

Deciding Between Wills and Trusts for Non-Cayman Domiciliaries

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Introduction

If an individual owns Cayman Islands situated property, it is important to address the question of what will happen on the death of that person. In some cases, a foreign Will is sufficient to deal with the Cayman assets, in other cases, a Cayman Islands lifetime trust may be more appropriate. In some, rare, cases a Cayman Islands Will may be the solution.

This Briefing Note sets out some of the issues involved in determining what is appropriate in any given situation. It also sets out some of the benefits of using a Cayman Islands Trust, which are not available when using a Will.

Using a Trust

The Cayman Islands Trust Law is based upon the provisions of English Law, as amended by various statutes over recent decades. This statutory intervention has introduced some major innovations into the development of Cayman Islands Trusts, allowing settlors to achieve things which cannot be done in most onshore jurisdictions. It is possible, under Cayman Islands law, for a settlor to establish a "Will-like Trust". The settlor transfers assets to the trustees. During the lifetime of the settlor, the settlor reserves significant powers to himself (including a power to revoke the trust). On the settlor's death, the assets within the trust are distributed by the trustees in accordance with the settlor's wishes. In this respect, the provisions take effect on the settlor's death as though they were contained within a Will (except that the need for a Grant of Probate is avoided).

This approach is attractive for a number of reasons. The Cayman Islands Trusts Law contains the "Foreign Element Provisions". These provisions act to prevent the forced heirship rules of the deceased's domicile at the date of death taking effect in relation to the assets held in trust. By transferring assets into a Cayman Islands Trust during lifetime, the trust will seek to protect those assets against a forced heirship claim arising after the death of the deceased.

To further strengthen the use of a "Will-like Trust", the Trust Law contains provisions relating to "Presumption of Lifetime Effect and Reserved Powers". These rules provide expressly that a trust established in the settlor's lifetime will be presumed to take effect immediately, notwithstanding the fact that the settlor may have reserved significant powers to himself during his lifetime. This rule also expressly applies even if the purpose in establishing the trust is to avoid the forced heirship rules, to avoid the need for a Will, and where the settlor reserves powers to himself during his lifetime. This rule was enacted to counter claims that such a trust should be treated as a Will, rather than as a lifetime trust.

An additional attraction of using a Cayman Islands Trust is the statutory provisions relating to protection from creditors. These are collectively referred to as the "Asset Protection Laws". The Asset Protection Laws provide that a disposition of property (including one of property into a trust) is incapable of challenge once 6 years have elapsed since the disposition took place. This applies even if the transaction was at an undervalue, and even if there was an intention to defraud creditors in the making of the disposition. An asset holder who wants to look at protecting assets from possible future creditors would be well advised to use a lifetime trust and not to rely on a Will to deal with those assets. In light of a recent case, care needs to be taken where the settlor wishes to reserve a power to revoke the trust, as this can undermine the asset protection planning.

The flexibility afforded by the Cayman Islands Trust Law makes the use of a lifetime trust extremely attractive in dealing with Cayman situated assets, even where the intention of the settlor is not to convey any immediate benefit on any other person. In most cases, the use of a trust will be preferable to the alternatives.

Foreign Wills

Where an individual owns movable property (which is similar to "personal property" in Common Law jurisdictions, and includes, for example, bank accounts), situated in the Cayman Islands, it may be appropriate simply to allow the deceased's overseas Will to govern the passing of that property on death. Advice in the asset holder's home jurisdiction would need to be taken on this issue.

Under international conflict of law principles, the law of the deceased's domicile at death governs the passing of movable property. If it is acceptable to the asset holder for the Cayman Islands assets to pass in accordance with the law of his domicile, then it may be more cost effective for the overseas Will to deal with this. The foreign Will would have to be admitted to Probate in the

Cayman Islands or "resealed" in the Cayman Islands' Probate Courts, after the death of the asset holder.

If the asset holder has any asset protection concerns, it is likely that a Cayman Islands Trust will offer more protection than is offered by the use of a Will. See the above information on "Using a Trust" for more detail on this.

Please also refer to our separate guide to "Cayman Islands Succession and Estate Administration for non-Cayman Domiciliaries" for more information on the international law issues involved in owning Cayman Islands asset on death.

Cayman Islands Wills

In some, rare, cases a Cayman Islands Will may be the most appropriate way to deal with some Cayman Islands assets. Due to the complications arising from international conflict of law principles it is generally only sensible for a specific Cayman Islands Will to be produced to deal with Cayman Islands situated immovable property (similar to the common law concept of "real estate" / "real property"). This is because international law provides that the law of the place in which the immovable property is situated governs the passing of those assets on death.

If the asset holder owns Cayman Islands situated immovable property, Cayman Islands law would govern the passing of those assets on death. If a Cayman Islands Will was produced to deal with those immovable assets, it would be Cayman Islands law which determined all of the key questions in relation to that Will (including the testator's capacity and the validity of the Will). This has the effect of excluding the forced heirship rules which may otherwise apply in the deceased's jurisdiction of law domicile.

In most cases, a Cayman Islands Will is unlikely to be the best solution, but it may be more cost effective than a trust where the only assets involved are Cayman Islands immovables.

Conclusion

The interaction of different legal systems is a complicated matter. Significant problems can be encountered by an inadequate understanding of how two (or more) legal systems will interact on the question of the ownership of assets after death.

It is important that this issue is given detailed consideration at the earliest opportunity to ensure that the ownership of any Cayman Islands assets is appropriately structured.

Our Team of Trust and Estate specialists are able to advise on all aspects of the ownership of Cayman Islands property, and to ensure that all of the above factors are appropriately considered.

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