



It's Complicated: Using Multijurisdictional Wills and Powers of Attorney with O'Sullivan Estate Lawyers

WEBINAR

Wednesday, 20 January 2021
10 a.m. EST / 3 p.m. GMT



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Thank you for joining us today

- This session is being recorded for replay
- Listen-only mode during the presentation
- Please submit questions via the Question Panel
- Questions will be addressed in the Q&A session at the end of the presentation



Presenters



O'SULLIVAN ESTATE LAWYERS LLP – TORONTO, CANADA



Margaret O'Sullivan



Susannah Roth



Stephanie Battista



Marly Peikes

Margaret O'Sullivan

Presenter



Introduction

Multijurisdictional and
Separate *Situs* Wills and
Powers of Attorney:

Why Are They Necessary?
Benefits?

Multijurisdictional and Separate *Situs* Wills and Powers of Attorney



WHY ARE THEY NECESSARY? BENEFITS?

- Increased mobility of clients, plus
- Increased globalization of assets necessitate ...

Greater need for coordinated estate planning, including multijurisdictional / separate *situs* wills and powers of attorney



Agenda



1. Benefits of Multijurisdictional and Separate *Situs* Wills
2. Special Planning and Drafting Issues
3. Legal Issues in Drafting
4. Dependant's Relief, Forced Heirship Claims
5. European Succession Regulation
6. Benefits of Separate *Situs* Powers of Attorney
7. Special Considerations in Planning and Drafting Multiple Powers of Attorney
8. Impact of Hague Convention XXXV

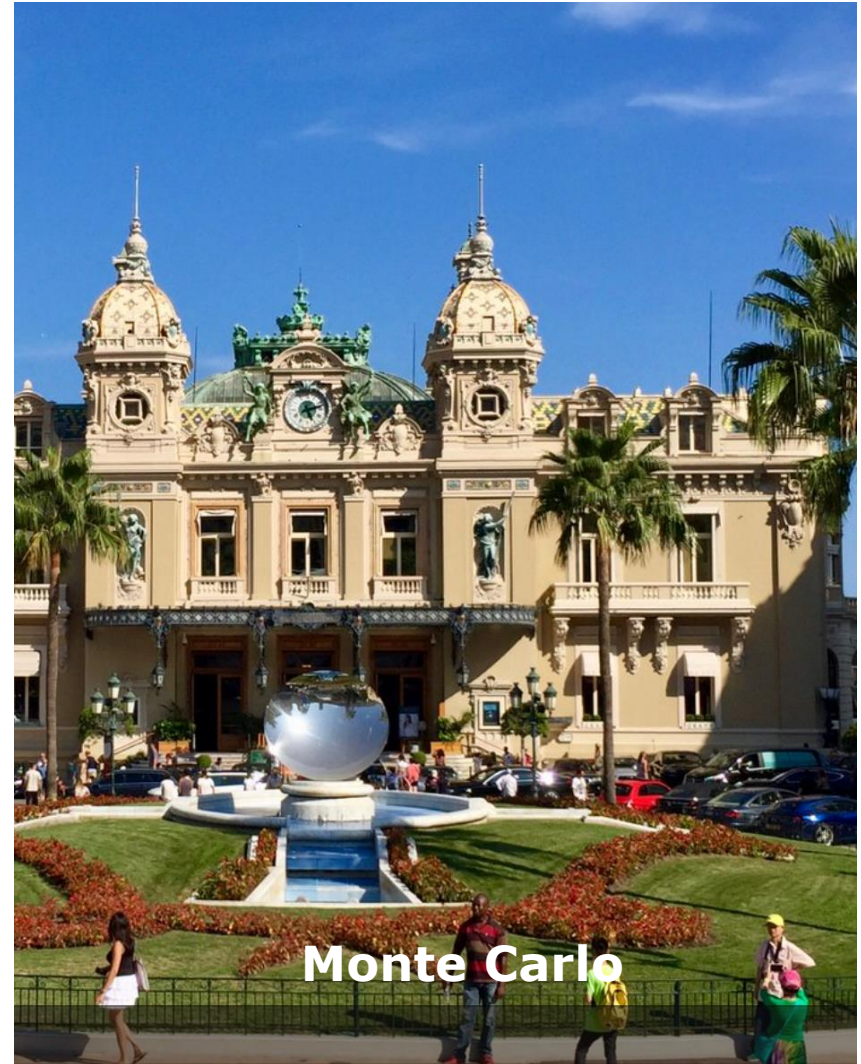
1.

