Should I Write a Separate Will for My China Assets?

Description

This question has been raised frequently over time. A recent inquiry was from a client in UK who has a couple of real properties in China. Upon working on his estate planning, he wondered whether he should write a single will covering both his UK and China assets or write a separate will for China assets. By the way, the inquirer is British, domiciled and habitually resides in England, not in China. So his or her will is to be governed by English law, not Chinese laws.

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In today's world, high net worth individuals' assets may span across different countries and accordingly they would need to face a lot of difficulties and confusion when setting up their estate plan across different jurisdictions with difficult rules. Don't forget that the area of succession law is generally more entrenched in local legal and social cultures and thus more difficult to reconcile between different jurisdictions.

I. **Goal of Estate Planning for Foreign Assets**

Discussion of this question on the internet is a lot for our western peers as their clients have such headache long time ago. Much discussion is undertaken from general perspective, and the mainstream view is that a separate will for foreign assets is preferred. While this separate approach may prove true in many cases, it may not be true all the time.

The purpose and goal of answering that question is to find the best course of action to deal with the foreign assets after the death of the testator. In the inquiry case, the client wants to find out how his China properties will be handled properly and easily.

So let us first look at the basic ways of dealing with inheritance of properties in China before we go further to make analysis.

(1) the parties to the inheritance appear in person before the clerks of the real estate registration authority in the place of the property in question;

(2) carry out the inheritance right notarization at a China notary office that will affirm the heirs' or beneficiaries' entitlement to the estates in China, and with that notarization document, title transfer can be done;

(3) go to court and get the inheritance done through litigation.

Apparently, the first option is not viable for most foreign clients esp when there are multiple heirs or beneficiaries. It is too much for everyone to attend to the process in person. The second option is the best course of action in practice provided that there is no dispute among heirs or beneficiaries. This notarization approach is most cost and time efficient. The third option of litigation is the last resort for clients, so not in any case preferred.

To conduct inheritance of estates by way of notarization, the will shall be presented to the China notary office. The notary office shall first determine whether the will is valid or not. However under China Law on Conflicts of Laws, the applicable law governing the validity of the will is British law. Here arises the problem. China notary officers don't know anything about British law, and they cannot make a decision on the validity of the will made in UK. Indeed, China Ministry of Justice (in charge of notary profession) has warned notary offices in dealing with inheritance involving wills governed by foreign laws. Thus, many China notary offices simply don't want to work on a case involving such foreign wills. Instead, as we have done frequently, they will advise to put away the will and go about the inheritance as an intestate succession, designed to achieve the same goal as set in the will.

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With that in mind, we need to think about which approach, either single will covering both UK and China assets or separate will covering only China assets, will help address the validity of the will/testament. This is the key element.

II. Pros and Cons of All-in Single Will or Separate Will

A single will covering both onshore and offshore assets can be useful in making holistic estate plan, and multiple or separate will can easily adapt to different legal rules in different jurisdictions, more flexible.

If the client writes one single will covering both British or China assets:

(1) given that both China and UK allow testators a great deal of testamentary freedom to bequeath estates to whoever they wish, only subject to compulsory provision rules. Most likely that the will made in UK under English laws will be recognized but this does not come easy.

(2) As a matter of law and practice, this UK will shall be probated at a UK court. Once the UK court approves the will as valid, then the will when presented to China notary officer will have a much greater chance being accepted as valid and China notary office may proceed to issue inheritance right notarization document. In the eyes of China notary offices (or even courts), the applicable law to the

will is English law, and no other persons or institutions have a better position than a UK court to decide on the validity of the legal document.

So inclusion of China assets in one single will bring about the advantage of the will being easily accepted in China notary office as valid.

The downside of using one single will is that in the case of dispute over the will, then it could be delayed for long which will affect the administration and distribution of estates in foreign jurisdiction.

(3) China is a civil law jurisdiction, and strictly speaking, China doesn't have the typical family trust and testamentary trust widely used in common law countries. So when UK client write a will covering China assets, they shall be careful of setting up trust for their China assets. If not properly worded or structured, the trust may not stand and cannot be enforced in China. In China, inheritance or succession primarily means the outright transfer of title in estate properties to heirs or beneficiaries. Hower, foreign clients may set up a UK testamentary trust on the sale proceeds of China properties, which could be an imperfect alternative.

If the client makes a separate will covering only China assets:

(1) Here a separate will made in UK shall still be governed by English laws as said above since the testate doesn't have habitual residence in China and he or she is not Chinese citizen. Even the person comes to China to make the will, the applicable law is still English laws, not Chinese laws.

(2) As you may have known, China doesn't have probate proceeding. No court intervention in the course of estate administration and distribution except that there is a dispute therein. China new Civil Code may bring about changes to this practice by allowing court to appoint estate administrator if the interested parties cannot come to agreement on their selection of administrator.

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Can a separate will save the trouble of probate proceeding in UK if the client chooses to do so?

Now if there is no dispute among interested parties, then the preferred way of dealing China estate is to carry out the inheritance by way of notarization in China. Then the same issue of determining the validity of the foreign will arises here. If the separate will can be quickly probated in UK, then it could be a good idea of making a separate will for China assets. Otherwise, the matter will most likely end up in China court, which may cause more chaos compared to going through the probate proceeding in UK.

III. Conclusion

You see, there is no one-size-for-all solution to the question of making a single will covering all assets or separate wills covering assets in different jurisdictions. Specific analysis shall be accorded when we investigate the same issue as between different countries by taking into various factors such as:

(1) size of estates in different jurisdictions;

(2) local rules and laws governing estate administration and distribution, forced heirship, freedom of choosing specific applicable law;

(3) bilateral treaties and international convention on inheritance and estate administration;

(4) complexity of clients' family relationship, and possibility of internal dispute or fight;

(5) need for testamentary trusts or other similar arrangements; and

(6) other factors that may have an impact on the cross-border administration of foreign estates.

Given the complication of writing wills for assets in different jurisdictions, the convenience and ease of setting up *inter vivos* trusts is prominent in this background. I specifically refer to the typical offshore trust structure using a holding company in owning various assets in different countries.

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