CROSS CONTINENT ESTATE PLANNING

September 2020 • ISSUE 362

BRENTHURST
THE HOME OF WEALTH

THE POWER
OF INDEPENDENT ADVICE

IN THIS ISSUE

"*It is imperative that your will is reviewed regularly and your offshore investment strategy is matched to your estate planning goals:* ***Do you need a foreign will?***"

FOR MORE INFO CONTACT US
www.brenthurstwealth.co.za

BRENTHURST AWARDED TOP WEALTH MANAGER IN SOUTH AFRICA 2020

JHB (HQ)	+27 (0) 11 799 8100
JHB (SANDTON)	+27 (0) 10 035 1391
PTA	+27 (0) 12 347 8240
CAPE TOWN	+27 (0) 21 418 1236
BELLVILLE	+27 (0) 21 914 9646
CLAREMONT	+27 (0) 21 418 1236
STELLENBOSCH	+27 (0) 21 882 8706
PAARL (VAL DE VIE)	+27 (0) 21 882 8706
MAURITIUS	+ 230 5843 5215

DOES YOUR OFFSHORE INVESTMENT STRATEGY MATCH YOUR ESTATE PLANNING GOALS?

By Rozanne Heystek-Potgieter (BA LLB) Brenthurst Wealth Management

With the increase in offshore investing, investors need to consider the impact offshore investing has on their estate planning objectives. Is a foreign will necessary? In order to answer that question, one needs to unbundle information such as the type of asset, the laws of the jurisdiction that governs the assets, possible tax implications locally and abroad, as well as who will inherit from your estate and where they are based.

HERE ARE 8 FOCUS POINTS TO CONSIDER WHEN ESTATE PLANNING WITH OFFSHORE ASSETS IN MIND:

1. TYPE OF ASSET

When tasked with global estate planning, it is pertinent to know, apart from where the asset is located, what type of asset it is. The process involved in handling an immovable property such as a house or empty stand in a foreign country will be different to that of dealing with movables such as an offshore bank account or investment.

Immovables in most cases require a separate foreign will that matches the laws of that jurisdiction.

A bank account, for example in Switzerland or Isle of Man, can be dealt with by a South African Executor without the need of a foreign will. Most banks will take instructions from a SA executor on receipt of court sealed copies of estate documents.

2. JURISDICTION

Certain laws governing assets held offshore might conflict with testamentary dispositions in your existing domiciliary will. The jurisdiction in which the investment falls under is a major factor in how you draft your will, as legal concepts that do not exist in SA law might apply to that investment.

Focusing on the jurisdiction of Guernsey, as an example: when the investment is co-owned and the joint tenancy option is selected when initially invested, Guernsey's joint tenancy rights will apply. This means that on the passing of the one owner, the surviving owner automatically becomes the full owner of the investment. This is a helpful estate planning tool for spouses, who have appointed each other as their sole heirs of their respective Estates.

It simplifies the estate administration process as there is no separate Guernsey estate to administer and ownership transfers without the need of a foreign grant of probate. It is important to note that a Testator will not be able to bequeath that half share to anyone in their will, this not only curbs their right of testation, but adds a dimension to consider when estate planning, such as knowing that the half share of that asset should not be included in a liquidity calculation for their Estate. In other words, the Executor will not have any claim over that half share, and cannot redeem part or all of it to cover any liabilities payable by the Estate.

3. FORCED HEIRSHIP LAWS

Certain civil law countries still follow a strict code of forced heirship laws based on Napoleonic law. Focusing on Mauritius - *lex rei sitae* applies to immovable property owned by a foreigner, meaning the laws of where the property is situated governs the devolvement of the asset on the owners' passing.

Forced heirship applies to Mauritian immovables, but on a limited basis. Distinction is made between a reserved and unreserved portion – a reserved portion is allocated to children, if the deceased had any (1 child – 50% reserved, 2 children, 66% reserved, 3+, 75% reserved). The reserved portion cannot be infringed upon by testamentary disposition. The unreserved portion can be bequeathed in a will. A surviving spouse is not a protected heir, his/her share must be dealt with in the will, and more importantly if the Mauritian property is the matrimonial home, the spouse has a right to a lifelong usufruct.

3. UPDATE ON EU LAWS

The European commission has introduced new rules that have simplified inheritance laws for foreigners who own property in the EU. The purpose of the new law is to allow for the estate administration process to be handled coherently, by one single authority and to allow for the foreign owner to choose their national law or the law of the country where they are habitually resident to apply in the succession of their assets instead of the law of the situs of the assets.

Before the implementation of the EU Succession Regulation (EU) No. 650/2012, also known as Brussels IV, foreign property owners were limited to the laws of the jurisdiction in which the asset was held, which more often than not conflicted with their testamentary wishes. A foreign property owner must expressly declare their choice of applicable law, in a testamentary disposition which is valid in the jurisdiction of where the asset is located.