Benefits of Multijurisdictional and Separate *Situs* Wills

Benefits of Multijurisdictional and Separate *Situs* Wills



1. Avoidance of unnecessary probate costs
2. Greater privacy in probate process
3. Use of local language (Including local “legal terms of art”)
4. Compliance with local requirements and rules (i.e. appointing a local executor)



Benefits of Multijurisdictional and Separate *Situs* Wills



- More efficient administration of foreign assets
- Greater capability of ensuring formal validity
- Choosing local law to govern interpretation and substantive validity of separate *situs* will where applicable and available



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offices, Toronto**

2.

Special Planning and Drafting Issues

Special Planning / Drafting Issues



Coordinated and thorough planning and drafting by advisors in each relevant jurisdiction is essential:

1. Comprehensive understanding of client's worldwide estate and any existing wills
2. Integration of principal will with any separate *situs* wills
3. Consider overlap amongst executors/trustees
4. Frequent review of succession plan to ensure it is up-to-date with no conflicts or irregularities
5. Minimize costly litigation and interpretation issues in administration stage

3.

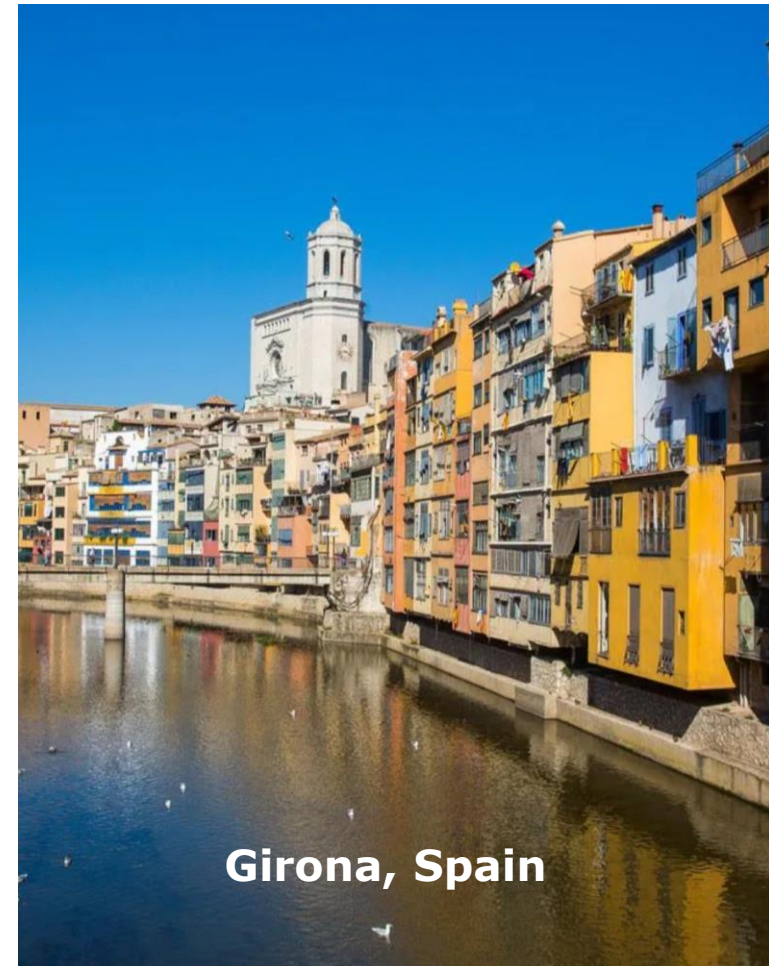
Legal Issues in Drafting

Legal Issues When Drafting Multijurisdictional and Separate *Situs* Wills



Effect of matrimonial regimes on disposal of property:

- Matrimonial family law may affect succession (e.g. community of property regimes)
- Interplay with conflict of laws rules regarding succession to property on death



Girona, Spain

Legal Issues in Drafting Multijurisdictional and Separate *Situs* Wills (Cont'd)



Determining applicable governing law for testate succession

- Common law jurisdictions
 - Domicile
 - *Situs*
- Civil law jurisdictions
 - *Scission*
 - Unitarian



Boca Raton, Florida

Legal Issues in Drafting Multijurisdictional and Separate *Situs* Wills (Cont'd)



Interpretation issues regarding critical terms

- E.g., “issue” inclusive of adopted children or children born outside of marriage?
- E.g., “spouse” exclusive of common law and/or same-sex spouses?



