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The International Comparative Legal Guide to:
Private Client 2012

A practical cross-border insight into private client work

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Group Publisher
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Global Legal Group Ltd.
59 Tanner Street
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Tel: +44 20 7367 0720
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Chapter 2

Key Considerations in Multi-jurisdictional and Separate Situs Will Planning

O'Sullivan Estate Lawyers

Margaret R. O'Sullivan

Overview

Increasingly, given the increased mobility of clients and globalisation of assets, property at death may be located in several different jurisdictions. As a result, a greater number of clients will require coordinated estate planning using multi-jurisdictional and separate situs wills.

A multi-jurisdictional will is a testamentary document which governs succession of assets located in several legal jurisdictions and either part or all of the testator's worldwide estate. By contrast, a separate situs will is a distinct testamentary document concerning assets located in only one legal jurisdiction, or "situs", and is typically executed in that jurisdiction in accordance with its law. Multi-jurisdictional and separate situs wills are important components of a coordinated estate plan created and implemented with the assistance of experienced advisors.

Benefits of Multi-jurisdictional and Separate Situs Wills

There are strategic, practical and legal reasons for using multi-jurisdictional and separate situs wills. Depending on the circumstances, the advantages may include: avoidance of unnecessary probate costs; adherence to local language both as to form and content; more efficient administration; and, most importantly, greater capability to ensure validity and thereby give effect to the testator's intent.

Avoidance of Unnecessary Probate Costs

Strategically, the benefits of separate situs wills can include a reduction of costs for probate fees. Probate limited to assets covered by the will can possibly avoid local probate fees being charged on the worldwide estate and duplicative probate fees being paid in multiple jurisdictions on the same assets. There is also greater privacy and confidentiality if, based on local rules, only assets and their value governed under the separate situs will need to be disclosed in the probate process, as opposed to worldwide assets.

Adherence to Local Language, Form and Rules

A separate situs will can more easily adhere to local language and form. The use of local language avoids a need for translation. Local form can be used to ensure efficiency in dealing with local advisors and the court process. Moreover, local rules may require the executor be a resident, or require a foreign executor to post a bond. A separate situs will may appoint a local executor, where this is a requirement or is otherwise advantageous.

More Efficient Administration

By use of a separate situs will, the administration of the local estate can be restricted to a smaller and more ascertainable group of assets, creating greater efficiency for estate administration purposes. The administration of the estate can proceed without delay, since a separate situs will can generally proceed directly to probate without any need to wait for probate of the will in the home jurisdiction and then proceed by ancillary probate, resealing of it or other court procedure, a two-step process. The local court may require the original will. If there is only one original will because separate situs wills have not been used, this can be problematic since the original will may have already been submitted and retained by the court of the home jurisdiction granting original probate, or if it has not been probated, it may not be desirable to have the original will retained by the foreign court.

Greater Capability to Ensure Validity

Most importantly, multi-jurisdictional and separate situs wills can help ensure that the will is formally valid and the assets are distributed as the testator intended. The use of separate situs wills can help ensure local formalities are carried out with regard to such matters as form and execution, which is particularly important where real estate is involved. In many jurisdictions, the local law where the real estate is located governs the formal validity of the will in respect of the real estate. Moreover, some jurisdictions have unique execution requirements, i.e., the need for more than the two witnesses typically required in the common form used in most jurisdictions based on English law. [See Endnote 1.]

Local law can be chosen to govern the will therefore avoiding legal problems, including which law should govern interpretation of the will. The will can be made substantively valid with regard to its provisions in accordance with local law and ensure that local law will give effect to the content of the will, and it can take into account local law on such matters as how long income can be accumulated, perpetuities including duration of any trust under the will and when assets must ultimately vest in the beneficiaries, and forced heirship among family members. Similarly, the use of local language and local "legal terms of art" can be used, avoiding translation and interpretation problems.

Proper Preparation Essential

While well-drafted multi-jurisdictional and separate situs wills are powerful planning tools, proper preparation is necessary to realise these benefits. There is a need for co-ordinated planning and drafting by professional advisors located in each relevant jurisdiction. The will plan should be integrated among a principal will and any separate situs wills. The client in conjunction with his or her professional advisors ought to consider among many other issues whether it is advantageous that there be overlap between the groups of executors and trustees chosen in each jurisdiction.

