WILLS AND CROSS-BORDER ASSETS

Is it better to have one will covering multiple jurisdictions?

Or

Is it better to have a separate will for each jurisdiction?

Many people hold assets in different jurisdictions. When constructing a will it is important to keep this in mind, to reduce potential complications arising when administering an estate. This article will address the issue from the perspective of Victorian law.

It is necessary to assess whether or not one should have multiple wills that are specific to each jurisdiction, or to have one will that covers each and every jurisdiction within which assets reside.

Having multiple Wills may be a simple and effective solution to some testamentary issues; however, it can also at times create its own set of problems when not exercised carefully, to cover all contingencies.

The Hague convention of 5th October 1961[1], essentially provides for foreign wills to be recognized in Australia and has been enacted in all Australian jurisdictions.

A new piece of legislation, *The European Succession Legislation or ('Brussels IV'),* has recently been introduced in Europe and will affect member states of the European Union. The law will relate to the estates of individuals dying on or after the 17th of August 2015, and will be "relevant to anyone with assets in a Brussels IV state, as well as to those who are habitually resident in such a state at the time of their death (or, in certain circumstances, within five years of their death), regardless of the location of their assets".[2] Brussels IV aims to allow European Union citizens to plan their succession in advance as well as aiming to guarantee the rights of those who are party to the will-makers estate such as family members, heirs, legatees and also creditors.

However, a number of significant member countries of the EU have decided not to be signatories to the legislation as yet. Both the UK and Ireland have decided not to opt-in, primarily due to concerns regarding clawback provisions applicable to lifetime gifts in the law of another state.[3] Currently, the law in both England and Wales gives individuals full rights of lifetime and testamentary disposition over their property. The concern of these countries appears to be that if they were to follow 'Brussels IV', this capacity may be significantly affected.

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[1] The Hague Convention 5 October 1961, *The Convention on the Conflict of Laws to the Form of Testamentary Disposition*.
[2] Catherine Bell, *The Long Arm of the EU Law: the new European Succession Regulation*.(2013)
[3] Catherine Bell, *The Long Arm of the EU Law: the new European Succession Regulation*.(2013)

Under Brussels IV, a will-maker may expressly or implicitly choose the law of his or her nationality to apply to the succession of his or her estate by a testamentary disposition. If a will-maker is a habitual resident in a Brussels IV state, but not a national, and does not choose their national law to apply, the law will be determined by their habitual residence.[4]

In Victoria, Section 17 of the Wills Act 1997 (Vic)[5], addresses the validity of a will executed in a foreign place. Generally, a will is to be taken to be properly executed if its execution conforms to the internal law in force in the place -

1. where it was executed; or
2. which was the will-makers domicile or habitual residence, either at the time of execution of the will, or at the will-makers death; or
3. of which the will-maker was a national, either at the date of execution of the will, or at the will-makers death.

In 2011, the Victorian government enacted a Bill[6], with the primary objective to "eliminate problems that arise when cross-border issues affect a will"[7]. The Bill[8] seeks to implement the *Convention Providing a Uniform Law on the Form of an International Will 1973*, of which the government is a signatory. However it has been feared that the Bill[9] may have a limited application unless the convention is adopted by other jurisdictions, and that its implementation could ultimately lead to greater confusion as opposed to simplifying existing laws and providing clarity.[10] The Bill was assented to on 27 June 2012 and became the *Wills Amendment (International Wills) Act 2012 (No.44).* However, the Act has not yet been proclaimed to commence and is therefore not currently operational.

Whilst there are a number of techniques aimed at reducing complexity and providing guidance as to cross-border estate planning, realistically there is still some confusion and difficulty in determining whether to have a single will covering all jurisdictions or multiple wills that specifically relate to a single jurisdiction where assets are held. An answer to this question will however depend on the types of assets held and the jurisdiction within which the assets reside. As a result, it is best not to make generalizations as to which form of will drafting should be used, but rather to make a determination on a case by case basis.[11]

The Case of Constantinou

[4] Catherine Bell, *The Long Arm of the EU Law: the new European Succession Regulation.*(2013)
[5] Wills Act 1997 Victoria
[6] *Wills Amendment (International Wills) Bill* 2011
[7] Second reading speech Robert Clarke
[8] *Wills Amendment (International Wills) Bill* 2011
[9] *Wills Amendment (International Wills) Bill* 2011
[10] Law Institute Victoria, (2012) *Inquiry into the Wills Amendment (International Wills) Bill 2011*
[11] *Cross border Estate Planning: Juggling overseas assets and other international issues – a question of jurisdiction?* (2009) Robert Gordon

A recent case in Queensland (*Estate of Constantinou* [2012] QSC 332) addressed issues arising out of the fact that the deceased had significant assets in several jurisdictions. In most common law countries, such as Australia, it is the domicile of a deceased that determines the testamentary law to apply to that deceased estate.[12]

The *Constantinou* case squarely raised the point that any "difficulties in determining the law applicable to a testamentary trust will generally be overcome if the law governing the trust is expressly prescribed in the will".