Legal Issues in Drafting Multijurisdictional and Separate *Situs* Wills (Cont'd)



Creating a unified and coordinated approach to liabilities, including:

- Payment of tax liabilities
- Payment of other creditor liabilities
- Allocating/apportioning liabilities between estates
- Implications of one estate being insolvent
- Impact on different pools of beneficiaries



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Toronto**

Legal Issues in Drafting Multijurisdictional and Separate *Situs* Wills (Cont'd)



- Liquidity (as amongst the various estates)
- Set-off among beneficiaries:
 - Consider possibility of “double hotchpot” and “double set-off”
 - If deficiency in one estate, recourse against another estate?



Susannah Roth

Presenter



Poll Question 1



In considering having a separate situs will, or advising clients to do so for assets in different jurisdictions, what do you think the biggest challenge or hurdle is?

- a) Additional legal fees and process is expensive;
- b) Finding legal advisors with the right expertise;
- c) Communication issues in dealing with different legal regimes, rules and languages; or
- d) Too much legal complexity and lack of harmonization among the laws of different countries.

Margaret O'Sullivan

Presenter



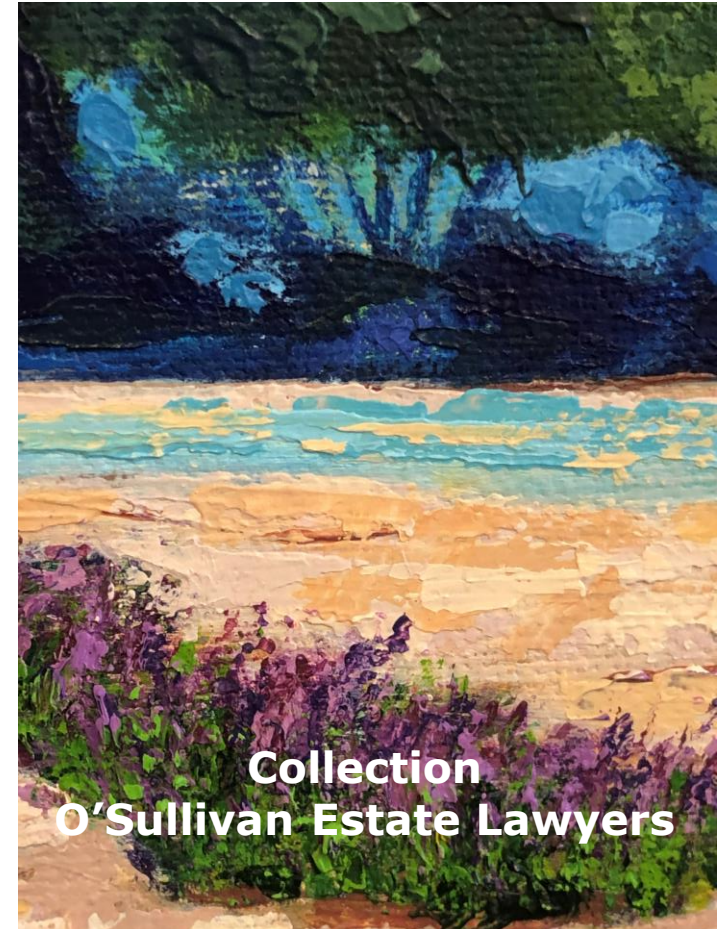
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Dependant's Relief, Forced Heirship Claims

Dependant's Relief Claims (Common Law Jurisdictions)



- Consider:
 - Availability of statutory claim for dependant's relief
 - Availability of judicial will variations ("moral obligations")
 - Assets exposed to such claims



Forced Heirship (Civil Law Jurisdictions)



- Some/all succession rights may be codified with limitations to testamentary freedom
- Consider how forced heirship rules of foreign jurisdiction may potentially apply to estate administered in another jurisdiction



Buen Retiro Park, Madrid

5.

