on death may be levied on the estate (or the deceased) or, less commonly, on the beneficiary, on various bases relating to personal characteristics of the deceased or beneficiary such as: citizenship and residency and including where a person has recently ceased physical residency in a jurisdiction but maintains tax residency. Furthermore, tax may be levied on the basis of the location of the inherited assets.

Most jurisdictions impose some type of death, succession, or estate tax. In a small number of jurisdictions (including Canada, Australia, New Zealand, and Denmark), capital gains tax applies to the gain in the value of the deceased's property arising on death which may take the place of estate or inheritance tax in that jurisdiction. Subject to conditions, in such jurisdictions it may be possible to effectively defer realisation of capital gains until disposition of the assets by the heirs or beneficiaries.

The possibility for double taxation arises in various situations: including taxation by multiple jurisdictions, and/or in the hands of different taxpayers. Few double taxation treaties provide for relief against double taxation with respect to gift or inheritance taxes, although unilateral measures may take such double taxation into consideration. A notable exception is the tax treaty between Canada and the U.S.: *Convention between Canada and the United States of America with respect to Taxes on Income and Capital*. However, even where provisions for relief against double taxation have been made, the situation may be complicated where the identities of the taxpayers and/or the timing of the tax liabilities differ as between jurisdictions.

With respect to inheritance tax payable by a beneficiary, it may be advisable to consider whether double taxation is expected to arise given the circumstances of the client and the intended beneficiary. It may also be advisable to consider prospectively the expected tax liabilities on the death of an intended beneficiary, particularly if that beneficiary's life expectancy is not longer than the client's, and to plan where possible to structure holdings so that the same assets are not taxed twice in quick succession, first in the hands of the client or his or her estate and then in the hands of the intended beneficiary.

16. Consider tax consequences to client of holding assets in each jurisdiction, in conjunction with taxation based on client's citizenship, nationality or residence or other affiliations and appropriate planning strategies.

The comments under consideration 15 set out the rationale for this consideration. For example, the United States levies transfer taxes including estate tax, gift tax and generation-skipping transfer tax on its citizens wherever resident and on persons domiciled in the U.S. (collectively "U.S. Persons"). For a U.S. citizen, estate tax is calculated on the basis of the fair market value of the gross worldwide estate net of allowable deductions and exemptions, and subject to an effective exemption amount which currently shelters approximately US$5 million from estate taxes but is subject to change effective January 1, 2013, to US$1 million unless Congress takes legislative action. Non-U.S. persons may be liable for U.S. estate tax and their executors and trustees may be required to file a U.S. estate tax return on such persons' U.S. *situs* assets.

17. Consider the efficacy of available "anti-probate" techniques to rationalise holding of assets, streamline the administration of the estate, and minimise probate fees and multiple estate administration proceedings in order to restructure assets so they do not pass through the personal representative on death, including designation of life insurance policies, use of *inter vivos* trusts, joint tenancies and corporations.

Probate fees or equivalent are levied in many common law jurisdictions at the time of probate, generally on the value of the assets passing under the probated will or other instrument or on intestacy. For example, Ontario levies an Estate Administration Tax at approximately 1.5% of the gross value of the assets of the estate passing under a probated will. Anti-probate techniques may be used to avoid the payment of probate fees and the burden of the often lengthy and expensive estate administration process. The estate planner may wish to consider the relative costs and benefits

of anti-probate techniques in light of the compliance and other costs of an arrangement designed to minimise probate fees.

In addition, a will submitted to probate generally becomes a public document, and financial disclosure of the value and assets of the estate is often required. Clients may be motivated to avoid probate to preserve their privacy and that of their beneficiaries by use of techniques and property ownership that passes assets outside the estate.

18. Consider uses of trusts, holding companies and partnerships as management vehicles for holding assets in order to collect the "chains of asset ownership" if assets need to be held in various jurisdictions for distinct purposes relative to each.

The rationale for this consideration is to consolidate the chains of ownership under an umbrella structure which can be easily managed under the common authority of executors and/or trustees. Consideration may be given to the location of the primary vehicle, including in respect of tax during lifetime and any applicable fees and taxes on death. Probate may not be required to establish the authority of the executors and/or trustees to deal with private company holdings.

19. Co-ordinate local foreign lawyers and tax counsel in each foreign jurisdiction to consult on planning, and preparation and review of documentation.

It is important to ensure that a multijurisdictional estate plan is designed to best withstand scrutiny in each jurisdiction where assets are held under the applicable law or whose laws may otherwise apply to the administration of the estate. The cost of such co-ordination can be well worth the time and expense saved, since lawyers and advisors from the foreign jurisdiction may see flaws or opportunities for improvement and optimisation of the estate plan which are not apparent to professionals in the client's home jurisdiction.

