

## Key considerations in multi-jurisdictional and separate situs will planning

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Given the increased mobility of clients and globalisation of assets, property at death is more often than before located in several different jurisdictions. As a result, a great number of clients will require co-ordinated estate planning using multi-jurisdictional and separate *situs* wills. A multi-jurisdictional will is a testamentary document that governs the succession of assets located in several legal jurisdictions and either part or all of the testator's worldwide estate. A separate *situs* will, on the other hand, is a distinct testamentary document concerning assets located only in one legal jurisdiction (*situs*), which is typically executed in that jurisdiction in accordance with its law. Multi-jurisdictional and separate *situs* wills are important components of a co-ordinated estate plan that is created and implemented with the assistance of experienced advisers.

This article considers the:

- Benefits of using multi-jurisdictional and separate *situs* wills.
- Great importance of proper preparation in planning and drafting the wills.
- Legal issues when drafting multi-jurisdictional wills and separate *situs* wills which may affect areas such as:
  - the disposal of matrimonial property;
  - governing law for testate succession and the differences between common and civil law jurisdictions;
  - interpretation of certain terms;
  - liabilities, liquidity, and set off; and
  - dependants' relief and forced heirship claims.

### 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:

- In the case of separate *situs* wills only, avoidance of unnecessary probate costs.
- In the case of separate *situs* wills only, use of local language and compliance with local form requirements and rules.
- More efficient administration of estate assets located in particular jurisdictions.
- Most importantly, greater capability to ensure that the testamentary documents are valid, and thereby give effect to the testator's intent.

#### Avoidance of unnecessary probate costs

The benefits of using separate *situs* wills can include reducing costs of probate fees. Limiting probate to assets covered by the will can avoid the possibility of local probate fees being charged on the worldwide estate and probate fees being paid in multiple jurisdictions on the same assets. Greater privacy and confidentiality

is ensured 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.

#### Use of local language and compliance with local form requirements and rules

A separate *situs* will can more easily be drafted in the local language and comply with local form requirements. The use of local language avoids a need for translation, and compliance with local formal requirements and local "legal terms of art" can ensure efficiency in dealing with local advisers and the court process.

In addition, local rules may require the executor to be a resident, or require a foreign executor to post a bond. A separate *situs* will can 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. This creates greater efficiency in estate administration, as a separate *situs* will can generally proceed directly to probate.

In contrast, when only one will is used, which is governed by foreign law, it is necessary to enter a two-stage process: wait for probate of the will in the home jurisdiction and then proceed by ancillary probate, comprising re-sealing of the will or another similar court procedure. In addition, 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.
- If the original will has not been probated, it may not be desirable to have it 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. They 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: for example, they may need more than the two witnesses typically required in the common form used in most jurisdictions based on English law. In each case, of course, care must be taken to consider which law applies to formal validity, which may depend on:

- The nature of the assets (personal assets including personal effects and financial assets versus real estate assets).
- Local statutory law, which may include distinctive conflict of laws rules.

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The use of a separate *situs* will allows for local law to be chosen to govern the will, thereby avoiding legal problems, including which law should govern interpretation of the will. Both types of 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 the duration of any trust under the will and when assets must ultimately vest in the beneficiaries.
- Forced heirship among family members.

### **DRAFTING OF MULTI-JURISDICTIONAL AND SEPARATE SITUS WILLS: PROPER PREPARATION ESSENTIAL**

Proper preparation is essential to realise the benefits from well-drafted multi-jurisdictional and separate *situs* wills. There is a need for co-ordinated planning and drafting by professional advisers located in each relevant jurisdiction. The will plan should be integrated among a principal will and any separate *situs* wills, and consideration given as to whether there should be an overlap between the group of executors and trustees chosen in each jurisdiction.

It is essential that estate planning advisers:

- Gain a comprehensive understanding of the client's worldwide assets and any existing separate *situs* wills, as there is a possibility of accidental revocation on the creation of subsequent wills. This is because if the testator changes a principal will, a prior separate *situs* will may inadvertently be revoked, as most wills include a general revocation clause.
- Frequently review the succession plan to ensure it is up-to-date, 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 separate *situs* will do not conflict by leaving the same assets situated in a particular jurisdiction to different beneficiaries. In addition, 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 avoiding double probate in the home jurisdiction and the jurisdiction where assets are located. There will likely be a need for legal and other advisers in each jurisdiction. Co-ordination is required among the advisers, 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.

### **LEGAL ISSUES WHEN DRAFTING MULTI-JURISDICTIONAL AND SEPARATE SITUS WILLS**

This section considers the particular issues that must be dealt with when drafting multi-jurisdictional and separate *situs* wills, including:

- The effect of matrimonial family law regimes on succession.
- Which governing law applies to testate succession? Common law and civil law jurisdictions.
- Interpretation issues when drafting multi-jurisdictional and separate *situs* wills.
- Concerns relating to liquidity, liabilities, and set-off.
- Dependant's relief and forced heirship claims.

### **Effect of matrimonial law regimes on disposal of property**

Depending on the jurisdiction and governing law, family law may affect succession. If the applicable matrimonial regime is a form of community of property (that is, the spouses' property acquired during the marriage is considered community property and is divided equally on marriage breakdown), this may limit what each spouse can 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.

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 regime. If there are no relevant statutes, conflict of laws 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 spouse under conflict of laws principles regarding succession to property on death. 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 (see below, *Which governing law applies to testate succession? Common and civil law jurisdictions and the EU Succession Regulation*).

### **Which governing law applies to testate succession? Common law and civil law jurisdictions and the EU Succession Regulation**

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.