Impact of European Succession Regulation

Consider European Succession Regulation



- Prior situation: conflict of laws rules (Private International Law rules, or PIL) apply to succession matters. Each jurisdiction is unique.
- Succession Regulation in force for deaths from August 17, 2015.
- Applies in all EU states except Denmark and Ireland. **(24 states total)** Never applied in the U.K.
- Goal = unity and simplify rules governing succession, while also increasing predictability.



European Succession Regulation (Cont'd)



Applicable Law:

- Unified choice of law rules
- One member state's laws will apply to entire worldwide estate—both moveables and immoveables (**unitarian in nature**)
- Primary connecting factor = deceased's last **habitual residence**
- Exception: if deceased was "**manifestly more closely connected**" to another jurisdiction



European Succession Regulation (Cont'd)



Applicable Law (Cont'd):

- Option to choose the law of nationality (if differs from place of habitual residence)
- Express or implied choice made in a will
- Multiple nationalities: any one of them may be chosen (including non-member states)
- Choice subject to later modifications or revocation



European Succession Regulation (Cont'd)



Practical effects on non-EU persons:

- Persons with assets in member state, but not nationals or habitually resident in any.
- Persons who are “habitually resident” in a member state at the time of death, but not nationals.
- Persons who are nationals of a non-EU member state and hold dual or multiple nationalities in member states.

Stephanie Battista
and
Marly Peikes
Presenters



Case Study 1



- Sophia Martini has ties to both Italy and Canada.
- Not married; no children.
- Grew a greengrocer business into a chain of gourmet food shops.
- Became a philanthropist.
- Sophia and her sister inherit valuable and substantial property in Italy.
- Sophia had an Ontario will and an Italian will.

Case Study 1: the Facts



- Italian will: real and personal property in Italy bequeathed to Sophia's sister
- Later Ontario will: general revocation clause and primary beneficiaries are charities.
- Death taxes clause provides for all death taxes to be paid from the estate.



Case Study 1: the Issues



1. Does the Ontario will revoke the Italian will?
2. Is there any legal basis to argue the Ontario will is not revoked?



Tuscany

Case Study 1: Thorny Issues



1. Is the Ontario estate liable for payment of Italian inheritance tax?
2. How could Sophia's will plan have been prepared to avoid these legal problems?



Margaret O'Sullivan

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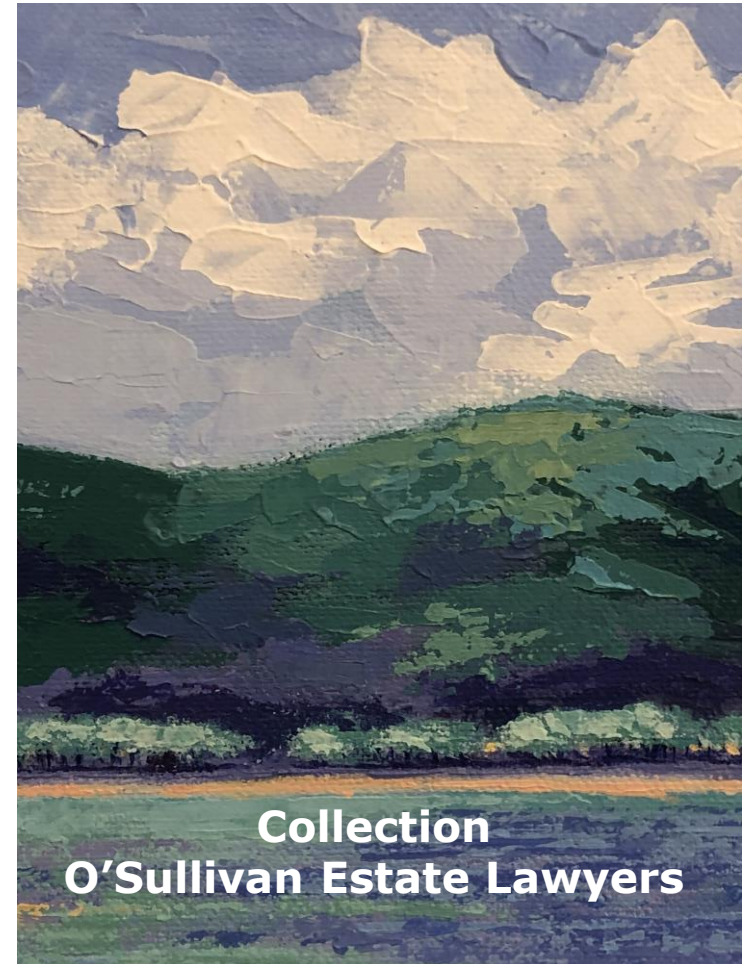
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Benefits of Separate *Situs* Powers of Attorney

Benefits of Separate *Situs* Powers of Attorney



- The problem of recognition of the “home” power of attorney in another jurisdiction.
- Practical solution: a power of attorney in each jurisdiction where one has assets or spends significant time.
- Need to understand where assets are located and each person’s lifestyle and residence patterns.



