

A Practitioner's approach to estate planning for Mauritians and Foreigners: Opportunities and threats

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ESTATE PLANNING

- Ageing Population
- Wealth
- Avoid family dispute
- Protect Minors
- Continuity in business
- Wealth preservation
- Secret beneficiaries
- International Element

LAW OF SUCCESSION

- The Transcription and Mortgage Act 1863
 - Affidavit de succession /notarial deed:
Immovable property must be transcribed within
3 months of death
- Heirs:
 - Children and descendants
 - Surviving spouse
 - Ascendants
 - Collateral parents

Children and Descendants

- Art 745 CC: Equal Rights. Equal Share. No discrimination based on sex or marriage
- Art 757 CC: Natural Child same rights as legitimate child
- Art 762 CC: Incestuous Child no right to inherit

SURVIVING SPOUSE

- Art 767 CC: same rights and rank as a child
- Art 768 CC: Usufruct right to the *logement principal du ménage*. Cannot be reduced or avoided by will
- Art 769 CC: Surviving spouse is not a *héritier réservataire*
- Art 770 CC: Share can be reduced or extinguished by will or donation
- Beware of matrimonial regime. Communauté de biens

Ascendants

- Art 746 CC: If no children, no spouse, no brother, no sister, no nephew and nieces - **half** to ascendants on father's side and **half** to ascendants on mother's side. Ascendant closer in line inherits
- Art 747 CC: Ascendants get back property given to deceased
- Art 748 CC: If no children, no spouse but brothers, sisters, nephew or niece: father and mother gets half of the estate to be shares equally
- Art 749 CC: If no children, no spouse but brothers, sisters, nephew, niece and either father or mother dies, share goes siblings

COLLATERAL SUCCESSION

- Art 750 CC: If no children, no spouse but mother and father- brothers, sisters or their children gets half of estate.
- Art 751 CC: If no children, no spouse but either mother or father- brothers, sisters or their children gets three quarter of estate
- Article 752 CC: Division among brothers and sisters
 - Uterin: brothers and sisters of same mother
 - Consanguin: brothers and sisters of same father
 - Germain: brothers and sisters of same parents

RESERVE HÉRÉDITAIRE

- **Heritiers Reservataires:** forced heirs who cannot be disinherited
- **Art 913, 914 CC:** children or their descendants.
- **Art 915 CC:** if no children, paternal and maternal ascendants
- **Not Spouse and collaterals**

Forced Heirship Share : **Réserve héréditaire**

- 1 child: half of estate
- 2 children; two third of estate
- 3 or more children; three quarter of estate

- No child but ascendants in both lines: half of estate
- No child but ascendant in one line only: quarter of the estate

QUOTITE DISPONIBLE

Donation by will or inter vivos

- **1 child:** half of estate
- **2 children;** one third of estate
- **3 or more children;** one quarter of estate
- **No child but ascendants in both lines:** half of estate
- **No child but ascendant in one line only:** three quarter of the estate
- **No child, no ascendant:** the whole of the estate

Art 919 CC; préciput et hors part. Quotite disponible can be given to forced heir to increase his/her share

CLAW BACK

- Art 920 CC: amount exceeding quotité disponible to be reduced
- Art 921 CC: Request can only be made by forced heirs
- Art 923 CC: testamentary dispositions reduced first before inter vivos donation
- Art 930 CC: action against Third Party holding immovable property in reverse chronology

Exception: where all forced heirs consented to transfer or Holder acquired property for consideration from person who seemed to have a valid title even if title deed subsequently held to be a form of disguised donation

WILL

- Art 970 CC: Olographe. Entirely Handwritten, dated and signed by testator
- Art 971 CC: acte public. Before two notaries or one notary and two witnesses. Legatee and relatives up to 4th degree cannot be witness
- Art 976: mystique or secret. Sealed envelopped to be remitted to a notary public before 6 witnesses who must be mauritian citizens of full age.
- Foreign will: olographe or by authentic deed. Must be registered in Mauritius or place where immovable property is located

VEHICLES

- INTER VIVOS DONATION
- WILL
- TRUST; Private trust company
- FOUNDATION
- WAQF

Case study 1 (a)

Client is in his fifties. He is partner in a leading accounting firm. He is married under the regime of legal community and have two children aged 12 and 10. He has a house, an apartment by the beach, a Mercedes car, shares in listed company and some cash. He has high cholesterol and a history of cardiovascular disease in the family. His marriage is wrecked but they are staying together for the children's sake. He wants to make sure that his children will be properly taken care of financially should something happens to him. He comes to you for advice.

