

Will my assets outside South Australia be covered by my Will?

When we are taking instructions for a Will, we will ask clients about the assets that they own, like property, bank accounts, shares or superannuation. Often, clients have assets not only spread around Australia but also overseas. It is common for Australians to spend a period of time living overseas or enter into a relationship with someone from another country and in the process, attain assets in this jurisdiction. Similarly, individuals that have moved to Australia may have retained assets in the country that they came from.

Interstate Assets

Once someone has passed away, one of the first roles of an executor or administrator of their estate is to compile a list of assets and liabilities of the deceased. The executor will then submit the statement of assets and liabilities, together with the Will and other information to the Supreme Court Probate Registry for a Grant of Probate or Letters of Administration. In relation to assets that are held in Australia (but outside of South Australia) these will be covered by a validly made Will here in South Australia. The executor will need to engage a practising solicitor in the State where that asset is held, Victoria for example, and apply to the Supreme Court of that jurisdiction to re-seal the Grant. Once granted, this is considered the recognition of the validity of the Will and the South Australian Supreme Court Probate Registry's Grant of Probate or Letters of Administration in another state. The executor

may then deal with the assets held in that state. For a South Australian asset where an interstate Grant of Probate has already been obtained, this is dealt with by way of Registration of that Grant with the Probate Registry.

Overseas Assets

It cannot be assumed that overseas assets you have will be protected by a Will that has been made here in South Australia. Every country has their own rules about what law should apply to your assets when you die. Further, the country where you have assets outside of Australia may not be a signatory to the Hague Convention, which allows mutual recognition of legal instruments. This is called the Convention Providing a Uniform Law on the Form of An International Will dated 26th October 1973. It provides a list of countries that can be included in Australian wills and likewise, act as a direction as to what countries you will not be required to complete a Will in to deal with those assets.

Your solicitor will need to establish the international private law that would apply in each respective country where you hold assets and the nature of the assets. When dealing with overseas assets, there is usually a distinction made as to whether the assets are ‘moveable’, such as bank accounts or shares, or ‘immoveable’, like real property. This distinction affects the succession laws of the country in which the assets are held. The permanent residence of the testator usually applies to moveable assets.

Moveable assets

Some moveable assets that are held in another country won’t require a reseal of a Grant of Probate. Shares, for example, are located in a country by way of the registered address of the company. You will not usually need to re-seal the grant as that country will recognise the country you are domicile of and accept certified copies of Grant of Probate. This is complicated where that country isn’t party to the convention or doesn’t have the same recognition of domicile as other countries.

Non-Moveable assets

Commonwealth countries and countries that are party to the convention, will typically recognise Australian Wills and reseal a Grant of Probate that has been granted in Australia. This is due to those countries allowing an Australian testator to apply their countries law to assets held abroad.

How do I deal with these assets in my

Will?

When reviewing your circumstances and advising estate planning, we take detailed instruction as to the location of your assets and work out the best method to deal with them. Based on the information provided above in relation to countries that recognise Australian Wills, this will be one of either drafting a paragraph that includes your overseas assets or drafting a paragraph that excludes your overseas assets.

International Wills

First, an international Will would be considered, whereby a Will is made in accordance with the Convention Providing a Uniform Law on the Form of an International Will 1973. Countries party to the Convention, will recognise a Will made in accordance with the requirements of the Convention. Of course, whether this will be appropriate will depend on the location of the assets and if indeed that country is party to the convention.

An international Will makes it easier to prove that the Will is formally valid in another country, however, there are some matters that are not covered by the convention, including:

1. Where Probate should be applied for;
2. Which local law should apply;
3. Tax jurisdiction;
4. Inheritance rules. Some countries have their own requirements as to who can inherit under an estate and more particularly, what can be inherited;
5. Who can claim against an estate and the jurisdiction in which the claim can be made.

You should discuss these matters with your solicitor when reviewing your estate planning.

A separate Will in the Countries where assets are held

Depending on the nature of your overseas assets, you may consider drafting a Will in each of the countries that you hold assets in. A reason to consider this, is due to the removal of the need to have a probate grant re-sealed or granted in each country. This can be costly and require postage and communications between countries of an original certified copy or grant from the jurisdiction where the first grant was obtained. Further, there may be reduced court fees, tax savings and a local advisor specific to that family member or executor, that can guide them through the process. It can be done concurrently in each jurisdiction, rather than waiting for a certified grant or re-seal to be obtained at each level.

Have caution however, when drafting a Will in each country of an asset that you own. Your solicitor in

each jurisdiction needs to know that you intend on doing this. Often a Will automatically revokes the previous Will, which would cause issues in this situation. The Wills mustn't contradict each other or cancel out the operative effect of another Will in another country.

How can Andersons help?

If you have assets overseas, it is important that you disclose all of them to your solicitor so that they can advise whether these assets will be covered by your Will and discuss the best structure tailored to your circumstances. Andersons Wills and Estates team can assist you with this.

The information in this article is general in nature and was accurate at the time of publication. Laws and circumstances can change. For advice specific to your situation, please seek professional legal advice.