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Planning beyond borders: why your will needs to keep up



Elana Nel
Fiduciary Specialist

South Africans today are far more internationally connected than they were even a decade ago. Many investors now hold offshore bank accounts, investments on foreign platforms, global funds or policies, or internationally domiciled products as part of a diversified portfolio. Global investing can provide diversification, currency exposure and access to a wider opportunity set, but it also introduces complexity that is often overlooked in estate planning.

Ensuring that your estate planning properly addresses both your local and foreign assets is not merely an administrative exercise. It is a critical part of preserving value for your heirs and avoiding unintended consequences, delays, additional costs and tax leakage.

Different jurisdictions have different rules governing:

Succession and inheritance

Estate duty or inheritance tax

Probate and administration requirements

A will that does not take these differences into account can unintentionally expose heirs to avoidable complexity, delays and costs.

South Africa's financial surveillance requirements (formerly exchange control) should also be considered. Where an executor is unable to implement the wishes set out in the will due to these provisions, it can lead to delays while awaiting South African Reserve Bank (SARB) approval, or even unintended consequences where approval cannot be obtained.

Does the location of an asset determine how it is taxed on death in South Africa?

The starting point is that if you are **ordinarily resident** in South Africa at the time of your death, South African estate duty applies to your **worldwide estate** (subject to certain exemptions and deductions).

South Africa has agreements with some countries to help prevent double taxation.

However, foreign assets may simultaneously be subject to:

- Foreign succession laws
- Foreign probate processes
- Foreign inheritance or estate taxes (depending on the jurisdiction)

Some countries tax assets on death based on **domicile**, others on **residence**, and others on **asset location** (situs). South Africa has entered into estate duty or inheritance tax agreements with a limited number of countries, including the US and UK, to help prevent double taxation. Depending on the relevant treaty and the specific facts, certain foreign assets may be taxed in only one jurisdiction.

Where no treaty relief applies, the Estate Duty Act provides a rebate against South African estate duty for foreign death duties paid in respect of the same property situated outside of South Africa, limited to the amount of South African estate duty attributable to that property.

In essence, foreign investments remain part of your estate for South African estate duty purposes, while also potentially giving rise to foreign probate, administrative and, in some cases, foreign tax consequences.

The importance of liquidity in an estate

Estate duty and capital gains tax triggered on death must be settled before an estate can be finalised and assets distributed. This can create practical challenges when an estate holds:

- Investment portfolios rather than cash
- Shares in companies
- Offshore assets that cannot be accessed immediately

If liquidity is not planned for, executors may be forced to:

- Sell assets at an inopportune time
- Realise investments prematurely
- Navigate foreign processes under time pressure

A well-structured will should anticipate where liquidity will come from, whether locally or offshore.

A well-structured will should anticipate where liquidity will come from, whether locally or offshore, and avoid placing heirs in a position where value is eroded simply to meet tax and administrative obligations.

One will or multiple wills?

One of the most frequent questions in cross-border estate planning is whether an individual should have a single global will, or separate wills dealing with assets in different jurisdictions.

The answer depends on:

- The nature and value of the foreign assets
- The jurisdictions involved and local succession rules
- Whether assets in one jurisdiction will be required to settle liabilities in another jurisdiction

Care must be taken to ensure that multiple wills do not revoke one another.

In some cases, a single carefully drafted will is sufficient. In other cases, separate local and foreign wills can help streamline the administration process. Care must be taken to ensure that multiple wills do not revoke one another and that it is clearly defined which assets are dealt with under each will.

Even where one will is sufficient or preferred, it can be beneficial to deal with the local and foreign assets in separate clauses, to reduce uncertainty and simplify administration.

Should my local and foreign assets have different appointed heirs?

In many cases, particularly where the heirs are individuals such as a spouse or children, the same heirs can be appointed for both local and foreign assets. Where trust structures exist locally and/or outside of South Africa, it may be appropriate to consider whether certain assets should be left to a trust or trusts.

Foreign assets

As a general principle, foreign assets should not be bequeathed to South African trusts. South African trusts are generally not permitted to hold foreign assets without specific SARB approval. If foreign assets are bequeathed to a South African trust, they may need to be liquidated and the proceeds repatriated to South Africa. Where a foreign trust has been established – whether already funded or set up as a so-called ‘freezer trust’ – it may be appropriate for foreign assets to be bequeathed to that foreign trust.