**Common law jurisdictions.** In common law jurisdictions, different issues relating to the testator's will under general conflict of laws rules are governed by different laws.

The following are generally governed by the law of domicile in relation to personal property, and the law of where the property is located in relation to real estate:

- The capacity to make a will (that is, 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).
- The formal validity of a will, relating to its form and execution.
- A will's validity with respect to its substantive content.

The construction of the will is interpreted according to the law intended by the testator. If this is not specified 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.

**Civil law jurisdictions.** In civil law jurisdictions, succession includes both succession in the common law sense as well as the actual 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 (as in common law jurisdictions) to vesting in the personal representatives who administer the estate by collecting in assets, paying liabilities, and distributing the remaining property to the beneficiaries.

Civil law jurisdictions differ widely in their interpretation of governing law. They either:

- Use *scission* as it 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.

- 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, unlike 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.
- 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.

**EU Succession Regulation.** When creating a succession plan for assets in multiple jurisdictions, it is also important to be aware of the potential operation and application of the new EU regulation for individuals with assets in or other ties to participating EU member states: Regulation (EU) 650/2012 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 (Succession Regulation).

The Succession Regulation, among other matters, provides rules to determine which country's law will apply to a deceased person's estate (both personal property and real estate) and applies to estates of people dying on or after 17 August 2015 (whether with or without a will). Save for the UK, Ireland and Denmark, all EU member states are participating member states under the Succession Regulation.

In most cases under the Succession Regulation, a deceased person's "last habitual residence" will determine which country's laws apply, unless the deceased was "manifestly more closely connected" to another jurisdiction through his or her vital interests such as personal presence, family and, to a lesser extent, business and economic interests. 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 dual or multiple nationalities, he or she can choose any of them to apply to his or her estate, even if it is a non-EU member state. For individuals with EU connections, these features are of particular importance. Consideration of the EU Succession Regulation rules will be particularly important for individuals habitually resident or owning assets in a participating EU member state. For example, in applicable situations the rules can be applied to ensure that forced heirship laws, present in a number of EU member states, do not apply (see below, *Dependants' relief and forced heirship claims*).

### Interpretation issues

Problems can arise where local law under a multi-jurisdictional or separate *situs* will governs interpretation and provides a different interpretation of 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?

Advisers must consider key terms and include specific definitions in the 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 co-ordinated estate plan using separate *situs* wills, advisers should consider in the planning stage how the principal and separate *situs* wills work together to create a unified whole, which addresses issues of:

- Liabilities to taxation authorities.
- Liabilities to creditors.
- Liquidity, including ensuring sufficient funds to pay debts, liabilities, legacies and other specific benefits to beneficiaries named in the wills.
- 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 advisers need to consider:

- Which executors, under which will, are liable to pay tax 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.
- 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. If there is a dispute, the interpretation of the will and express provisions relating to payment of debts and tax will be important. Under general conflict of laws 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 concerning governing law. For 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 (1990 CanLII 1228 (B.C.S.C.)).

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 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 (63 DTC 1276). The traditional basis for this rule is to protect the sovereignty of nations. Enforcing the tax claims of a foreign country may be viewed as an invasion of that 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 ([1992] A.J. No. 1075 (Q.L.), 48 E.T.R. 248).

However, protocols and conventions may modify this general rule. For example, both the United States and Canada will effectively collect taxes owed by their respective residents to the other, in certain circumstances, for the reasons of avoiding double taxation and combating tax evasion (*Canada-United States Convention with Respect to Taxes on Income and on Capital 26 September 1980, as amended by Protocols signed 14 June 1983, 28 March 1984, 17 March 1995, 29 July 1997 and 21 September, 2007*). In addition, the exchange of information and service of documents and enforcement of valid tax claims, including inheritance tax claims, has been agreed to between the countries that have ratified the Council of Europe and OECD Convention on Mutual Administrative Assistance in Tax Matters, originally primarily European nations but as a result of a 2011 amendment, its ratification has now been opened up to all countries.

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

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claims, this may be problematic if a will directs payment of all taxes as opposed to merely authorising payment.

**Liabilities to creditors.** The client and his or her advisers 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. Advisers 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 co-ordinated 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.** It is important to consider what recourse one estate may have against the other to pay legacies and bequests if there is a deficiency in one of them.

**Set-off among beneficiaries.** It is also important to consider the way in which advances made to beneficiaries may affect the distribution in one or more wills. A will may include a hotchpot provision, which provides 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 adviser 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. For example:

- 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**

**Dependants' relief.** Certain common law jurisdictions provide under 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. Advisers 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 dependant's relief. For example, in *Foote Estate (Re)*, the court considered the issue of the deceased's domicile at date of death (2009 ABQB 654 (*CanLII*)). 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, or the law of Norfolk Island, an Australian territory applied; those laws differed significantly in regard to the liberality and scope of those support claims.

**Forced heirship.** 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. Advisers 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 (437 N.Y.S. 2d 860 (*Surr. Ct. 1981*) *aff'd* 54 N.Y. 2d 773 (1982)). 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.

This article has demonstrated that there is a need for careful planning and drafting by experienced professional advisers with broad cross-border expertise, and frequent and co-ordinated review of the succession plan. Issues involving administration of 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.

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- Regularly advises on all aspects of estate planning.
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- Estate litigation.
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**Professional associations/memberships**

- Past Deputy Chair and past member of the Board of Directors and Council for the Society of Trust and Estate Practitioners (STEP) Worldwide.
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**Publications**

- Author of *Engineering a Trust* and *Trust and Estate Management* (Trust Institute of the Institute of Canadian Bankers).
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