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Where there's a 'will', there's a way: The importance of having a will as an expatriate living in Singapore

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A global economy meets global family

It is now commonplace for individuals to invest in cross-border investments to gain exposure to international markets (real estate, shares, currency) in a bid to achieve diversification and to spread risk. The phenomena of cross-border investments goes hand in hand with an increasing number of 'cross-border' families where any one family can have family members residing in a multitude of different jurisdictions.

In this context, having an effective international estate plan becomes very important. Estate planning can involve a range of tools but as a minimum, an individual with an international profile should have an effective will or wills in place.

This is relevant not just for expatriates who settle here in Singapore, but also for Singaporeans with assets overseas. This article focuses on the key considerations for a British expatriate living in Singapore with assets in both the UK and Singapore.

What's the worst that can happen?

If an individual dies without having a valid will in place, he is 'intestate'. An 'intestate' has no control over who will inherit the assets in his estate when he passes away. Instead, intestacy rules step in to determine which family member should benefit from the estate and in what portion. The applicable intestacy rules will turn on the nature of the assets (whether they are real estate or movables), where the assets are located and the domicile of the deceased.

Depending on the jurisdiction in point, the intestacy rules can offer rather different outcomes.

For example, under the intestacy rules of Singapore, the surviving spouse will take half of the estate and the children will take the other half in equal portions. In contrast, under the intestacy rules of England & Wales, the surviving spouse of an English domiciled individual will take property of up to GBP250,000 and the deceased's personal chattels, as well as, half of the balance of the estate, with the remainder held on statutory trusts for the surviving children.

The concept of 'children' also differs: Singapore intestacy rules only expressly recognise legitimate children. The intestacy rules in England & Wales are, therefore, more generous than those in Singapore. However, what is common to both jurisdictions is that the intestacy rules are arbitrary and leave no scope for passing assets to other family members if the deceased is survived by his spouse and children.

In an intestacy, not only does the deceased have no control over who will inherit his assets, he also does not have a say in who should 'administer' his estate. In Singapore (as in the UK and other common law jurisdictions), there is the concept of administration of the estate, whereby a personal representative calls in the assets and settles the debts of the deceased prior to distributing the remaining assets to the beneficiaries. Where there is a will, this duty falls on the executors who are carefully chosen by the testator (the person making the will). In an intestacy, this role falls on the person who applies successfully for letters of administration in Court and it may not necessarily be the person the testator would have wanted to assume the role.

Under Singapore law, certain classes of people are recognised, in order of priority, as having the right to apply for letters of administration. However, this can become complicated when the deceased is a foreign-domicile, raising questions of which governing law should apply. Such complexities could delay the process of applying for letters of administration which could have significant consequences for surviving family members: as a practical matter, when a person passes away, until the grant of probate or letters of administration are granted, a family member may not be recognised to have the authority to access the deceased person's assets and administer the estate, much less make distributions to the beneficiaries.

This can have disastrous consequences where the deceased spouse was the breadwinner for the family.

So, we agree, it is best to have a will but what are the key questions that should be addressed when preparing a cross-border will?

Location of assets: It is important to identify the assets an individual owns directly and where those assets are located. Equally, it is important to keep in mind that assets which an individual has given away to a lifetime trust, will not be dealt with by his will. The testator should be mindful that there are some assets where it is simple to determine situs, for example, real estate will be situated where the real estate is located and company shares are generally situated where the company is registered. For other assets, further investigation may be required to determine situs, for example, bank accounts may be administered in one jurisdiction but held in another and if the individual owns an investment portfolio comprising different assets – it is not always clear whether he owns an account, the underlying asset or an interest in a trust/fund.

One will or two: Where an individual's assets are located is an important factor in determining whether or not he should opt for multiple wills in different jurisdictions. One school of thought favours different wills for assets in different jurisdictions. Those practitioners who favour multiple wills tend to do so on the basis that multiple wills can speed up matters post-death, as probate or the equivalent procedures, can occur concurrently in more than one jurisdiction.