In this case, the will-maker died leaving an extensive estate across a number of countries to his 14 children. This included assets valued close to $26 million in Papua New Guinea, assets valued around $10 million in Queensland, Australia, and assets close to $560,000 in Cyprus. The will-makers estate was to be equally divided between his children.

However, five of the will-maker's children were under the age of 25 and his will stipulated that their inheritance was to be put on trust until they attained the age of 25 years.

Questions which arose included:

- what is the law governing the trusts created by the will? (The will made no reference to a governing law).
- if the law governing the trusts created by the will is that of Papua New Guinea:
  - can the executors and/or trustees appoint new trustees to the trusts created by the will?
  - can the executors and/or the trustees of the trusts created by the will purchase real property?
  - when does a beneficiary of the trust created by the will cease to be a minor?
- if a beneficiary of the trust created by the will dies before attaining the age of 25 years, without issue, who is entitled to receive property held on trust for that beneficiary?
- does the will create one trust for all beneficiaries under the age of 25, or separate trusts for each such beneficiary.

Questions such as these may give rise to different answers for the administration of the estate.

[12] *Cross border Estate Planning: Juggling overseas assets and other international issues – a question of jurisdiction?* (2009) Robert Gordon

Issues to consider following Constantinou

A potential solution to the issues faced in *Constantinou*[13] would have been to consider multiple wills that dealt specifically with assets in each particular jurisdiction, ultimately minimising delay and conflicting laws. This is not a decision that should be made lightly however. There are a number of factors that should first be considered so as to attain the most desirable outcome for the will-maker, and enable the will-maker to exercise the greatest degree of control over their estate as possible.

Key considerations include[14]:

- the will-makers domicile, residence, nationality, citizenship, family background, and intended beneficiaries.
- whether there is complete testamentary freedom in a jurisdiction and whether the local law will give effect to the terms of the will.
- the tax treatment of the inheritance by the beneficiaries; the tax consequences of holding assets in each jurisdiction as well as tax reporting and disclosure requirements and issues of confidentiality.
- the marital and spousal regimes which may impact on the ability to transfer property on death.

After taking the above points into consideration, a will-maker will be in a better position to make a judgment as to the advantages and disadvantages of using a single will compared to that of multiple wills.

Considering Separate Wills

- Incapacity instruments - where the will-maker wishes to set up ongoing testamentary trusts for beneficiaries in another jurisdiction and the trust assets are within that jurisdiction, it may be better to set up a separate will and be clear which jurisdiction governs the trusts. This point is illustrated in *Constantinou*[15], where different jurisdictions yielded vastly different answers for the intended beneficiaries (such as what constituted a “minor beneficiary”).

[13] *In the Estate of Constantinou* [2012] QSC 332
[14] Margaret O’Sullivan (2013) “Key Succession Issues for the Multijurisdictional Estate” *The International Comparative Legal Guide to: Private Client*
[15] *In the Estate of Constantinou* [2012] QSC 332

- Also, some Civil Law countries may not recognise trusts or enduring power of attorneys, in which case the will-maker should use the appropriate legal instrument to fulfil the will-makers wishes.

- Expedition and minimising probate fees – it may be more expeditious to have a separate will in another jurisdiction as there can be simultaneous applications for probate. If there is only one will, executors may need to obtain probate in one jurisdiction and then reseal it or obtain another grant in the other jurisdiction.[16]

- Discrete Assets - where there are discrete assets in a jurisdiction which are proposed to be left to different beneficiaries in that jurisdiction it will usually be more convenient to deal with those assets in a separate will. This may also isolate the assets for tax and insolvency purposes.

