

MEMORANDUM

Wills and Avoidance of Probate

1. Why make a Will? This is to ensure that those you wish to receive your property will do so and that those whom you wish to administer your estate will do so.
2. If you do not make a Will, then the rules of intestacy of the country will apply to determine who will receive what proportion of your estate and who will administer. Seldom do such rules provide that surviving spouse will receive everything and they may not otherwise provide what you wish regarding either who benefits or who will administer your estate.
3. If a client has assets in many jurisdictions and has only one Will, that will need to receive Probate in the country of his domicile first before being taken to the other countries for Probate after that.
4. Probate is a piece of paper issued by the Court stating that the Will is valid in the jurisdiction concerned and that the named executors are the persons validly appointed to carry out the administration of the client's estate.
5. The exception to the rule that the domicile of the client at the date of his death governs his Will is where he holds immovable property the transfer of which is governed by the law of the jurisdiction in which it is situated.
6. Therefore, it may be wise and practical to have Wills limited to the disposal of assets in each jurisdiction in which such immovable property is situated.
7. Other Wills limited to the disposal of assets in other jurisdictions can also be made by the client to cover the disposal of valuable assets without having to wait for the Probate of his main Will in the country of his domicile. This may save time and cost.
8. If the client has a main Will and limited Wills, disposing only of his property of whatever nature situated in stated jurisdictions, his main Will will dispose of all his property of whatever nature and wherever situated, except for the property of whatever nature situated in the jurisdictions of the limited Wills.
9. To avoid the need for Probate altogether, the client can transfer assets in his lifetime to the Trustees of a Trust or to a Foundation so that, when he passes away, the assets transferred are no longer part of his estate, requiring a Will or Wills and Probate, but rather are trust assets or assets of a Foundation already catering for succession to those assets.
10. Whether or not the creation of a lifetime Trust or a Foundation is appropriate will depend upon the cost of transfer of the assets concerned and the taxation implications of such transfers and later when the assets are in the Trust or Foundation and when any Beneficiary receives a distribution or benefit.