O'SULLIVAN
ESTATE LAWYERS

Advisory

Multijurisdictional and separate situs will planning

Given society's increased mobility and the globalization of our assets, it is becoming more common to own property located in several jurisdictions. If you own property in another jurisdiction, you should consider a coordinated and comprehensive estate plan that utilizes a multijurisdictional will or multiple separate situs wills.

In this Advisory, we provide a brief overview of the benefits of multijurisdictional and separate situs wills, as well as summarize a variety of planning points and considerations to be reviewed when creating and implementing an estate plan with assets located in multiple jurisdictions. This Advisory also highlights the importance of working with a team of experienced advisors from the relevant jurisdictions in order to ensure your estate plan is properly integrated and effective.

WHAT ARE MULTIJURISDICTIONAL AND SEPARATE SITUS WILLS?

(a) Multijurisdictional Will

A multijurisdictional will is one testamentary document which governs the succession of assets in several different legal jurisdictions. It is important that advice be obtained from foreign counsel to ensure that any provisions relating to foreign assets do not create any issues under the laws of the foreign jurisdiction.

(b) Separate Situs Will

A separate situs will is a distinct testamentary document concerning assets located in a particular legal jurisdiction (or "situs") and is typically executed in accordance with that jurisdiction's laws. A separate situs will is used in conjunction with a principal will that deals with all of your other assets.

BENEFITS OF MULTIJURISDICTIONAL AND SEPARATE SITUS WILLS

If you have assets located in multiple jurisdictions, there are strategic, practical and legal reasons for using a multijurisdictional will and separate situs wills. Depending on the assets and jurisdictions involved, as well as your own personal circumstances, the advantages may include: (a) ensuring your documents will be valid and that your intentions are realized and given effect; (b) making the administration of your assets upon death more efficient; (c)

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ensuring clarity by using local language and form; and (d) avoiding unnecessary probate costs. Each of these benefits is briefly discussed in more detail below.

(a) Greater Capability to Ensure Validity

Using either a multijurisdictional will or separate situs will can help to ensure that the will is valid and that your assets will be distributed as you intended. Local formalities can be complied with, which is particularly important when real estate is involved. In many jurisdictions, the local law where the real estate is located governs the formal validity of the will as it applies to real estate. For example, there may be special form and execution rules. Some jurisdictions have unique execution requirements such as the need for *more* than two witnesses (which is the typical requirement in most jurisdictions with systems based on English law).

The local law of the foreign jurisdiction can be chosen when appropriate to govern the will dealing with assets in that jurisdiction, which can avoid future legal problems, including confusion regarding which law should govern the interpretation of the will. With the assistance of a local experienced professional advisor, the separate situs will can be drafted so that its provisions are substantively valid under the local law and to ensure that local law will give effect to the content of the will. A separate situs will can take into account local law on such matters as (a) how long income can be accumulated, (b) the period any trust under the will can last before it must terminate, and (c) mandatory succession or forced heirship rules among family members where the local law requires a division of the estate of certain amounts or percentages. Similarly, the use of local language and local "legal terms of art" can be used, avoiding translation and interpretation problems down the road.

(b) More Efficient Administration

By using a separate situs will, the administration of the local estate can be restricted to a smaller and more identifiable group of assets, creating greater efficiency. The administration of the estate can proceed without delay because a separate situs will can usually be directly submitted to probate without waiting for a will to be probated in your home jurisdiction and then trying to have it admitted in the second jurisdiction—a two-step process.

If separate situs wills are not used, the local court may require the original will. As there is only one original will, problems may arise because the original will may have already been submitted to the home jurisdiction court that granted the original probate. Problems may also arise if the original were retained by a foreign court.

(c) Use of Local Language, Form and Rules

A separate situs will can more easily incorporate local language and local formalities. The use of local language avoids a need for translation when it is time for the will to be used in the jurisdiction. Using local form helps to ensure that the court process and administration of assets in the jurisdiction will proceed efficiently. Local rules may also dictate certain requirements that are not found in other jurisdictions. For example, local rules may require the executor to be a resident of the jurisdiction or require a foreign executor to post a bond. A separate situs will can be prepared with these jurisdiction-specific rules in mind—such as by appointing a local person to be executor in that particular jurisdiction.

(d) Avoidance of Unnecessary Probate Costs

Separate situs wills can reduce the total cost of probate fees payable on death. Separate wills for each of the jurisdictions in which you hold assets can avoid local probate fees being charged on your worldwide estate, and duplication of probate fees being paid in several jurisdictions on the same assets.

Separate situs wills can also ensure greater privacy and confidentiality during the probate process if, based on local rules, only those assets and their values which are governed by the separate situs will need to be disclosed during the probate process (as opposed to having to disclose your worldwide assets).

THE IMPORTANCE OF PROPER PREPARATION

While well-drafted multijurisdictional and separate situs wills are powerful planning tools, proper preparation is necessary for you to realize their benefits. In particular, the planning and drafting of the documents need to be coordinated by professional advisors located in each of the relevant jurisdictions. If using separate situs wills, your will plan should be integrated among a principal will and any separate situs wills.

In conjunction with your professional advisors, you should consider the following:

- Is it advantageous to choose parallel groups of executors and trustees in each jurisdiction?

- Will a pre-existing principal or separate situs will be accidentally revoked if changes are subsequently made to one of the wills, given the use of a general revocation clause in most wills? Great care needs to be taken to ensure there is no accidental revocation of a prior will.

- Can the payment of double probate fees on your worldwide assets in both the home jurisdiction and in the jurisdiction where the foreign assets are located be avoided by having the foreign assets dealt with under a separate situs will?