Case study 1(b)

If he dies Ab intestate without a will:

His wife gets half of all matrimonial property plus the same share as a child in the remaining half i.e. two thirds

Plus she has a usufruct over the matrimonial home.

Each child get one sixth of the estate. ($1/2$ divided by 3)

On top of that the wife gets to administer the shares of the children as long as they are minor.

If after he passes away the wife remarries and have children, those children will get a share.

Case study 1(c)

Advice:

Change matrimonial regime. Art 1398 CC. 5 years.
Notarial deed to be approved by Judge in Chamber.
“L’ intérêt de la famille”

Donation: With consent of wife transfer assets into
the name of children

Will: leave quotite disponible to the children and not
wife.

Case study 1 (d)

Set up a trust or foundation for benefit of children.

Qualified trustee/council will look after the income and capital of the trust

Appoint a protector to ensure that qualified trustee/council carries out his wish.

Income of trust can be accumulated and used for specific purpose of education and maintenance

Case 2 (a)

Client is a self made man in his seventies. He is a very successful businessman and has interest in real estate, trade, manufacturing and distribution. All his business is under his personal name. He was married under separate community regime and his wife has passed away. He has three sons aged 50, 48 and 25. He is concerned that after his death his elder sons will fight over the business. He has worked hard to build a name and wants to preserve the goodwill and business for future generation. He is also worried about his younger son who is totally irresponsible and has a tendency to throw away money.

Case 2 (b)

Advice:

Rearrange his business. Segregate assets and liabilities relating to each business under a separate legal entity such as a company.

Transfer shares inter vivos or by will.

Include in constitution restrictions on share transfer.

Quotite Disponible in a trust/foundation

- Income to son, capital to grandchildren
- Spendthrift trust section 18 Trusts Act

If a determining event occurs income goes to spouse, child of beneficiary

INTERNATIONAL ELEMENT

Austin v Bailey (1962) MR 113

Mauritian national residing in England by will left movables and immovable in Mauritius on trusts for benefit of children and grandchildren. Heirs attacked the will.

Held:

The trust was valid so far as they related to the *quotité disponible* but null and void in so far as it relates to the *réserve* of the heir

Austin v Bailey (1)

- French rules of private international law
 - *Lieu d'ouverture* of the Succession is by virtue of Art 110 of the CC her place of domicile and it is the competent court of her domicile which has jurisdiction to determine any question regarding the validity of the will.
 - Domicile
 - Art 102 CC: Le domicile de tout Mauricien , quant à l'exercice de ses droits civils, est au lieu où il a son principal établissement.
 - Art 103 CC Le changement de domicile s'opérera par le fait d'une habitation réelle dans un autre lieu, joint à l'intention d'y fixer son principal établissement.
- A change in domicile is not presumed

Austin v Bailey (2)

➤ **Lex Successionis** law applicable to succession

Movables - *maxim mobilia sequuntur personam*
lex domicilii law of domicile of testatrix

Immovable- *lex situs*

Art 3 CC: Les immeubles, même ceux possédés par des étrangers, sont régis par la loi mauricienne.

Case 3(a)

Client is a retired British Citizen who has decided to invest in real estate in Mauritius under the Real Estate Scheme. He intends to retire to Mauritius but will continue to spend his time between Mauritius and England. He has various immovable properties in Europe and hold shares in various companies all over the world. He is married and has two children of full age. He is in love with another lady and would like to bequeath all his property to her.

Case 3 (b)

Place of domicile at death.