Potential advantages (depending on the structure and beneficiaries) may include:

- Foreign assets may be retained outside of South Africa.
- Future income and capital gains resulting from the inheritance in the foreign trust may not be subject to income tax in South Africa unless the income or capital gains are distributed to South African tax resident beneficiaries.
- As noted earlier, South African residents are subject to estate duty on worldwide assets. This will also apply to assets bequeathed to the foreign trust. However, once those assets are held in the foreign trust, there may be no further South African estate duty on those assets.

South African trusts are generally not permitted to hold foreign assets without specific SARB approval.

Local assets

Local assets cannot be transferred to foreign trusts with South African beneficiaries without specific SARB approval. They should therefore typically be awarded to individual beneficiaries or to South African trusts. As with bequests to foreign trusts, this can help ensure that estate duty is not levied on the same assets again in future generations.

Beneficiary designations and investment structures

Not all assets devolve according to the provisions of a will. Certain investments and structures allow for beneficiary nominations and direct transfers outside of the deceased estate.

Retirement funds

For retirement fund products, beneficiary nominations serve as guidance to the trustees of the fund. The trustees must determine the allocation in accordance with section 37C of the Pension Funds Act. A will cannot override the trustees' discretion.

Living annuities

Unlike retirement fund death benefits, living annuity benefits are generally not distributed in terms of section 37C of the Pension Funds Act. Instead, they follow the annuitant's beneficiary nominations and the relevant product terms. A will cannot override a valid beneficiary nomination.

Investment policies

Investment policies (such as the Ninety One Global Life Portfolio and Ninety One Life Portfolio) allow beneficiaries to be nominated. Beneficiaries may typically elect to receive the benefit in cash or to receive a matured policy.

Retirement fund proceeds and living annuities are not included as 'property' in the deceased estate for estate duty purposes, although certain amounts, such as disallowed contributions, may be included. Income tax may be payable on lump sums in accordance with the retirement lump-sum tax table.

Where beneficiary designations are inconsistent with your will, the results can be surprising and unintended. Investment structures, beneficiary nominations and your will should therefore be reviewed together, rather than in isolation.

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Example

Mrs X has two children, Y and Z. She holds a Ninety One Global Life Portfolio valued at R10 million and a Ninety One Global Investment Portfolio valued at R10 million. Several years ago, she nominated only Y as the beneficiary of the Ninety One Global Life Portfolio and as sole heir in her will. Mrs X later updated her will to leave her estate equally to Y and Z but did not update her beneficiary nomination on the Ninety One Global Life Portfolio.

Ignoring taxes and costs on her death, the outcome is as follows:

- Y receives the Ninety One Global Life Portfolio (R10 million).
- Y and Z each receive R5 million from the Ninety One Investment Portfolio.
- Y therefore receives R15 million in total, while Z receives only R5 million.

Reviewing your will as your life and assets evolve

Estate planning is not a once-off event. A will should be reviewed periodically (for example, every one to two years) and whenever there is a material change in circumstances, including:

- Externalising funds and acquiring foreign assets
- Changes in residency (permanent or temporary), for you or an heir
- Significant growth in asset values
- Changes in family circumstances (such as divorce, death or marriage)
- Legislative developments

An outdated will can be just as problematic as having no will at all.

The takeaway

A well-constructed investment portfolio is designed to grow wealth over time. A carefully drafted will helps ensure that the value you have built is preserved and transferred efficiently to the next generation.

When local and foreign assets are involved, alignment between investment strategy and products, estate planning, tax considerations and jurisdictional rules cannot be overstated.

Ensuring that your will properly addresses both South African and foreign assets is one of the most effective steps you can take to protect your legacy, reduce complexity for your heirs and avoid unnecessary erosion of capital.

When local and foreign assets are involved, alignment between investment strategy and products, estate planning, tax considerations and jurisdictional rules cannot be overstated.

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Contact details

36 Hans Strijdom Avenue
Foreshore, Cape Town 8001

Telephone: +27 (0)21 901 1000
Client service support: 0860 500 100
Email: clientservice@ninetyone.com

Please contact our Advisor Service Centre
on telephone: 0860 444 487.

Alternatively, please contact your Ninety One
investment consultant.

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www.ninetyone.com