Granich Partners

BARRISTERS & SOLICITORS

BRIEFLY SPEAKING

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PRINCIPLED, PROFESSIONAL, PERSONAL

Granich Partners is an incorporated West Perth based law firm providing personal, professional and principled legal services and advice to its clients.

We have acted as advisers for over 38 years to many individuals and small businesses (including farmers) in the Metropolitan and Regional areas of Western Australia by giving them the legal support they require with a timely and economic driven focus.

WILLS AND OVERSEAS ASSETS

Australia is a land of immigrants and migrants. One in four Australians were born overseas and relative to our population size, Australia has one of the greatest movements in migration in the world, with some one million Australians, or five percent of our population, currently living outside of our national borders. This is why it is common that a person will not only hold Australian assets, but also have overseas interests.

It is generally wise for a testator (i.e. the person making the Will) who has assets in Australia and in a foreign country to make two wills. An Australian will should be made dealing with their property wheresoever situated including in Australia but excluding property in the foreign country concerned say, Italy. The Italian Will would then deal with their property in Italy.

Because the law in relation to succession or inheritance differs widely from country to country, it is unwise for an Australian solicitor to prepare a will dealing with foreign assets as the Australian solicitor will not be an expert in the law of the foreign country. There are a number of reasons why it is wise to obtain the advice of a foreign lawyer:

(a) some foreign countries have laws that require the spouse and/or children of the testator to take a minimum amount or proportion of the estate, which amount or proportion cannot be reduced by will;

(b) some Australian concepts of holding assets in trust, for example, may not exist in the foreign country;

(c) taxation laws are likely to be different in the foreign country;

(d) Australia has not had any form of death duties since 1980, whereas many foreign countries have death duties;

(e) there may be taxation and/or costs savings where a foreign jurisdiction is only dealing with a will that covers assets in this

jurisdiction rather than dealing with an Australian will that needs to be probated both in Australia and in the foreign country.

(f) there are different laws in different countries with respect to laws against perpetuities (i.e. the length of time that a trust or other interest can exist);

(g) ideally, the Australian and foreign will should be prepared around the same time and there should be consultation between the two lawyers. It may not be necessary to have a lawyer resident in the foreign country to prepare the foreign will if there is a suitably qualified person in Australia conversant with succession law in the foreign country, such persons include:

(i) embassy or consulate staff of the foreign country;

(ii) local lawyers with experience of the foreign country law;

(iii) international law firms which practice under the foreign jurisdiction.

As a general rule, wills contain a clause revoking the previous Will. Care needs to be taken in the preparation to ensure that where a testator who has separate Wills prepared in Australia and another country, the first made Will of the Australian and foreign Will is not revoked by the Will made later.

Australia is a signatory to the Hague Convention on the Conflict of Laws Relating to the Form of Testamentary Dispositions, which (inter alia) deals with the formalities required for the validity of a will where the formalities required by one jurisdiction are satisfied and the validity of the will in another is in question.

Legislation implementing this convention in Western Australia is contained in Section 20 of the *Wills Act 1970* (WA) which provides that a Will is taken to be properly executed, if its execution conforms to the internal law in force in the place where it was executed or the place where the testator lived or was a national at the time of death or at the time of making the Will.

Many countries, particularly Western countries, have implemented similar legislation pursuant to the Hague Convention. However, it is important to note that Section 20 of the *Wills Act* deals only with the form and not the substance of the Will. It does not deal with the validity of a disposition made in the Will.

For example, if a foreign country had a law as stated above mandating that a certain portion or quantum of the estate goes to the spouse and/or children of the deceased, then Section 20 of the *Wills Act* would ensure that, if the Will was not signed in accordance with foreign country law, but was signed in accordance with Australian law, it would be a valid Will in the foreign country however, any disposition in the Will itself that contravened that mandatory law would not be valid.

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