To avoid possible friction it is generally advised to match the chosen applicable law to that of any matrimonial law that governs your marital property regime. Lastly, it is important to note, that Denmark, Ireland and the UK have opted to not participate in the new regulation, meaning any foreigners owning assets in said countries cannot benefit from the new rules and the local laws still apply.

4. LANGUAGE AND MULTIPLE WILLS

Some believe that simply having separate wills for each jurisdiction in which they hold an investment or property will alleviate any future concerns for their estate. Although, this applies best to scenarios in which immovable property is owned, we do warn that drafting multiple wills must be approached with caution.

The drafters of each will must collaborate and coordinate the finalization of the wills simultaneously, in order to avoid one will revoking the other one. Using an example in which a SA national and resident owns property in France, it is pertinent that they seek specialist advice before electing to draft a will in France and declaring that SA law applies to the French assets, it is still obligatory that a French Notaire is to handle the estate.

Time zones and language barriers might make this a challenging and expensive task, as well as deciding on who to appoint as an executor or similar in a foreign country. If the testator acquires further assets in that foreign jurisdiction and fails to update their will or wills, the devolvement of that asset will then be governed by our Intestate Succession Act. All testamentary wishes will then not materialize. We advise seeking legal advice from a specialist based in each country in which you wish to draft a will.

5. SITUS TAXES

The Estate of a South African tax resident with assets physically situated in the USA or the UK might be exposed to further taxation, known as situs taxes.

In the US, estate taxes are 40% on any amounts above the threshold of $60,000. The current inheritance tax threshold in the UK is £325,000, per person, transferable between spouses – amounts above the nil-rate band is taxed at 40%.

In view of immovable property situated in the UK, the UK would have primary taxation rights – the South African tax authorities will then tax the same asset, but the amount can be offset under double taxation relief. The SA executor must claim back the tax credit from SARS, limited to 20%, the amount taxed in SA. Taxation of foreign assets need to be kept in mind when liquidity calculations are done for the estate. It is best to discuss how to avoid situs taxes with your Brenthurst financial advisor, as investments through certain offshore unit trust portfolios, Exchange traded Funds (ETF's) and insurance wrappers registered outside the relevant jurisdiction may hold underlying situs assets but in most instances will not attract direct situs tax.

7. LOCAL TRUSTS

Local SA trusts by law cannot own offshore assets outright. Something to keep in mind when all assets are offshore, and the main heir of the estate is an existing or testamentary local SA trust. The Executor in the estate will be forced to repatriate all of the offshore funds, in order to follow through the testamentary wishes in the will.

8. DOMICILE OF HEIRS

When estate planning, it is important to keep in mind where you heirs are based, especially if they have emigrated. How you configure the devolvement of your assets might be a hindrance to heirs who are already offshore – especially if you decide on a local SA trust as a structure to safekeep their inheritance, simply put it might trap their cash in SA.

Certain countries heavily tax inheritances and benefits received from a trust, the applicable laws of the heirs' domicile should be kept in mind when drafting a will or an offshore will. If an heir is a SA expat, certain exchange control procedures will apply when making a distribution from the Estate to the heir's nominated bank account, such as proving their financial emigration – a reference number is issued when placing the emigration on record with the South African Reserve Bank.

BRENTHURST OFFERS ITS CLIENTS ASSISTANCE WITH THE DRAWING UP AND SAFEKEEPING OF WILLS, ESTATE PLANNING AND THE WINDING UP OF DECEASED ESTATES.

LEGAL & FIDUCIARY SPECIALIST

ROZANNE HEYSTEK-POTGIETER (BA LLB)
Email: rozanne@brenthurstwealth.co.za
Tel: +27 (0)11 799 8100

MALISSA ANTHONY FPSA® (B COM, LLB)
Email: malissa@brenthurstwealth.co.za
Tel: +27 (0)21 882 8706

It is imperative that your will is reviewed regularly and your offshore investment strategy is matched to your estate planning goals:

MORE DETAILS ABOUT ESTATE PLANNING ARE AVAILABLE HERE: ESTATE PLANNING

BRENTHURST SERVICE OFFERING:

INVESTMENT PLANNING	WILLS & ESTATE PLANNING	LIFE / BUSINESS INSURANCE
RETIREMENT PLANNING	TAX PLANNING	EMPLOYEE BENEFITS
OFFSHORE INVESTMENTS	FOREX SERVICES	GLOBAL PROPERTY

JOHANNESBURG	**+27 (0) 11 799 8100**	**PRETORIA**	**+27 (0) 12 347 8240**	**CLAREMONT**	**+27 (0) 21 418 1236**	**STELLENBOSCH**	**+27 (0) 21 882 8706**
SANDTON	**+27 (0) 10 035 1391**	**CAPE TOWN**	**+27 (0) 21 418 1236**	**BELLVILLE**	**+27 (0) 21 914 9646**	**PAARL (VAL DE VIE)**	**+27 (0) 21 882 8706**