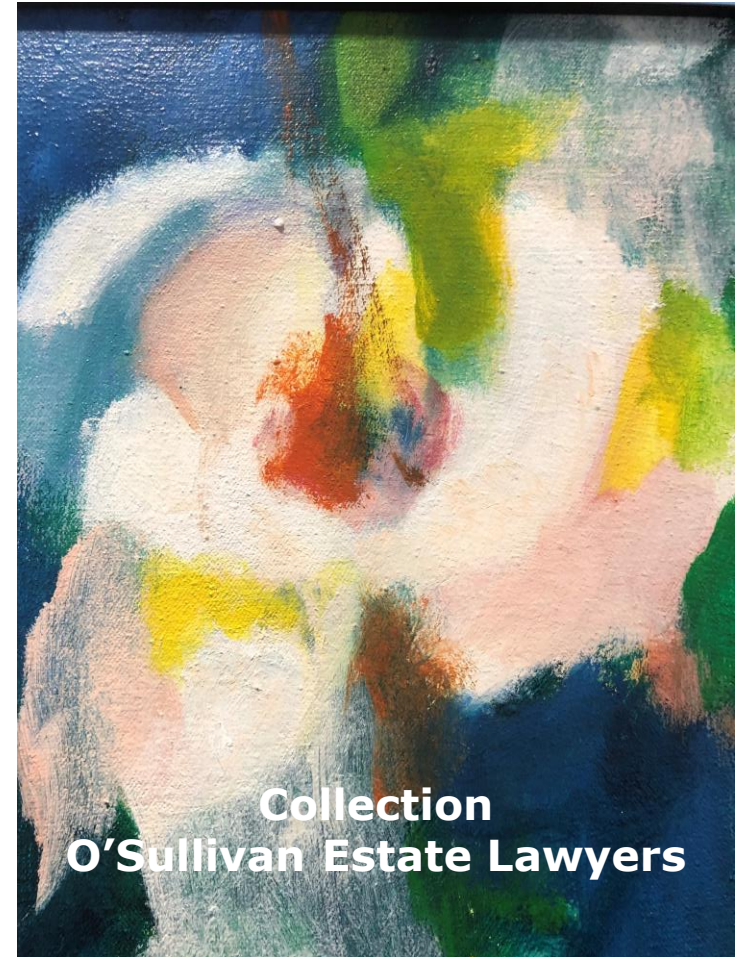
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Special Considerations in Drafting Multiple Powers of Attorney

Special Considerations in Drafting Multiple Powers of Attorney



- Inadvertent revocation of a prior power of attorney
- Multiple attorneys
- Termination
- Compensation of attorneys
- Standard of care
- Execution requirements



8.

Impact of Hague Convention XXXV: Protection of Adults

Impact of Hague Convention XXXV: Protection of Adults



- It's an "open" convention and can apply to help Canadians in their estate planning to have their "home" power of attorney recognized in a contracting state.
- Austria, Czech Republic, Estonia, Finland, France, Germany, Latvia, Monaco, Portugal, Scotland and Switzerland have ratified Convention XXXV.



Susannah Roth

Presenter



Poll Question 2



With increasing globalization, people will need more complex will and power of attorney planning, as their situation has international, not just domestic, considerations. What is the best way forward so these issues are properly addressed?

- a) More articles and popular press on not just finding a dream home in an exotic locale, but also on the legal and tax consequences in order to raise client awareness;
- b) More and better professional education for legal and tax advisors on international planning;
- c) Clients being more proactive and taking more “ownership” of these issues and getting legal and tax advice before making a move or acquiring assets in another jurisdiction; or
- d) More law reform to harmonize laws across countries. The existing state of affairs is a legal nightmare that clients can’t be expected to know about.