At the outset, there is a need for a comprehensive understanding by estate planning advisors of the client's worldwide assets and any existing separate situs wills. Advisors must be aware of the possibility of accidental revocation on the creation of subsequent wills. There is a concern that if the testator changes a principal will, a prior separate situs will may inadvertently be revoked, given the use of a general revocation clause in most wills.

In addition, there is a need to frequently review the succession plan and ensure it is up to date and reflects the testator's wishes and that there are no conflicts or irregularities. For example, it is important to ensure that both a principal will and a separate situs will do not conflict in leaving the same assets situate in a particular jurisdiction to different beneficiaries. Also, if assets later change or are disposed of, possibly unintentionally, the beneficiaries under the separate situs will may be deprived of their inheritance or there may be an inequity in the distribution of the assets among the various beneficiaries under the various wills.

At the administration stage, there are potential additional costs to multiple estate administrations. Each jurisdiction may levy local probate and administration costs; however, these may be offset by avoidance of double probate in the home jurisdiction and in the jurisdiction where assets are located. There will likely be a need for legal and other advisors in each jurisdiction. Coordination is required among the advisors, and the executors and trustees of the various estates. This investment in proper preparation and administration may avoid costly litigation and interpretation issues in the future.

What Property Passes on Death?

Effect of Family Law Regimes on Succession

Depending on the jurisdiction and governing law, family law may affect succession. If the applicable matrimonial regime is a form of community of property, i.e., the spouses' property and earnings are considered communal property during marriage and are divided equally on marriage breakdown, this may limit what each spouse may dispose of by will. Where spouses are subject to one legal regime for matrimonial property, and another legal regime governs succession to property on death, problems can arise.

A key issue in the context of an estate administration may be what law governs the property rights of the spouses in the context of determining succession to property on death and the validity and effect of the deceased's will. In some jurisdictions, statute law ensures that habitual residents' matrimonial property rights are determined under the local matrimonial property regime. Absent statutory guidance, conflict of law principles may apply. For example, a court of a common law jurisdiction might characterise local property as either real estate or personal property and determine the rights of the spouses under conflict of law principles. The law of the situs would govern the determination of the surviving spouse's share of the estate for real estate, and the law of domicile for personal property.

Which Law Governs Each Will?

When creating a succession plan for assets in multiple jurisdictions, it is important to be aware of the principles and relevant rules determining which law governs succession of property. These rules are complex, and it may be unpredictable how they will be applied to assets in jurisdictions outside the court of the jurisdiction where a principal will is interpreted. Careful drafting and professional advice can address some of these uncertainties.

A. Common Law Jurisdictions - Testate Succession

In common law jurisdictions, different issues relating to the testator's will under general conflicts of law rules are governed by different laws. The capacity to make a will, i.e., the testator's personal physical and mental capability to make a will and whether or not the testator is a minor and has the ability to make a will, is governed by: the law of domicile for personal property; and the law of where the property is located for real estate. The formal validity of a will, relating to its form and execution, is governed by: the law of the domicile at date of death for personal property; and the law of where the property is located for real estate. With regard to a will's validity with respect to its substantive content, generally, the law of a deceased's domicile at the date of death for personal property and the law of its location for real estate will govern.

The construction of the will is interpreted according to the law intended by the testator. At common law, there is a rebuttable presumption that this was the law of the domicile at the time of the execution of the will. In some jurisdictions, statute law may modify the usual conflict of laws rules.

B. Civil Law Jurisdictions - Testate Succession

In civil law jurisdictions, "succession" includes both "succession" in the common law sense and administration of the estate, and no distinction is made with regard to the governing law. Assets and liabilities are directly transmitted to the heirs, as opposed to vesting in the personal representatives who "administer" the estate by collecting in assets, paying liabilities, and distributing the remaining property to the beneficiaries.

With regard to governing law, some civil law systems have "scission" as exists under the common law, meaning that the testator's personal law governs personal property and the law of the location of the property governs real estate, while others are "unitarian", applying the testator's personal law to all inheritance. To determine the testator's personal law, some civil law systems use "domicile", which is linked closely to habitual residence, rather than its common law meaning, and is often interpreted as the place where a person has his or her residence, the centre of his or her affairs and the seat of his or her wealth, and the affection of his or her family. Other jurisdictions use nationality or habitual residence. Habitual residence is often interpreted as the place where one has one's principal home with a certain permanence.

