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ESTATE PLANNING AND PROPERTY DISPOSITION IN THE BAHAMAS

Thursday, 28 March, 2019

Answers to six frequently asked questions from Latin American clients with respect to their estate planning and the disposition of their property situate in the Bahamas

Question 1: If I am a non-domiciliary of the Bahamas and own Bahamian property, can I execute a Bahamian will disposing of such property?

Answer: According to s.7 of the Wills Act 2002 (the Act), a testator who: (a) is not domiciled in the Bahamas and (b) is disposing of their property situate in the Bahamas, may execute a will disposing of such property if such testator expressly declares in their will that the laws of the Bahamas shall be the governing law of such disposition.

Question 2: If I am non-domiciliary of the Bahamas and execute a Bahamian will, what process must occur in the Bahamas in order to distribute or take possession of my Bahamian property upon my death?

Answer: In such circumstances under Bahamian law, in order to distribute or take possession of a deceased person's property situated in the Bahamas, a grant of probate or letters of administration must be obtained from the Bahamian courts. If there has been a grant of probate (or its equivalent) or a grant of letters of administration (or their equivalent) in a foreign country, with respect to a deceased person having property in the Bahamas, the personal representatives may not take possession of, or administer any part of, the Bahamian property until they first obtain a resealing of the probate or letters of administration by the Bahamian courts.

Question 3: If I am non-domiciliary of the Bahamas and subject to forced-heirship laws, can I still use a Bahamian will to distribute my Bahamian property according to my wishes?

Answer: Although s.7 of the Act suggests that the same protection may apply to personal and real property in the Bahamas, this section is not entirely free from doubt, mainly because of legal questions that can conceivably arise as to where some types of personal property[1] are deemed to be situated. Therefore, having regard to that particular uncertainty under s.7 of the Act and; having regard, in any event, to our answer in question four below, a Bahamian will would not override forced-heirship laws.

Question 4: If I am non-domiciliary of the Bahamas and subject to forced-heirship laws, can I use a Bahamian trust to distribute my Bahamian property according to my wishes?

Answer: An inter vivos trust[2] governed by Bahamian law is an effective estate-planning tool for this purpose. The Trusts (Choice of Governing Law) Act, 1989 (the TCG Act) provides that if a trust stipulates Bahamian law to be its governing law; such a stipulation will generally preclude foreign forced-heirship laws from having any invalidating or inhibiting effect on the trust or any transfer of property into the trust. Instead, the

trust, at least insofar as Bahamian law is concerned, would operate freely under Bahamian law without any reference to the foreign forced-heirship law in question.

However, one of the important exceptions to this is enshrined in s.7 (2) (a) (iii) of the TCG Act, which states that the TCG Act 'shall not validate…any testamentary trust or disposition which is invalid according to the laws of the testator's domicile'. Thus, if a person is domiciled in a forced-heirship jurisdiction, any Bahamian will that he or she might make, including any trust created by such Bahamian will, would not provide any protection against forced-heirship laws. A Bahamian will made by such person domiciled in the forced-heirship jurisdiction is invalid, if it purports to defeat the forced-heirship entitlements under such law of the forced-heirship jurisdiction.

Question 5: If I am non-domiciliary of the Bahamas subject to forced-heirship laws and settle a Bahamian trust (during my lifetime) to distribute my Bahamian property, ignoring forced-heirship laws, could my forced heirs have a legitimate claim over the settled assets?

Answer: The heirs under the forced-heirship jurisdiction would have no claim under Bahamian law against a Bahamian inter vivos trust or its assets in order to satisfy what they might otherwise be entitled to under the laws of their forced-heirship jurisdiction. Such a claim could not be successfully instituted in the Bahamas, nor could a foreign judgment (based on foreign forced-heirship laws) be enforceable in the Bahamas against such a Bahamian trust or its assets. Instead, the forced heirs would be completely shut out from retrieving the disposition. An important caveat to the foregoing would be in relation to any real property situated outside of the Bahamas.

Question 6: What is the difference between executors holding my Bahamian estate upon a testamentary trust and a trustee of a trust created during my lifetime holding my settled assets?

Answer: Under Bahamian law, a Bahamian will has no legal effect until the testator has died. By extension, and as previously mentioned, any trust created under a Bahamian will would have no legal effect until the testator has died and the will has been admitted to probate. By further extension, the executors of the Bahamian will would have no legal authority to begin administering the trusts under the will, until their authority has first been affirmed by a formal grant of probate by the Bahamian courts. Thereafter, the executors can then go about the business of disposing of the trust assets in accordance with the terms of the will. While they hold these assets as executors, they will, of course, be doing so as fiduciaries and thus they would be under an obligation to deal with the assets only as permitted by the Bahamian will or under the general rules governing the administration of estates.

By contrast, an inter vivos trust is created by a declaration of trust or deed of settlement or trust agreement during the relevant property-owner's lifetime. It will generally take immediate effect, with the trustees having immediate ownership and control of the trust assets either directly or through underlying companies – the issued shares of which will usually be held by the trustees or their nominees. Moreover, unlike the probate of Bahamian wills, trust-creation in the Bahamas is private: it is not subject to any registration, nor any regulatory or judicial approvals. The trustees' obligation to hold and distribute trust assets is governed by the terms of the trust instrument. However, if (as is normally the case) the trust is of the discretionary trust-type, the primary point of reference will be a non-binding, confidential letter of wishes from the settlor advising the trustees as to what he would want to happen and when.

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Previously published in STEP LATAM Newsletter -- March 2019.

1. For example, bank accounts, securities, shares in companies or interests in investment funds, works of art, jewellery, boats, cars, etc.

2. A trust created during the settlor's lifetime.

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