OWNING ASSETS IN A FOREIGN COUNTRY – IS THERE A NEED FOR A SEPARATE WILL?

More and more South Africans use their annual discretionary foreign investment allowances to invest offshore and to acquire assets in foreign countries. The question then asked, is whether one needs to have a separate Will for those assets. Many people draft a single Will, which includes assets in any part of the world. However, this is not always the best option as there are several complexities to consider such as the nature of the assets and the type of jurisdiction in which the assets may be owned.

The options for dealing with offshore and South African assets are:

- Draft one Will that applies to the worldwide estate, i.e. including South African and international assets;
- Draft separate Wills – one for each country where assets are owned; or
- Draft one Will dealing with assets in South Africa and a separate one for the remaining assets, irrespective of which part of the world they may be found.

To determine whether an offshore Will is required, one must consider the type of offshore assets and where it is located. A separate Will is almost always recommended if immovable property is owned in another country.

The Principal of Survivorship may apply to some clients who own joint foreign bank or investment accounts. If the principle is applicable, depending on where the account is registered, when one joint owner passes away, the deceased's share may not pass through their estate and may pass automatically to the surviving joint owner. This principle operates in the UK, Ireland, Jersey, Guernsey, the Isle of Man and many other countries throughout the world. So, for example, a husband who jointly owns a bank account in England with his wife, should not try and make a specific gift in his Will of his share in the joint account to somebody other than his wife, as this could lead to a dispute.

In some countries, freedom of testation is not recognised. These countries have inheritance laws that override the intentions of the deceased – it is known as forced heirship. Forced heirship laws – which vary from country to country – are mostly prevalent among civil law jurisdictions, including Mauritius, Switzerland, Spain, France, Japan and Portugal, as well as countries operating under Shariah law. Essentially, forced heirship is a set of rules which restrict the testator's freedom to distribute his/her estate to protect certain heirs, such as his/her spouse, children and/or other close relatives. In most countries where this system applies, a part of the

estate is subject to the laws of forced heirship while the balance is left to the testator's discretion.

Therefore, if you own assets in a country with forced heirship laws, it is best to have a separate Will drafted for assets in that jurisdiction. Each country's forced heirship rules are unique and it is always advisable to consult with a local expert in that country. Once an offshore Will is drafted, your South African Will should therefore be amended to include wording such as "This Will deals with my assets in South Africa only".

One must also bear in mind that when a new Will is drafted, it usually revokes former Wills. If offshore Wills are made, it must be clear that each Will does not revoke another offshore Will. It is particularly important to keep this in mind if the Wills are made in different countries with the assistance of different advisers. Your South African Will should therefore be amended to include wording such as "This Will revokes all previous Wills made by me in respect of my assets in South Africa only".

By having a separate offshore Will, one also ensures that the foreign estate is administered at the same time as the South African estate, which results in limiting delays in the winding-up process. The nominated South African executor will then be able to obtain a grant of probate that authorises him/her to deal with the foreign estate. There will be no need for the executor to obtain sealed Letters of Executorship from the Master of the High Court, as this is normally needed when there is only one Will dealing with the worldwide estate.

A last important point to bear in mind is the tax liability. In terms of section 3(2) of the Estate Duty Act, if you are a permanent resident of South Africa, you will be liable for estate duty and capital gains tax on assets worldwide. The requirement to report foreign assets for estate duty purposes remains, even though an offshore Will may have been drafted. These foreign assets can also be subject to inheritance tax, based on the jurisdictions where the assets are located, known as situs tax. One must also be cognisant of double taxation. If South Africa does not have a double taxation agreement with a country where the foreign assets are based, the client can end up paying tax in both countries.

In the estate planning and Will drafting discussion, one needs to be familiar with the various pieces of legislation in order to best assist our clients. It is, therefore, important to deal with a professional in the drafting of a Will. Consult our PPS Fiduciary Specialist Rehana Cassiem at 082 577 6465 or rcassiem@pps.co.za

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