Considerations in the Preparation of Multi-jurisdictional and Separate Situs Wills

Interpretation Issues

Problems can arise where local law under a separate situs will governs interpretation and provides a different interpretation with respect to critical terms from that under the law in the testator's home jurisdiction. For example, does the use of the term "issue" or "children" under local law include or exclude adopted children or children born outside of marriage? Does the term "spouse" refer to only legal spouses or also common-law or same sex spouses under local law? Advisors need to consider key terms and include specific definitions in the separate situs will to avoid unintended results if local law would otherwise provide a meaning not in accord with the testator's intention.

Liabilities, Liquidity and Set-off

In developing a coordinated estate plan using multi-jurisdictional and separate situs wills, advisors should consider in the planning stage how the wills work together to create a unified whole which addresses issues of: liabilities to taxation authorities and creditors; liquidity including ensuring sufficient funds to pay debts, liabilities, legacies and other specific benefits to beneficiaries named in the wills; and set-off provisions which are a tool to equalise benefits or otherwise ensure fair treatment of beneficiaries.

Tax Liabilities

The client and his or her advisors need to consider which executors under which will are liable to pay liabilities on death and to file the deceased's tax returns. It may be necessary to apportion primary and secondary liability among the executors of multiple wills. They also should consider the implications if one estate is insolvent or lacks sufficient assets to discharge tax liabilities.

It is of key importance to draft a debts and taxes clause which takes account of these issues in order to avoid problems which might otherwise arise. Where there are different beneficiaries under each estate, the impact of the allocation of tax liabilities and which estate bears the burden will be a key issue and can create the basis for a dispute. The interpretation of the will and express provisions relating to payment of debts and tax will be important if there is a dispute. Under general conflict of law rules in common law jurisdictions, there is a presumption that the law of the domicile of the deceased at the date of the will governs unless there is evidence to the contrary, such as an express provision in the will with regard to which law governs. As an example, in *Barna Estate*, where the testator had left valid Canadian and French wills, a Canadian court considered whether the applicant, a beneficiary of the testator's Canadian estate may be liable for French taxes on property passing under the French will, and concluded it was not based on the drafting of the Canadian will. [See Endnote 2.]

What right does a taxing authority have to enforce tax liabilities in a foreign jurisdiction against the executors of the estate in that foreign jurisdiction? A general rule of private international laws states that the courts of one country will not enforce, directly or indirectly, claims made for taxes of a foreign government. For example, in *United States of America vs. Harden* the Supreme Court of Canada held that it would not enforce a judgment obtained in California for United States taxes in an action brought in British Columbia. [See Endnote 3.] The traditional basis for this rule is protecting the sovereignty of nations. Enforcing the tax claims of a foreign country may be viewed as an invasion of such sovereignty. In *Dubois v. Stringam*, the Alberta court held that an Alberta administrator of an estate was not authorised to liquidate a farm in Alberta to pay funds to the United States executor of the estate to satisfy United States estate taxes, where the United States estate had a deficiency and could not otherwise pay all the tax. [See Endnote 4.]

However, protocols and conventions may modify this general rule. For example, under the *Canada-United States Convention with Respect to Taxes on Income and on Capital*, as amended, for the stated reasons of avoiding double taxation and combating tax evasion, each of the United States and Canada will effectively collect taxes owing by their respective residents to the other in certain circumstances. See also the *Convention on Mutual Administrative Assistance in Tax Matters*, which provides for exchange of information and service of documents and enforcement of valid tax claims, including inheritance tax claims, by the countries that have ratified the Convention, primarily European nations and the United States.

Where foreign tax claims arise involving multiple wills, it will be necessary for the executors to seek expert legal advice with respect to their obligations. In seeking protection against foreign tax claims, note that this may be problematic if a will directs payment of all taxes as opposed to merely authorising payment.

Creditors

The client and his or her advisors should consider which estate is primarily responsible for payment of debts, and whether foreign creditors of one estate can have recourse against the assets of the other estate in another jurisdiction. Advisors should consider whether the foreign debts are enforceable against the other estate.

Prudent drafting techniques can potentially avoid future problems. For example, each will might provide a set of priorities as regards payment of creditors for that will. A coordinated approach might consider the appointment of a principal executor under a principal will who is ultimately responsible for all the debts. There is a need for co-ordination and careful consideration and drafting of appropriate provisions.

Liquidity and Set-off Among Beneficiaries

It is important to also consider what recourse one estate may have against the other to pay legacies and bequests if there is a deficiency in one of them. As well, it is important to consider the way in which advances made to beneficiaries may affect the distribution in one or more wills.

