Testamentary Freedom, Wills and Succession

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Testamentary freedom has been in the legal press again recently, this time as a consequence of the introduction of the EU Succession Regulation (No.650/2012) in Europe and the debate as to whether the UK would opt in, or opt out, of it.

The Regulation binds EU member states that have opted in and in summary, provides that the law applicable to succession to a deceased's worldwide estate will be that of the deceased's '*habitual residence*', which is to be established by reference to all the circumstances of the deceased's life in the years up to the time of his death. It expressly excludes questions relating to trusts, tax and matrimonial property. The aim is to create a more uniform approach to succession in contrast to the position previously, where some member states would determine the applicable law by reference to the location and nature of the assets of the estate, or by the domicile of the deceased, giving rise to conflicts of laws issues which would hold up the administration of the estate and increase the costs of doing so. Worthy as that aim is however, it remains open to question the extent to which the Regulation will achieve consistency of approach, particularly given that the UK, Ireland, Switzerland and Denmark have opted out.

Although the Regulation does not have direct application in the Cayman Islands, the discussion about it has brought the topics of wills and succession and more particularly, testamentary freedom, domicile, residence and cross border estates, sharply into focus once again, issues which are of relevance to practitioners here.

The basic principle in English common law jurisdictions, like the Cayman Islands, is that a testator can dispose of his or her estate in whatever way he or she wishes. Like many basic principles, this is subject to a number of caveats and conditions. Testamentary freedom and the rationale underpinning it were described in the English case of *Banks v Goodfellow* (1869-70) LR 5 QB 549, at 563, in this way:

"*The law of every civilised people concedes to the owner of property the right of determining by his will, either in whole or in part, to whom the effects which he leaves behind him shall pass … The English law leaves everything to the unfettered discretion of the testator … the common sentiments of mankind may be safely trusted to secure, on the whole, a better disposition of the property of the dead, and one more accurately adjusted to the requirements of each particular case than could be obtained through a distribution prescribed by the stereotyped and inflexible rules of a general law*."

In contrast to testamentary freedom, regimes exist including forced heirship[1], elective shares[2] or community property[3] dictating the disposition of property on death. Within those broad categories lies a varied and complex network of rules, regulations and convention governing property disposition on death in each individual country or state[4]. In short, each regime operates to limit testamentary freedom by preventing disinheritance, usually of a testator's surviving spouse and/or children. Those limitations can affect not only individuals and the extent of their inherited wealth, but also the operation and disposition of family businesses when the owner dies.

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[1] Eg Civil law jurisdictions like France or Brazil and Islamic Shari'a law countries

[2] Eg New York and Florida

[3] Eg Switzerland or California

[4] '*Succession and Forced Heirship Disputes*' by Andrew De La Rosa in ' *International Trust Disputes*', OUP 2012.

Other jurisdictions like Guernsey have moved more recently to abolish their forced heirship regimes[5], recognising that testamentary freedom is an attractive concept for wealthy testators who may wish to settle there and adopt Guernsey as their domicile.

The question of a testator's domicile can be vitally important. Domicile may be key not only to the availability of testamentary freedom but also to the determination of the validity of the will, the liability to estate or inheritance taxes, the entitlement to and proper forum for taking out the grant and to family provision claims[6].

Deciding domicile is not as straightforward as simply looking at where the deceased was living at the time he died, even in cases where the deceased may have been living in a particular place for several years. The general rule here in the Cayman Islands is that a child will take the domicile of his father, unless illegitimate in which case he takes the domicile of his mother. As an adult, a person may acquire a domicile of choice which is different to the domicile of his father. This is where disputes often arise in succession claims. It is not easy to acquire a domicile of choice: as I have already mentioned, it is not only defined by where the testator lives, but requires evidence of an unequivocal intention to reside permanently and indefinitely in that country, such that he abandons his domicile of origin[7].

