



A FOREIGN ESTATE REQUIRES CAREFUL PLANNING

With the relaxation of South African Foreign Exchange Controls and more investors seeking to diversify risk, many are creating offshore estates. People often don't think about what the offshore probate formalities might be, what the death duties position might be, and what other effects the death of the investor will bring about.

This is according to David Knott, fiduciary expert at Private Client Trust, a division of Private Client Holdings, who says that in many instances, a South African Will would be acceptable and recognised in that foreign jurisdiction, provided of course it complies with the South African formalities.

Forced heirship and the rules in other countries

"The local executor, once appointed, would then need to appoint an agent in the foreign jurisdiction to deal with the foreign estate and effect a distribution to the heirs. A single world-wide Will is workable in many instances where there are no forced heirship rules in place," explains Knott. "There are no such rules in the common offshore havens such as Jersey, Guernsey or Isle of Man."

"Due advice and caution must be taken where forced heirship rules apply, for example in Scotland or in many European countries. In France, the freedom to dispose of assets is restricted if the deceased is survived by either descendants or ascendants. Descendants are preferred over ascendants and interestingly, a spouse is not regarded as a forced heir. If the deceased is survived by one child, that child must receive at least one half of the estate; where two children survive they must share equally two-thirds of the estate and if three or more children survive they must share equally three-quarters of the estate."

"Spain, Belgium, Portugal and most other European countries all have differing rules. Several jurisdictions demand that any fixed property in that country can only devolve under descendants and failing them, ascendants and only if none upon remoter beneficiaries. Matters complicate considerably once an estate is held in an Islamic country."

One "world-wide Will" or separate Wills for each jurisdiction?

However, according to Knott, whether there are forced heirs or not, obtaining the necessary local documents in a manner acceptable to the foreign probate office could take up some time, for example

translations may be required and for this reason many would rather execute a separate Will in the foreign jurisdiction.

“One would need to identify an acceptable foreign executor to draft the offshore Will to ensure that all necessary requirements are met. Care must also be taken that the local Will and the foreign Will do not revoke each other and it is clear which estates must be dealt with in terms of that particular Will.”

Generally, your offshore estate would be liable for estate duty in South Africa and may also attract some death duties abroad, depending on the amount. We have tax treaties with many countries to ensure that assets are not taxed twice, and the local tax authority would allow a credit here against any foreign tax paid in terms of the treaty.

“If you might have been born or lived in the foreign country where investments are held, the foreign tax authority might be keen to deem you still domiciled in that country and so claim death duties on your world-wide estate. Should this apply, it would be prudent for you to execute a declaration of domicile confirming when you gave up your domicile of birth and acquired a domicile of choice in South Africa to avoid this argument later.”

Knott concludes that whilst fiduciary experts cannot be expected to know what the probate requirements are in every jurisdiction world-wide, it is still extremely prudent to contract the services of such a specialist who at least knows when to anticipate problems and also who one needs to consult with.

Ends

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