A "hotchpot" provision in a will may provide that advances made to beneficiaries, including gifts and loans during the deceased's lifetime, are to be taken into account and set off against the beneficiary's entitlement. Problems can arise if each will is not clear with respect to which assets the set-off applies to. The advisor should carefully consider whether a hotchpot clause provides recourse only to a beneficiary's entitlement under the will which creates the hotchpot, or whether it contemplates recourse to a beneficiary's entitlement under an estate under another will or wills as well. Could there be inadvertently a "double hotchpot" provision creating a "double set-off" if more than one will contains the same set-off provision? If there is a deficiency in one estate, would there be recourse against the other estate to ensure full set-off?

Dependants' Relief and Forced Heirship Claims

Certain common law jurisdictions provide by statute for dependants' relief on an individual's death which allows certain persons within a circumscribed relationship to the deceased such as spouses, children and parents to make a support claim where the deceased has not made adequate provision for them under the will. In addition, some common law jurisdictions permit judicial variation of wills where a court finds that a testator has inadequately provided for a person to whom a "moral obligation" is owed. Advisors should consider when a court will take jurisdiction in a dependant's relief claim, and which assets are exposed to a claim, including the question of whether assets in a foreign jurisdiction governed by a separate situs will are included in the computation of the estate's value for the purpose of a claim for dependants' relief. For example, in *Foote Estate (Re),* the court considered the issue of the deceased's domicile. [See Endnote 5.] The finding on domicile would affect the degree and manner in which the family could make dependants' relief claims against the estate because it determined in that case whether the law of the province of Alberta, a Canadian province, versus that of Norfolk Island, an Australian territory

applied, which differed significantly in regards to the liberality and scope of such support claims.

"Forced heirship" arises in civil law jurisdictions where some or all succession rights are codified rather than subject to testamentary freedom. Typically, forced heirship provisions state that a certain portion of the deceased's assets accrue to each forced heir, for example a spouse or child. Advisors should consider how the forced heirship rules of a foreign jurisdiction potentially apply to an estate administered in another jurisdiction, where the principal will or a separate situs will is located in that other jurisdiction.

In the United States, courts have resisted enforcing forced heirship rights in property located in the United States, based on public policy principles of the states (except Louisiana) which disfavour forced heirship. In *Re Jane Renaud*, the New York court refused to allow forced heirship rights to be applied against bank and brokerage accounts in New York and disposed of under a will drawn in New York in which the testator, a French domiciliary, designated that New York law apply. [See Endnote 6.] The deceased's son, a dual citizen of the United States and France, claimed that under French law, he was entitled to a forced share in the accounts. The court relied on the choice of New York law under the will as determinative of the validity and effect of the disposition of assets located in New York.

Conclusion

Multi-jurisdictional and separate situs wills are necessary and powerful planning tools for clients with assets located in multiple jurisdictions; and their use will only continue to grow with increasing mobility and globalisation of clients and their assets. As is evident from the foregoing, there is a need for careful planning and drafting by experienced professional advisors with broad cross-border expertise, and frequent and co-ordinated review of the succession plan. Issues involving administration of the estates falling under multi-jurisdictional and separate situs wills are intricate and complex, requiring a high level of expertise to ensure key issues are identified and properly considered. The majority of issues may be avoided by careful "preventative" drafting of the will plan and subsequent implementation to carry out the client's intentions.

Endnotes

1 However, in each case, care must be taken to consider which law applies to formal validity, which may depend on the nature of the assets, i.e., personal assets including personal effects and financial assets vs. real estate assets, and local statutory law which may include distinctive conflict of law rules.

2 1990 CanLII 1228 (B.C.S.C.).

3 63 DTC 1276.

4 [1992] A.J. No. 1075 (Q.L.), 48 E.T.R. 248.

5 2009 ABQB 654 (Can Lll).

6 437 N.Y.S. 2d 860 (Surr. Ct. 1981) aff'd 54 N.Y. 2d 773 (1982).

Margaret R. 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. Prior to establishing an independent trusts and estates boutique firm, was a partner of Stikeman Elliott where she directed its trusts and estates practice. Member of the Board of Directors and Council for Society of Trust and Estate Practitioners ("STEP") Worldwide and 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) 2007. Contributing author to *Widdifield on Executors and Trustees* (Carswell 2002). Called to Ontario Bar in 1983.

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