Stephanie Battista
and
Marly Peikes
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Case Study 2



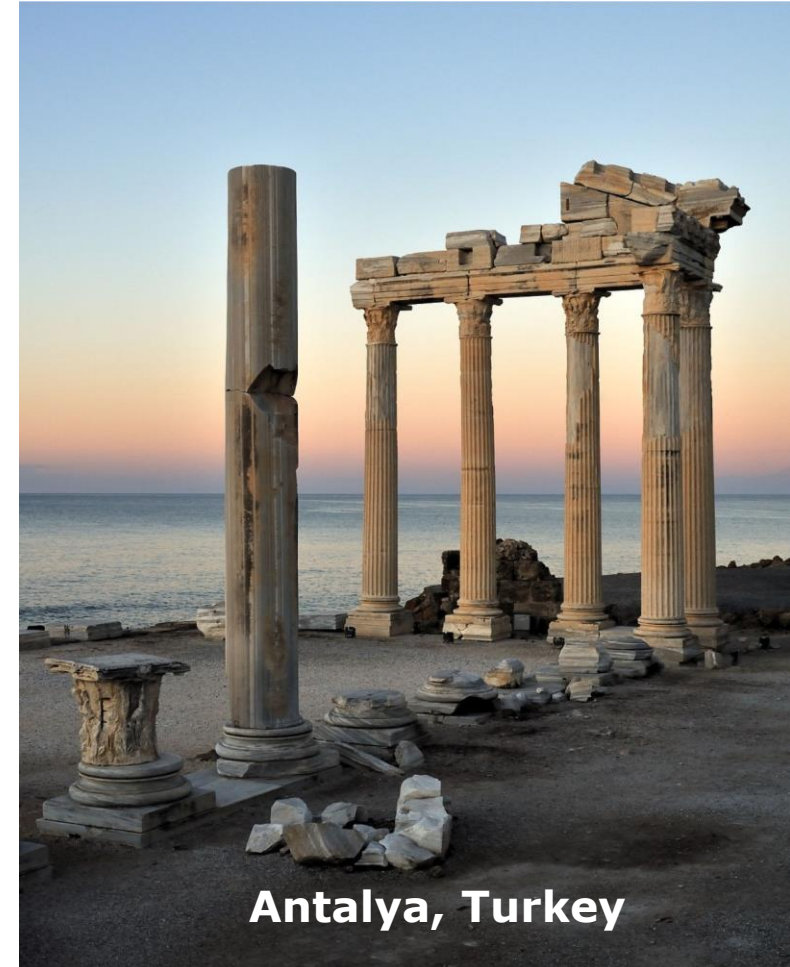
- Trevor and Annabella were born in UK and are now based in Boston.
- They are citizens of the world—very mobile.
- Financial assets in: New York, U.K., Massachusetts, and Ontario.
- Own real estate in: Massachusetts, France and Turkey.
- Spend time in: Massachusetts, U.K., France and Turkey.

Case Study 2 - Analysis



Financial power of attorney or equivalent in:

- Massachusetts
- New York
- Ontario
- UK
- France
- Turkey



Case Study 2 – Analysis (Cont'd)



Personal care power of attorney or equivalent in:

- Massachusetts
- UK
- France
- Turkey



Long Wharf, Boston

Case Study 2 – Analysis (Cont'd)

