It’s not plain sailing
Navigating the choppy waters of offshore deceased estate administration
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The Fiduciary team at Eversheds Sutherland brings together the knowledge and experience you need to ensure your assets are protected. We will ensure that your estate is administered in an efficient and professional manner, every step of the way.

We shape our advice to the unique circumstances and challenges of each project, and ensure the right people are in the right places to offer insight and certainty – from the day-to-day to the most complex, multijurisdictional matters.

Is it necessary to have a separate Will regulating the distribution of offshore assets?

**Note:** this overview is based on the premise that the individual referred to in this article is a South African resident.

Many South Africans own assets in foreign jurisdictions and it is a common misconception that in such a case, it is necessary to have a separate Will regulating the distribution of those foreign assets. This is not a necessity. A single Will regulating the distribution of a person’s worldwide assets is generally recommended, although individual circumstances and practical considerations may dictate when having a separate Will is advisable.

One of the dangers of having separate Wills dealing with offshore and South African assets is that a client requiring a new Will regulating the distribution of his South African assets may omit to inform the practitioner that he already has another Will drawn up in a foreign jurisdiction or one that was drawn up locally but which is limited to the distribution of offshore assets. When drawing up the new Will, unless the practitioner knows of the existence of such a Will and incorporates specific wording into the new Will to the effect that it does not revoke the Will regulating the distribution of offshore assets, the new Will automatically revokes all former Wills. This may be contrary to the client’s intentions. It is therefore incumbent on any practitioner instructed to draft a Will for a client to take careful instructions.

Another danger is where an individual having assets in several foreign jurisdictions for example, a fixed property and a bank account in England and offshore investments in Guernsey and the Isle of Man, instructs a practitioner to draft two Wills, one regulating the distribution of his South African assets and the other regulating the distribution of his assets in the United Kingdom. The individual may not know that the assets in Guernsey and the Isle of Man do not form part of his estate in the United Kingdom as they are situated in separate legal jurisdictions. In this particular example, the deceased will die partly intestate, in so far as the assets in Guernsey and the Isle of Man are concerned. This may have far-reaching and unintended consequences.

If an individual has a single Will regulating the distribution of his worldwide assets, it is important to note that it is not necessary to file an original signed Will with the relevant authority in each foreign jurisdiction. Upon the death of the individual, the original Will must be filed with the Master of the High Court in South Africa. Once the Will has been registered and accepted by the Master, one or more certified and sealed copies can be obtained and generally these certified and sealed copies will be accepted in other foreign jurisdictions including the Isle of Man, Guernsey and the United Kingdom. The signature of the Master may need to be authenticated but, in many jurisdictions, authentication is not required. The alternative is to have a copy of the Will notarised prior to it being filed with the Master. The signature of the notary public may or may not need to be authenticated. It may of course also be necessary to obtain a sworn translation of the Will for use in other countries where English is not the official language.
Foreign letters of administration

Letters of executorship issued in South Africa that authorise an executor to administer assets situated within South Africa are generally not accepted in foreign jurisdictions. Upon the death of an individual who owns assets in several foreign jurisdictions, it will be necessary to obtain separate grants of probate (the equivalent of letters of executorship) or another form of authority as required in each jurisdiction. Using the example of the deceased who owns assets in the United Kingdom, Guernsey and the Isle of Man, it would be necessary to apply for the letters of executorship issued in South Africa to be resealed in the United Kingdom in order to deal with the fixed property and the bank account situated in the United Kingdom. The resealing of letters of executorship is a faster and more efficient way to obtain recognition by the English court of the letters of executorship issued in South Africa as opposed to obtaining probate. It will, however, be necessary to obtain probate in both the Isle of Man and Guernsey to deal with the offshore investments as there is no similar procedure for the resealing of letters of executorship in the Isle of Man and Guernsey. Obtaining several grants of probate can be costly and can take a considerable length of time, depending on where the asset is situated. Invariably it is advisable and often necessary to appoint a solicitor in a foreign jurisdiction to apply for the relevant grant of probate or other form of foreign authority on behalf of a South African executor and to administer the foreign assets.

Despite the above, certain financial institutions, including some of those situated in the United Kingdom, Isle of Man and Guernsey will accept South African letters of executorship, subject to an indemnity signed in favour of the financial institution by the executor, but usually this applies only where the value of the investment is below a certain threshold set by the particular financial institution. The requirements of each financial institution will differ depending on which institution it is, the type of investment involved and the value of the investment.