Of course, in some cases, it will be necessary to have more than one will, for example, this may be appropriate if the rules governing the formal validity of a will in the jurisdiction where one asset is located differs from that in another jurisdiction, or if the complexities of the law of the jurisdiction in which the asset is located make it simpler to deal with the asset in a separate will.

However, generally, our preference, is to have one will or at least, as few wills as possible. Where an individual has multiple wills there is always the risk that assets in a particular jurisdiction may be "missed" and the possibility that one of the wills may inadvertently revoke another of the wills. Where there are multiple wills, coordination and centralised review will be necessary.

Tax planning: It is important that the will is drafted to address debts and taxes. For clients with an international profile, it is always possible that the liability to tax or the debt and the assets may be located in different jurisdictions. If an individual has more than one will, the wills should provide for the allocation of debts and other liabilities and be consistent across the board.

There is no estate tax or inheritance tax in Singapore. However, it may well be that an individual has assets in jurisdictions which impose inheritance, estate and/or gift tax on the assets. Where an individual has assets in jurisdictions with some form of inheritance or gift tax he should seek proper advice before implementing a will to ensure that his wishes regarding the succession will be achieved in a tax efficient manner.

Inheritance tax is the form of estate and gift tax that applies in the UK. An individual who is domiciled in the UK is subject to inheritance tax on his worldwide assets, whereas a non-UK domiciled individual is only subject to inheritance tax on his UK property. There are also special rules that apply to subject to UK inheritance tax UK residential property held by a non-UK domiciled individual through a non-UK company or through a trust structure. A discussion on the UK domicile rules is beyond the scope of this article but residence and domicile are two distinct concepts for the purposes of English law and it is perfectly possible for an individual to be UK domiciled but resident in Singapore.

Broadly, where an individual is subject to UK inheritance tax, the first GBP325,000 of his estate (known as the 'nil rate band' ('NRB')) is taxed at 0% and amounts in excess of the NRB are charged at a rate of 40%. However, where a couple are married, provided their wills are drafted appropriately, they can take advantage of the UK spouse exemption, which generally provides a 100% relief from UK inheritance tax. As such, a simple estate planning technique for UK domiciled spouses, is to leave all of their assets to each other under their wills. Similarly, as non-UK domiciled spouses will have an inheritance tax liability in respect of any UK assets, they may consider leaving their UK assets to each other under their wills.

Where there is a domicile 'mismatch' (that is, where the domicile position of the married couple is different, for example, where one spouse is UK domiciled on death and the other is non-UK domiciled), the spouse exemption is automatically capped at the NRB (GBP325,000) where assets pass from the UK domiciled spouse to the non-UK domiciled spouse. In these circumstances, the non-UK domiciled spouse can elect to be treated as UK domiciled for inheritance tax purposes (so that the 100% relief afforded by spouse exemption is available), and assuming, the non-UK domiciled spouse is not resident in the UK, he or she will cease to be treated as UK domiciled after four complete tax years. Significantly, if assets pass from the non-UK domiciled spouse to the UK domiciled spouse, the full spouse exemption applies and there is no need for any election to be made.

Post-death procedures: In most common law jurisdictions, on death, a personal representative will need a grant of representation before he can deal with the assets.

This requires a will to go through a formal court process (commonly referred to as the probate process). When the court are satisfied that the will is valid, it will issue a court order in the form of a grant of probate authorising the personal representatives to 'unfreeze' and deal with the assets comprising the estate.

In the UK, inheritance tax forms will need to be filed with Her Majesty's Revenue and Customs ('HMRC') even if, in practice, no UK inheritance tax is due because the spouse exemption applies. If inheritance tax is due it must be paid before the grant of probate (described above) is issued. A typical application for probate in England & Wales will take around two weeks. On the other hand, Singapore has abolished estate duty and thus there are no estate duty filing requirements. A simple probate application in Singapore could take around one to two months.

Certain jurisdictions have a mutual recognition probate procedure and so a grant of representation issued in one jurisdiction may be 're-sealed' in another under a relatively simplified procedure without the need to take out a fresh grant. For individuals with assets in Singapore and the UK, a Singapore probate can be re-sealed in the UK. Similarly, an English probate can also be 're-sealed' in Singapore with regards to Singapore assets.

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