Further, in order to avail oneself of freedom of testamentary disposition in English common law jurisdictions, a testator must have capacity to do so, in other words, he must be an adult[8] and he must possess a certain level of understanding of what he is doing by making a will. This level of understanding is referred to as 'testamentary capacity' and despite close judicial scrutiny over the years, the basic test for testamentary capacity remains, broadly, as set out in *Banks v Goodfellow*.

As evidenced in several cases in England since *Banks*, testamentary capacity has repeatedly vexed not only lawyers and the courts, but also experts in the field of psychiatry, medicine and dementia, alcohol and drug dependencies. It has on occasion, led to long drawn out battles lasting several years costing millions of dollars and often involving the most intense scrutiny of the minutiae of family and business relationships, much of which ends up being played out in the press[9]. The question of whether a testator had crossed "*an imprecise divide*"[10] at the time he executed his Will is notoriously difficult to assess after the fact; after all, the testator is no longer around to be subjected to medical testing, although there is often a wealth of anecdotal evidence to be assessed. As Lord Cranworth described it so eloquently, "*There is no possibility of mistaking midnight from noon, but at what precise moment twilight becomes darkness is hard to determine*."[11]

A testator must know and approve of his will's contents[12] but as Chadwick LJ put it in *Hoff v Atherton* [2005] WTLR 99, "*Where there is nothing to excite suspicion, the court may infer (without more) that a testator who signs a document as his will does know its contents. It would be surprising if he did not.*" Not surprisingly, a claim that a testator did not know and approve of his will's contents is often run in conjunction with a claim of mental incapacity.

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[5] The Inheritance (Guernsey) Law 2011

[6] Eg in England and Wales under the Inheritance (Provision for Family and Dependents) Act 1975 (as amended)

[7] *Holliday v Musa* [2010] EWCA Civ 335 and *Morris v Davies* [2011] WTLR 1643

[8] Unless he is a serving member of the armed forces on actual military service or a mariner at sea s7 Wills Law (2004 Revision)

[9] See for example the Jimi Hendrix and Brooke Astor estate disputes in the USA

[10] *Sharp v Adam* [2006] WTLR 1059

[11] *Boyse v Rossborough* (1857) 6 HL Cas 2, cited in *Sharp v Adam*

[12] *Wyntle v Nye* [1959] 1 All ER 552

One example of when suspicion will be aroused is when a beneficiary under the will is instrumental in its preparation[13]. Another might be when there has been a fundamental and arguably irrational change in the testator's intentions between prior wills and a final will.[14] Practitioners do also have to be alert to undue influence, another claim which is often run in conjunction with a claim of mental incapacity. Clients who are mentally and physically frail may be more vulnerable to bullying from those who wish to take advantage of them. Practitioners are encouraged to meet elderly clients alone and not in the presence of any of the intended beneficiaries of the will and enquiries should always be made about any lifetime gifts that may have been made by the testator. Appeals to a testator's affection would not be enough, the undue influence has to be sufficient to "*overpower the volition*"[15] so there is an evidential burden to discharge for anyone making such an allegation.

Testators with assets all over the world are often advised to make separate wills in each country where assets are held. These local wills should comply with the relevant local laws. Problems do occasionally arise, usually as a consequence of one of the wills unintentionally revoking an earlier will. Practitioners here who are asked to draft a will to deal with Cayman Islands assets should be provided with copies of all other wills to ensure the Cayman law will is drafted accordingly.

While succession claims only rarely come before the Cayman Islands' court, cross border issues and conflicts of laws do arise after the death of a client in relation to the administration of assets held here, particularly if there is a question over the client's capacity, domicile or testamentary freedom. Given that we are involved in an international financial services industry, it is incumbent on us all to be alert to potential issues and to areas of concern and to take advice in the relevant jurisdiction if questions do arise.

[13] *Fuller v Strum* [2002] 2 All ER 87

[14] *Boudh v Bodh* [2007] EWCA Civ 1019

[15] From *Hall v Hall* (1888) IP & D 481, quoted in *Carpeto v Good* [2002] EWHC 640.