Law applicable to succession; lex domicilii for movables ; lex situs for immovables

Real estate in Mauritius. Forced heirship rules applicable

Convert immovable assets to movable assets by transferring immovable property under companies.

PLANNING TIPS

▶ Choice of domicile of trusts

- ▶ anti forced heirship rules

▶ Choice of trustee

- ▶ no connection with territories with forced heirship laws or which do not recognise trusts

▶ Keep trusts assets out of jurisdiction

- ▶ Convert immovable property governed by *lex situs* into movable property e.g shares

AVOIDING ATTACK (1)

▶ SECTION 7(6) Trusts Act 2001

(6) The transfer or disposition on trust of property situated outside Mauritius, which if it had taken place in Mauritius would constitute a valid transfer or disposition of the property under this Act, **shall not** be declared void or invalid merely by reason that it contravenes the applicable law of the transfer or disposition, or the law of the transferor's domicile or nationality.

AVOIDING ATTACK (2)

▶ SECTION 8(4) TRUSTS ACT 2001

(4) Notwithstanding any enactment, where a **non-citizen** transfers or disposes of property on trust, the transfer or disposition **shall not** be set aside, avoided, or otherwise declared invalid or ineffective by virtue of any rule or law of his domicile or nationality relating to inheritance or succession or any rule or law of a similar nature, or any rule or law restricting the right of a person to dispose of his property during his lifetime so as to preserve such property for distribution at his death, or any rule or law having similar effect.

AVOIDING ATTACK (3)

▶ SECTION 11 TRUSTS ACT 2001

Notwithstanding any rule or law relating to enforcement of judgments given by the court of another jurisdiction, where the law of Mauritius is the proper law of a trust, the Court shall not vary it or set it aside or recognise the validity of any claim against the trust property pursuant to the law of another jurisdiction or the order of a court of another jurisdiction in respect of –

(a) the personal and proprietary consequences of marriage or the dissolution of marriage;

(b) succession rights (whether testate or intestate) including the fixed shares of spouses, ascendants and descendants or relatives; or

(c) the claim of creditors in an insolvency.

Avoiding Attack (4)

- Limiting access to information
- **Section 33. Disclosure by trustee**
- (1) Subject to the other provisions of this section, a trustee shall, on receipt of a request, provide accurate information as to the state and amount of the trust property and the conduct of the trust administration –
- [...] (c) where the terms of the trust so authorise -
- (i) to any beneficiary of the trust of full age who has legal capacity and having a vested interest in the trust;
- **VIGNAUD O. v. TEMPLE CORPORATE SERVICES 2011 SCJ 153**

FOUNDATION (1)

Capacity of founder

Section 4(2) Foundations Act 2012

(2) A founder who is a non-citizen and endows property to a Foundation shall be considered to have had the capacity to endow property to the Foundation where, at the time of the transfer, he was of full age and sound mind under –

- (a) the laws of Mauritius;
- (b) the laws of his domicile or nationality; or
- (c) the proper law of the transfer.

FOUNDATIONS (2)

Avoidance of transfer; Section 4(3)

(3) Notwithstanding any other enactment, where a non-citizen endows property to a Foundation, the transfer shall not be set aside, avoided or otherwise declared invalid or ineffective by virtue of any rule or law –

(a) of his domicile or nationality relating to inheritance or succession or any rule or law of a similar nature;

(b) restricting the right of a person to dispose of his property during his lifetime so as to preserve the property for distribution at his death, or any rule or law having similar effect.

FOUNDATION (3)

➤ Nothing on enforcement of foreign judgment

➤ **35. Rights of beneficiary to information**

A beneficiary of a Foundation shall, on written request to the secretary, be entitled –

(a) to obtain information from the Foundation as regards the fulfilment of the objects of the Foundation;

(b) to inspect and have a copy of –

(i) the charter; (ii) the Articles, if any; (iii) any audit report, including any special audit report and books of account; (iv) any report on the financial position of the Foundation and the annual accounts; and (v) the minutes of proceedings of any meeting of the Council.

CONCLUSION

- Potential for growth
- Need to be aware of the various Pitfall and challenges
- Careful planning