20. Consider tax reporting and disclosure requirements and confidentiality/privacy issues.

In conjunction with considerations of tax liability discussed above, it may be advisable to consider the anticipated tax reporting duties and disclosure requirements of the executors and trustees. Generally, executors and trustees are responsible for the payment of taxes from the estate and related compliance, including with respect to the deceased's income taxes, including relating to prior years insofar as such obligations are proper (enforceable) debts of the estate.

Reporting duties and disclosure requirements to the taxing authorities of a foreign jurisdiction typically arise pursuant to an enforceable obligation on the executors and/or trustees in the home jurisdiction to pay tax to the relevant foreign jurisdiction. In common law jurisdictions, there has historically been the "revenue rule" under which the courts have refused to enforce revenue judgments arising pursuant to the law of other sovereign states, either directly or indirectly, subject to exceptions under applicable tax treaties. Many jurisdictions have increasingly entered into bilateral tax information exchange agreements. *The OECD Convention on Mutual Administrative Assistance in Tax Matters*, which nineteen jurisdictions, including the U.K. and the U.S., have currently implemented creates enforceable disclosure obligations.

E. Issues Relating to Incapacity Planning

21. Consider incapacity planning techniques. Will a continuing, durable or enduring power of attorney valid under the law of domicile/residence be given effect in the foreign jurisdiction?

The formal requirements including execution requirements of a continuing, durable or enduring power of attorney for property or for personal care and the formal legal language required to give effect to the substantive provisions may vary significantly across common law jurisdictions. For example, the State of New York prescribes a rigid statutory format for these documents. In the U.K., there is a requirement for government registration with the Office of the Public Guardian to validate a lasting power of attorney. Practically, persons in a foreign jurisdiction may lack familiarity with the form of a power of attorney drafted in the form of the home jurisdiction, and language or interpretation issues with respect to a power of attorney in a foreign jurisdiction may arise to complicate matters.

22. Consider efficacy of a continuing, durable or enduring power of attorney for each jurisdiction in which the client holds assets.

Consideration may be given to ensuring the client has a continuing, durable or enduring power of attorney for each jurisdiction where it is expected to be required. It is necessary to ensure that a power created in a foreign jurisdiction does not revoke powers from another jurisdiction which are expected to be coterminous with it. It may also be advisable to ensure that the team of attorneys is consistent or harmonious across multiple jurisdictions and that the attorneys appointed in the foreign jurisdiction will be capable of handling matters there, including considering possible language requirements and physical location or mobility of the attorneys.

23. Consider other techniques for incapacity planning, such as trusts, including revocable or protective trusts.

Consider also alternatives to a durable, continuing or enduring power of attorney, such as placing assets in an *inter vivos* trust or through a holding company with multiple directors.

III. Conclusion

The purpose of this checklist and commentary is to provide a general aid in evaluating each client's estate planning situation where there are multijurisdictional connections, and to raise general awareness of the complexity of issues that may arise where a person or their property interfaces with, or has an affiliation with more than one jurisdiction. This understanding and approach is never more important than now and will only increase in future with globalisation of clients and their property.

Margaret O'Sullivan

O'Sullivan Estate Lawyers
Ernst & Young Tower
Toronto-Dominion Centre
222 Bay Street, Suite 1410, P.O. Box 68
Toronto, ON M5K 1E7
Canada

Tel: *+1 416 363 3700*
Fax: *+1 416 363 9570*
Email: *mosullivan@osullivanlaw.com*
URL: *www.osullivanlaw.com*

Practises exclusively estate planning; estate litigation; advising executors, trustees and beneficiaries; administration of trusts and estates. Margaret is recognised in *Euromoney's Guide to the World's Leading Trust and Estate Practitioners 2011 - 2012*, in *The Canadian Legal LEXPERT Directory 2011 - 2012* as a leading practitioner in estate planning and in *The Best Lawyers in Canada 2012 - 2013*. Deputy Chair and member of the Board of Directors and Council of Society of Trust and Estate Practitioners ("STEP") Worldwide and former Chair of its Professional Standards Committee. Past Deputy Chair of STEP (Canada) and past Chair of Editorial Board for STEP Inside. Past Chair, Trusts and Estates Section, Ontario Bar Association. Elected Fellow, ACTEC, 1995. Member of Council, Ontario Bar Association (1993-1998). Authored two textbooks *Engineering of a Trust and Trust and Estate Management* for Trust Institute, Institute of Canadian Bankers. Author, Canada Chapter, *International Succession Laws* (Tottel) 2009. Contributing author to *Widdifield on Executors and Trustees* (Carswell 2002). Called to Ontario Bar in 1983.

O'SULLIVAN
ESTATE LAWYERS

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GLG
Global Legal Group

59 Tanner Street, London SE1 3PL, United Kingdom
Tel: +44 20 7367 0720 / Fax: +44 20 7407 5255
Email: sales@glgroup.co.uk

www.iclg.co.uk