Frequent review of your estate plan is necessary to ensure it is up-to-date, it reflects your wishes, and that there are no conflicts or irregularities, such as the same assets being left to different beneficiaries in each will. As well, if you change your assets or dispose of them at a later date, reviewing your plan is important to ensure that the beneficiaries under the various wills are not unintentionally adversely affected.

Investing in proper advice, preparation and administration may avoid costly litigation and interpretation issues in the future.

WHAT PROPERTY PASSES ON DEATH?

Family Law Regimes and Their Effect on Succession

Family law rules may affect the succession of your property upon death, depending on the specific jurisdictions and governing law involved. If one of the applicable matrimonial regimes is a form of community of property (*i.e.,* spouses' property and earnings are considered community property during marriage and are divided equally between them on marriage breakdown), there may be limitations on what property you and your spouse may each dispose of by will. Problems can arise where spouses are subject to one legal regime for matrimonial property, and another legal regime governs succession to property on death.

When it comes time to administer an estate with assets in multiple jurisdictions, one key issue may be which law governs the property rights of the spouses on death and the validity and effect of a spouse's will.

WHICH LAW GOVERNS EACH WILL?

When creating a succession plan for assets in multiple jurisdictions, it is important to be aware of the legal rules to determine succession of property. These rules are complex, often confusing, and unpredictable in 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, the formal validity of a will (which relates to its physical form and its manner of execution) is governed by: (a) the law of your domicile at date of death for personal property; and (b) the law of where the property is located for real estate. Further, the construction of your will is interpreted according to the law you intend. At common law, there is a rebuttable presumption that this is the law of your domicile at the time of the execution of the will. It is important to note that in some jurisdictions, statutory law may modify these rules.

(b) Civil Law Jurisdictions – Testate Succession

In civil law jurisdictions, 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. Regarding the governing law, some civil law systems have a separate rule for personal property and the law of the location of the property for real estate, while other civil law systems are "unitarian"—applying the testator's personal law to all estate assets.

(c) European Union Succession Regulation

For those with connections to a European Union ("EU") jurisdiction, the EU Succession Regulation may have relevance. Under its terms, a deceased person's "habitual residence" will determine the law that governs succession on death. However, a person can choose to apply the law of his or her nationality if it is different from his or her place of habitual residence. Also, if a person has more than one nationality, he or she can choose any of them to apply, even if it is a non-EU jurisdiction. For Canadians with property in a EU state, it is possible to make a choice of law in a will, including a separate situs will, of the Canadian province or territory you are most closely connected with to apply, which can ensure that forced heirship rules do not apply (see (e) below "Forced Heirship Claims").

CONSIDERATIONS WHEN PREPARING MULTIJURISDICTIONAL AND SEPARATE SITUS WILLS

(a) Interpretation Issues

Problems can arise where local law under a separate situs will governs interpretation and provides a different interpretation or definition for critical terms than those 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 legally married spouses or also common law or same sex spouses under local law? Your advisors will 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 that is not your wish.

(b) Tax Liabilities

In developing a coordinated estate plan using a multijurisdictional will or separate situs wills during the planning stage, your advisors should consider how the wills will work together to create a unified whole and address the issue of tax liabilities.

You will need to consider which executors under which will are liable to pay tax liabilities on death and to file your tax returns. It may be necessary to apportion primary and secondary liability among the executors of multiple wills. You should also consider the implications if one estate is insolvent or lacks sufficient assets to discharge your tax and other liabilities.

A debts and taxes clause can be drafted in order to avoid problems which might otherwise arise. Where you have 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 be the basis for a future dispute. The interpretation of the will and express provisions relating to payment of debts and tax will be important if there is a dispute. 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 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.

What right does a taxing authority have to enforce tax liabilities in a foreign jurisdiction against the executors of the estate in the foreign jurisdiction? A general rule of private international law 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 v. 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. The traditional basis for the 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 authorized 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.

However, protocols and conventions entered into between jurisdictions 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.

When foreign tax claims arise involving multiple wills, it will be necessary for your executors to seek expert legal advice with respect to their obligations.

(c) Creditors

With the guidance of your advisors, you should consider which estate will be primarily responsible for the payment of debts, and whether foreign creditors of one estate can have recourse against the assets of the other estate in another jurisdiction. Consideration should also be given to whether the foreign debts are enforceable against the other estate.

Prudent drafting techniques can be used to potentially avoid future problems. For example, each of your wills might provide a set of priorities regarding payment of creditors for that will. A coordinated approach might entail appointing a principal executor under a principal will who is ultimately responsible for all the debts. There is a need for careful consideration and drafting of the appropriate provisions in the circumstances.

(d) Liquidity and Set-Off Among Beneficiaries

Thought should also be given as to what recourse one estate may have against the other to pay legacies and bequests if one of them is deficient. Similarly, it is also important to consider how advances to your beneficiaries may affect the distribution in one or more of your wills.

(e) Forced Heirship 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 your estate must pass to each forced heir, for example a spouse or a child. Consideration will need to be given to how the forced heirship rules of a foreign jurisdiction 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 disfavor 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 apply. 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 of 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

Multijurisdictional and separate situs wills are necessary and powerful planning tools if you have assets located in multiple jurisdictions. Their use will only continue to grow with increasing mobility and globalization of people and property.

Careful planning and drafting by experienced professional advisors with broad cross-border expertise are critical. So too is the frequent and coordinated review of succession plans that have already been put in place. Issues involving the administration of estates falling under multijurisdictional 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 potential issues can be avoided by the careful "preventative" drafting of your will plan and its subsequent implementation in order to ensure your intentions are ultimately carried out.