- Tax consequences – if there are significant tax liabilities in another jurisdiction, it would be advisable to make a separate will in that jurisdiction dealing solely with the foreign assets. This may, in effect, allow the will-maker to quarantine assets within that jurisdiction. This is a way to circumvent revenue authorities from having recourse to assets out of that jurisdiction.[17]

- Liabilities and Insolvency – conversely, if there is a serious likelihood of an estate in a particular jurisdiction being insolvent, it may well be advisable to make a foreign will to deal with the foreign assets which is self-contained. Even if the Australian estate turns out to be insolvent there will be little chance of the ATO enforcing any judgment in the foreign jurisdiction if it is solely for the purpose of obtaining revenue to meet tax liabilities.

- Lack of Testamentary Freedom – inheritance laws in foreign countries may prescribe who is to receive the will-maker's estate. In some Civil Law jurisdictions, the laws do not allow for complete testamentary freedom and there are fixed requirements to provide for distribution of property on death among family members. For example in France, the rule of "*reserve hereditaire*" requires some assets to be set aside for dependents. The ability to execute multiple wills may allow a will-maker the freedom to dispose of foreign assets as the will-maker wishes and navigate around certain heirship laws.[18] However now with the

[16] Barry Fry, Partner at Maddocks, (2012) *Cross Border Estate Issues*
[17] Paula Jones, (2006) The Effect of Residency in International Estate Planning, *The Tax Adviser*
[18] Margaret O'Sullivan (2013) "Key Succession Issues for the Multijurisdictional Estate" *The International Comparative Legal Guide to: Private Client*

introduction of the *European Succession Regulation*, Brussels IV nationals who are habitually resident in non-Brussels IV "might be tempted to let the law of their habitual residence apply to their worldwide estate to avoid the application of forced heirship rules".[19]

- Formalities and Language issues – a single will may have trouble meeting the formal requirements and also create translation issues in a non-English speaking country. Unless the will-maker is familiar with the other jurisdictions, it may be easier using a local lawyer to create a separate will for the foreign jurisdiction. However it is important that the will-maker understands the document and that it is executed appropriately if the language of the jurisdiction is not the will-maker's first language or one they are fluent in.

Exercising Caution

Whilst multiple wills may be advantageous in the circumstances mentioned above, there can also be some very serious consequences if the will-maker does not execute the will(s) appropriately considering all relevant factors . Some issues to consider include:

- Revocation clauses – the will-maker must be cautioned when writing multiple wills so as not to revoke a will pertaining to another jurisdiction and vice-versa.[20]
- Construction problems **–** there may also be potential construction problems, particularly in relation to payment of debts incurred in various jurisdictions. Disputes may arise as to which assets are burdened with liabilities in another jurisdiction, if the drafting is not clear to allow for accurate construction of the will.
- Failure to cover all assets – there is also the possibility that the separate will may omit certain assets within a particular jurisdiction. Residuary clauses need to be carefully drafted to avoid jurisdictional conflict.
- Covering all contingencies – if there are multiple Wills, they need to cover all contingencies. Each will should clearly specify to what property within a particular jurisdiction it applies and clearly specify what law is applicable to the property.
- Dealing with assets – the jurisdiction in which real estate assets in particular are located will normally exercise primary control over them. Issues may arise as to whether particular assets are covered by a certain jurisdiction's law. There can also be issues as to which assets are moveables and which immovables and questions as to the actual location of

[19] Catherine Bell, *The Long Arm of the EU Law: the new European Succession Regulation*.(2013)
[20] Nicole Rockliffs, (2012) *Assets in Foreign Countries – Beware of Revocation Clauses in Wills*

those assets.[21] Complex conflict of law issues then arise as to the construction and implementation of the will.

Summary

Cross-border estates will arise when a will-maker owns assets in two or more different countries or jurisdictions. To prevent costly disputes which can significantly reduce the size of the estate, it is important for the will-maker to consider the issues raised above and for the will-maker to fully instruct their solicitors as to all their assets in different jurisdictions so that their Will(s) cover all contingencies.

On balance, whilst in many situations it is preferable to have a single Will covering all contingencies, (which also stipulates which jurisdiction governs it) multiple wills can also be used effectively where some of the above mentioned scenarios are involved. Ultimately it will be at the discretion of the will-maker in conjunction with the advice provided by their solicitor, to determine which avenue to take for effective cross-border estate planning.

In the coming years, a number of factors may have a significant impact on cross-border estate planning, particularly if the *Wills Amendment (International Wills) Act 2012 (No.44)* is proclaimed and becomes operational and also with the commencement of the Brussels IV legislation which comes into effect in 2015.

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[21] Barry Fry, Partner at Maddocks, (2012) *Cross Border Estate Issues*