To illustrate the different approach adopted by financial institutions in Europe, two recent experiences have been summarised. The first involved an investment of significant value held with a private bank in Belgium. The particular bank accepted the South African letters of executorship and Will, a translation of which was not required. By contrast, a German bank’s requirement for dealing with the proceeds of a bank account of significantly less value was a certificate of inheritance issued by a German Surrogate Court. A certificate of inheritance is a certificate that proves a person’s status as an heir to a deceased estate. Obtaining the certificate of inheritance involved a rather cumbersome application process, including the production of numerous documents, a copy of the deceased’s Will translated into German and the swearing of an oath by the executor in person before the head of the Legal and Consular Section at the German Embassy in Pretoria. The length and complexity of the process to be followed therefore largely depends on the specific requirements of the financial institution and the law of the country in which the financial institution is situated.
In South Africa there is freedom of testation, which means that every person is empowered to make a Will disposing of his entire estate as he wishes. However, it is important to bear in mind that many countries have succession rules in place whereby there is some form of forced heirship. Forced heirship means that, irrespective of the provisions of a person’s Will, a certain portion of his estate will devolve upon certain family members.

An example is French Inheritance Law, which applies to all French residents regardless of their nationality and primarily protects descendants and to a lesser extent a surviving spouse. In terms of French Inheritance Law, an individual is only entitled to freely dispose of a certain portion of his estate and the size of this portion is determined by the number of descendants of the deceased. French Inheritance Law will only apply to a non-resident’s fixed property situated in France if the laws of his country of residence provide that the law of the country where the property is located takes precedence.

In Mauritius the principle of forced heirship applies to all individuals, both citizens and non-citizens, who are domiciled or permanently resident in Mauritius. Our Mauritius office has compiled an overview discussing the main provisions relating to succession and inheritance law in Mauritius, which appears hereunder.

Portuguese Inheritance Law applies to all residents in Portugal. In certain circumstances, it may also apply to fixed property situated in Portugal owned by a non-resident. For example, if the deceased owned fixed property in Portugal, and the law of his country of residence determines that the law of the country where the property is located takes precedence, then Portuguese Inheritance Law will apply. In terms of Portuguese Inheritance Law, the forced heirship rule dictates that a fixed portion (usually a minimum of 50%) of a deceased individual’s estate will devolve upon his spouse and descendants, or even direct ascendants, regardless of any provision in the deceased’s Will to the contrary. The remainder of the deceased’s assets can then be distributed in terms of a Will.

In some countries, such as United Arab Emirates, Shari‘ah Law, which is extremely complicated and pre-determined, applies to any Will made by a foreigner disposing of his fixed property situated in the United Arab Emirates. There are many South Africans living and working in cities such as Dubai who have invested or are considering investing in fixed property. To circumvent the application of Shari‘ah Law a possible solution would be to register an offshore company to purchase fixed property. However, it is important to note that only offshore companies registered with the Jebel Ali Free Zone Authority or the Ras Al Khaimah International Corporate Centre can purchase fixed property in Dubai. Offshore companies registered under other international jurisdictions such as Seychelles, Hong Kong, British Virgin Islands or Cayman Islands are not allowed to own properties in Dubai. The permitted offshore companies are also only allowed to purchase property in designated “freehold areas” which are the only areas in which foreigners may purchase property in Dubai.

The European Succession Regulation which was introduced on 17 August 2015 has provided some assistance in avoiding the implications of forced heirship rules. These Regulations are, however, only applicable in EU member states (including France and Portugal) with the exclusion of Ireland and Denmark. The general rule in terms of the Regulation is that the law applicable to succession is the law of the country where the deceased was habitually resident at the time of his death. This applies to both movable and immovable property. This could result in difficulties if the individual resided in an EU member state in which forced heirship rules apply. The Regulation therefore provides an exception which allows individuals whose habitual residence is not in their country of nationality, to choose the law of their country of nationality to govern the succession of their assets. The election of such a law should be set out in clear and unambiguous terms in the deceased’s Will. Such an election assists in preventing unintended consequences. For example, if the deceased owned fixed property in Portugal and the law of his place of residence determines that the law of the country where the property is located takes precedence, then Portuguese Inheritance Law, including the forced heirship rule, would be applicable.
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If you are a South African citizen or resident and would like any advice, please contact us.

Key contacts: South Africa

Leigh Jepson
Partner
T: +27 31 940 0501
M: +27 82 872 0336
leighjepson@eversheds-sutherland.co.za

Caitlin Petzer
Candidate Attorney
T: +27 31 940 0501
M: +27 83 252 7686
caitlinpetzer@eversheds-sutherland.co.za
The main provisions relating to succession and inheritance in Mauritius are found in the Mauritian Civil Code, the Code of Civil Procedure, the Successions and Wills Act and the Non-Citizens (Property Restriction) Act. The law recognizes two types of successions; where the deceased has not left any Will (ab intestat) and where there is a Will.

**Forced heirship**

The Mauritian Civil Code provides for the forced heirship of the children and descendants of the deceased. The aim of such a rule, which is of public order, is to protect the rights and interests of the children and descendants of the deceased with regards to his estate. These protected heirs are known as the "héritiers réservataires".

