



PLATO, FRANKENSTEIN AND OFFSHORE ESTATE PLANNING

Plato said that nothing in the affairs of men is worthy of great anxiety. Perhaps not, but flawed estate planning can cause great anxiety for the heirs you leave behind. I want to address in this article one of the fundamental mistakes which I have come across in the offshore financial services industry: the failure of those with assets held offshore to adequately deal with succession before the (usually) unexpected event of death occurs. It doesn't matter in what offshore jurisdiction those assets are controlled, the potential dangers, delays and, often, distress remain. Those readers who have wisely put in place appropriate offshore wills, trusts or foundations need not read on. Everyone else with offshore assets should consider carefully what follows.

If a will exists, control of the deceased's offshore assets passes to his executor, unless there is a special foreign will covering the offshore assets. If not, there will be a delay before the domestic will is recognised by the foreign court that has jurisdiction over the assets. Meanwhile, management of those assets might be affected while transfer of control to the executor takes place.

Then there is intestacy which is the worst-case scenario. Even before representation by an executor is approved, one has to be found. Often there will be a delay while family members decide who to appoint, especially if rivalries exist or some members live in different countries. And intestacy, which applies the rules of succession without deviation, doesn't guarantee that the eventual beneficiaries will be the ones that the deceased would have chosen. I have looked across my desk and seen the disappointed faces of those who, except for the prevailing intestacy laws, would – and should – have received some benefit.

Shakespeare said that “he that dies pays all debts”. Not so, because your debts must first be paid before any beneficiaries can receive any inheritance, and so it is important to have your affairs in order. In so many instances, a simple trust will suffice – and I mean “simple”. I have found in my career that too often people are offered complex solutions to their offshore affairs when a very direct path can be travelled. If, for example, all a person is concerned about on his death is that the assets of his offshore company will be enjoyed by his heirs, then why should a deed of more than one page be required? Skilled draftsmen can be concise and you just have to choose professionals of the right calibre. Firstly, they shouldn't be chosen because they were the cheapest you could find and, secondly, they must have the right background experience, which brings me on to hammers. An Engineering Plant Manager was unable to fix a mechanical breakdown and in sheer desperation he contacted the retired engineer who had installed the equipment.



After a brief inspection, surrounded by the manager and his team of technicians, the elderly engineer took a hammer and, with a resounding blow, hit a particular piece of piping. Suddenly, the machinery sputtered and sprang to life, much to the relief and delight of the manager. The next day, the retired engineer sent a bill for \$1,000 and the manager, although grateful, protested that this was excessive for one solitary blow from a hammer. “Oh”, countered the retired engineer, “I only charged \$1 for hitting the pipe. The other \$999 was for knowing where to hit it.” Look beyond an academic degree to the professional’s degree of experience. If, for example, he tells you that a bare trust is associated with nudity and that the 3 established essentials of a valid trust in law are a client, his cheque book and a pen, my advice to you is to make a hasty departure.

If you’ll pardon my saying so, let me hammer home my point. Mr. O (an associate of the late Red Adair, famous for putting out oil fires) ran a very successful business which provided specialised equipment to international oil companies worldwide. The administration and accounting for the worldwide lease agreements and supporting services were all managed offshore and the company through which the operations flowed was owned by an offshore trust. The important point here is that the success of the entire offshore structure hinged on the validity of the trust underpinning it. If the trust was void, in other words, the entire edifice would crumble and any tax advantages would be lost. The resulting financial conflagration on Mr. O’s death would have been impossible for even Red Adair to tackle. I was asked to review the trust deed and I found that it had a fatal flaw. The trust had been settled under Cayman law and needed to have a termination date – known as the rule against perpetuities. But when the trust deed had been drafted, a perpetuity provision had been omitted which, in essence, meant that, firstly, the beneficial interests that were to pass on the company owner’s death were defective and, secondly, the tax consequences would be disastrous.

Fortunately, the situation could be salvaged but what had happened in this case has an all-too-familiar ring. The trust deed had been prepared by amateurs who had done with scissors and paste (we’re talking 40 years ago) what today, using a computer, would be called “a copy and paste job”; parts of several precedents had been combined to create the deed. The precedent deed had originally been intended to be a Liechtenstein trust, but had become, through their doctoring, a Frankenstein trust. The lesson here is that whether the trust deed is just one or, as in the case of Mr. O, nearly thirty pages long, it needs to be right.

An article by Dorothy Leonard and Walter Swap in the Harvard Business Review included this comment: “We would all rather fly with a pilot who has taken off, flown and,



especially, landed in all kinds of extreme weather than one who has always enjoyed smooth conditions”. Seek out an offshore professional who, similar to that pilot, has known smooth and extreme conditions and then get your offshore affairs in order. The final thought, like the first one, goes to Plato: “Time brings everything”. Be prepared.

Contact Us

Courier Address: Edificio Balboa Plaza, Oficina 522, Avenida Balboa Panama, Republic of Panama

Telephone: (507) 269-2438, (507) 263-5252

Fax: (507) 269-9138, (507) 269-4922

E-mail: enquiries@trustserv.com