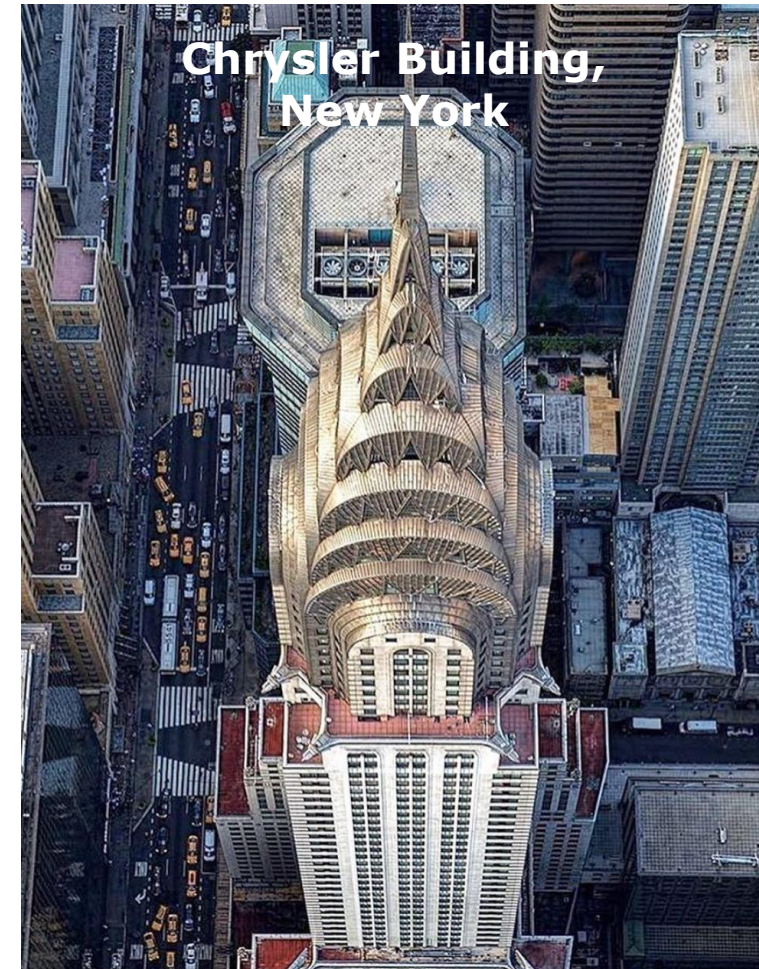


Massachusetts:

- General Power of Attorney executed before a Notary Public
- Living Will and Health Care Proxy

New York State:

- General Power of Attorney signed before a Notary Public
- Statutory Gifts Rider to make gifts over US \$500
- Does not automatically revoke prior powers of attorney



Case Study 2 – Analysis (Cont'd)



Ontario:

- Continuing Power of Attorney for Property

United Kingdom:

- Lasting Powers of Attorney – one for property and financial affairs and one for health and welfare
- Independent certificate provider
- Not valid unless registered with the Office of the Public Guardian



Toronto

Case Study 2 – Analysis (Cont'd)



France:

- “Mandat de protection future”
- Effective once incapacity is established and once registered
- Massachusetts powers of attorney will be valid under Convention XXXV on the basis of Trevor’s and Annabella’s habitual residence, and each should refer to it

Turkey:

- No parallel documents under Turkish law survive incapacity
- Consider “legalization” of Massachusetts Power of Authority to have it recognized in Turkey



Resources:



1. [Multijurisdictional Checklist](#)
2. [Multijurisdictional and Separate Situs Will Planning](#)
3. [Multijurisdictional and Separate Situs Powers of Attorney for the Mobile Client](#)
4. ["Conflict of Laws Issues in Drafting and Using Powers of Attorney for the Mobile Client"](#)

Blog and Advisories



O’Sullivan Estate Lawyers has a blog (twice per month) in which we cover current domestic, cross-border and multijurisdictional trust and estate issues. We strive to be clear, concise and also provocative. Our goal for each post is to provide a few “pearls of wisdom” – easy to comprehend, relevant, and when strung together, an important and valuable collection.

If you would like to subscribe to our Blog, and our firm Advisories, please register at <https://www.osullivanlaw.com/blog/>.

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Susannah Roth

Presenter



Questions



To ask our speakers a question,
type your question into the Questions Panel
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Presenters



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Margaret O'Sullivan



Susannah Roth



Stephanie Battista



Marly Peikes



Thank you!







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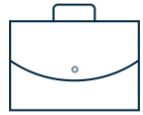
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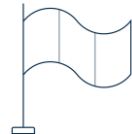
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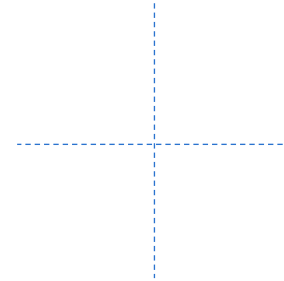
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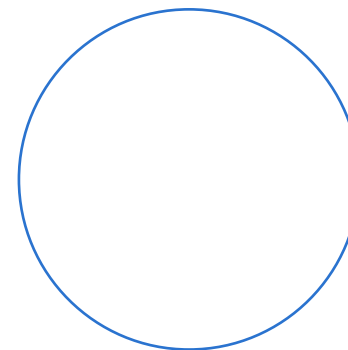
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