Therefore, an individual cannot provide for the distribution of all his assets in a Will as he sees fit, as the rights of his protected heirs will prevail. It is to be noted that the law makes no distinction between legitimate and natural children of the deceased, as long as the parental relationship with the natural child has been legally established.

Furthermore, if any one of the children of the deceased has predeceased him or her, the children of the predeceased heir are entitled to receive the share of their deceased parent in the succession of their now deceased grandparent.

In Mauritius, the regime is therefore different from that of freedom of testation, which allows an individual to distribute all his assets in any way he wishes after his death, through a Will.

**What happens to the estate of the deceased?**

At the outset of succession, the estate of the deceased shall comprise the reserved portion and the unreserved portion.

This reserved portion is that which the law expressly reserves for the protected heirs of the deceased and which cannot be given to anyone else, through a Will or otherwise. This reserved portion usually varies from half to three quarters depending on the number of children succeeding the deceased. Each child and/or descendant of the deceased is entitled to an equal share in the reserved portion.

As for the unreserved portion, it may be distributed to any person as per the wishes of the deceased, or as provided for in the Civil Code, to any person or institution.

In the absence of any heir and any Will of the deceased, the estate will go to the State of Mauritius.

**Exception to the forced heirship rule ("indignité successorale")**

The Civil Code limitatively provides for circumstances in which an heir may be debarred from receiving the estate of a deceased and, as a result, is excluded from the whole succession. The circumstances are:

- where the heir has been sentenced for killing or has attempted to kill the deceased;
- where the heir has made serious slanderous accusations against the deceased; and
- where the heir, who is of age, was informed of the murder of the deceased and has failed to report it to the authorities.

It is to be noted that the share of that heir will then accrue to his children, and he or she will not benefit from the usufruct usually attributed to a parent over the property of their children.

**The rights of the surviving spouse**

The children and the surviving spouse have the same rank in the order of succession. While the children are considered as protected heirs and are entitled to the reserved portion of the estate, the rights of the surviving spouse are exclusively exercised on the unreserved portion. Therefore, the deceased can completely exclude the surviving spouse from his or her estate by way of testamentary provisions or his/her share of the estate may even be reduced.

However, the Civil Code provides that the surviving spouse will still benefit from a right of usufruct over the matrimonial home and furniture till his or her death.
Principles applying to inheritance of properties in Mauritius

As per Article 3, al. 2 of the Civil Code, immovable properties, even those owned by foreigners, will be governed by Mauritian law. Thus, the concept of Lex rei sitae applies, i.e. the law where the property is located.

A foreigner can inherit of property in Mauritius from his relative, irrespective of whether the deceased was a foreigner or a Mauritian, only in instances where a Mauritian citizen can also inherit in the country of that foreign heir.

For movable properties, the concept of Lex domicilli applies, i.e. the law of the domicile of the deceased. In order to determine the law that will apply to the distribution of movables, the country where the deceased had established his domicile will apply, irrespective of the place of death.

It is to be noted that where an immovable property has been purchased through a legal entity, the shares in that entity giving rights to the property are deemed to be movables and thus the law of the domicile of the deceased will apply. However, a legal arrangement made in order to evade mandatory legal provisions relating to succession or non-citizens property rights in Mauritius, will be void.

What about the Will?

A Will is usually not required if an individual wishes to bequeath his assets equally to his heirs. However, a Will is necessary if he/she wishes to distribute the unreserved portion to other persons, or favour one heir over another.

For a foreigner, it is advisable that he/she makes a Will in Mauritius. This is mainly to avoid the lengthy legalization and enforcement formalities and to avoid the pitfalls that might make a Will unenforceable.

In order to make a Will in Mauritius, the person must be of sound mind and must not lack capacity under the law to dispose of his assets (ex: a minor of less than 16 years). The three types of Wills provided by the Code are:

- the Olographic Will, which must be written, dated and signed entirely by the testator;
- the Authentic Will, which is drawn up by a Notary upon the instruction of the testator, read to him/her and signed in the presence of two witnesses, or drawn up by two Notaries; and
- the Secret Will (“testament mystique”), must be signed by the testator after being either written by the latter or by someone else, and remitted to a Notary in a sealed envelope in the presence of at least six witnesses, together with other formalities.

Several additional mandatory formalities must be observed for the drawing of a Will in Mauritius and legal advice should ideally be sought beforehand to ensure that the Will is valid and enforceable as per the wishes of the testator.
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Key contacts: Mauritius

Yannick Fok
Partner
T: +230 2110550 (ext. 28)
M: +230 52588395
yannickfok@eversheds-sutherland.mu

Renand Pretorius
Partner
T: +230 2110550m (ext. 26)
M: +230 58582649
renandpretorius@eversheds-sutherland.mu

Prisca Bolaram
Associate
T: +230 2110550 (ext. 29)
M: +230 57573443
priscabolaram@eversheds-sutherland.mu