

Offshore: Guernsey¹

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This section compares law and practice of various jurisdictions in particular areas. We use the Q&A format familiar to readers of the World Trust Survey, but the In Focus section asks for more detailed answers than in the Survey. For 2009 the subject is succession, looking particularly at forced heirship rights, the division of community property and the recognition and enforcement of foreign judgments. In this issue we deal with the onshore position in England and Wales and the offshore position in Guernsey.

I. Type of system

- **What legal system operates in the jurisdiction—civil law, common law or other (specifying closest to which system)?**

It should be noted that the Bailiwick of Guernsey consists of three jurisdictions for civil law purposes, namely the Island of Guernsey, the Island of Alderney and the Island of Sark. This description deals only with succession on the island of Guernsey where over 90 per cent of the population of the Bailiwick of Guernsey reside, the Alderney and Sark systems both have characteristics not found in Guernsey.

Guernsey has developed from a customary law system and accordingly there are influences of pre-revolutionary Norman and French Law which since the 19th century has been greatly supplanted by English common law. In spite of this, the Law of Succession adheres to its customary law roots,

although how long that will remain is a subject for debate, with a recent proposal that the current restrictions on freedom of testation (see below) should be abolished.

2. Applicable law

- **Which law will govern devolution of moveable and immovable assets in deceased's estate – nationality, domicile or habitual residence? Explain these concepts.**

Guernsey has adopted common law principles in order to determine the law applicable to successions and as regards substantive succession personal property (as moveable property is habitually referred to) would be governed by the law of the domicile of deceased whilst the succession to real property is governed by the law of the place where it is situated.

With regard to succession a clear distinction is made between real property (immovable) and personal property (movable). The succession to real property operates as a matter of law without the appointment of executors or an act of administration following the customary principle '*le mort saisit le vif*'. Succession to movable property is more akin to common law principles with the Executor, or in the case of an intestacy, the Administrator, having a greater right to possession to the property in the estate whilst the property is in administration to that of the Beneficiaries.

Domicile is referred to in the Execution of Wills (Bailiwick of Guernsey) Law, 1994 as one of

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1. For further information see: Gordon Dawes, *Laws of Guernsey*, Chapter 9, 2003; and 'Guernsey' in Garb (ed.), *International Succession*, 2002, 2008 supplement.

the factors that can 'save' the validity of a will and thus Guernsey will accept a will that is formerly valid by virtue of the domicile of the Testator either at the time of this death or at the time the will was made. The Law does not define domicile and accordingly English common law concepts of the domicile of origin, the domicile of dependency and domicile of choice are utilised.

3. Jurisdiction and conflict of law aspects

- **When the deceased has foreign domicile/nationality, when will another court make a grant of representation in relation to property in his estate?**
- **What is the order of priority of persons entitled to take a grant?**
- **Does the court of domicile/nationality take precedence?**

As mentioned above there is no grant of probate or act in respect of real property situate in Guernsey with the ownership vested in the heirs automatically at the instant of the deceased's death. However, in the case of personal property grants are made by the Guernsey Ecclesiastical Court. The Ecclesiastical Court has jurisdiction wherever there is personal property situated in Guernsey (including Alderney and Sark) regardless of the domicile or nationality of the deceased.

In the case of an intestacy the order of priority for those applying will be:

- surviving spouse, who failing;
- adult children, whom failing;
- guardians of minor children, whom failing;
- siblings, whom failing;
- parents.

Where a Guernsey grant is required a grant from the Court of the domicile or nationality of the deceased will not of itself be sufficient.

4. Forced heirship rights

- **Are there compulsory shares? If so please describe them.**
- ***Inter vivos* gifts or testamentary dispositions which defeat forced heirship rights: is the gift or testamentary disposition valid (on grounds of public policy or otherwise? Or do forced heirs have right of claw back? How does this work— does it give heirs money claims against donees?**

Guernsey is currently a forced heirship jurisdiction both with regard to real property and personal property in that it protects surviving spouses and descendants.

Real property

With regard to real property, a person who dies leaving no descendants (legitimate or illegitimate) or a surviving spouse has freedom of testation with regard to his real property.

Where a person dies leaving no descendants but a surviving spouse, the spouse is entitled to a life interest over what is in effect a 50 per cent life interest of the deceased's real property up to death or remarriage of the spouse. It is possible by will to increase the life interest or leave the property whole or partially to the surviving spouse outright. It is also possible to devise the property to third parties subject to the surviving spouse's interest.

Where a person dies leaving a descendant or descendants, he must leave his real property to one or more of the following:

- his surviving spouse (who is in any event entitled to her 50 per cent life interest);
- any of his blood descendants, whether legitimate or illegitimate; and
- any of his step children or their descendants.

Property can be divided in successive interests with a typical disposition creating a life interest for the

surviving spouse and subject to that in equal shares to each of the testator's children.

Personal property

With regard to personal property, an individual who has no descendants (legitimate or illegitimate) or a surviving spouse is free to leave his personal property to whom he pleases. Where that does not apply the applicable legislation dictates how it must devolve [*Loi Relative a la Portion Disponsable des Biens Meubles des Peres et Meres* (1930), Law of Inheritance (Guernsey) Law 1979, Law Reform (Inheritance and Miscellaneous Provisions) (Guernsey) Law, 2006].

Where an individual has a surviving spouse but no surviving descendants the spouse is entitled to one half of his personal property ('*droit du conjoint*'). Where an individual is survived by descendants but no surviving spouse the descendants (in seniority of degree with representation of a dead parent who would otherwise have taken) are entitled equally between them to one half of the personal property ('*legitime*'). For example, if an individual died leaving two children surviving him and also had a pre-deceased child who in turn left two children, the deceased's two surviving children would each take one-sixth and his grandchildren (the children of the deceased child) would each take one half of their parent's one-sixth.

Where a deceased is survived both by descendants and spouse, the corresponding shares are a third to the spouse and a third between the descendants, again in seniority of degree with representation.

It will be noted that in all cases where these forced shares apply there will always be a proportion of either a half or a third that the individual is free to leave by will. He can either give to those who are already entitled to shares or to third parties who need not be his heirs.

Whilst these rights will usually apply it is possible for the other heirs to challenge them on the grounds that the individual has been 'indigene'. Thus in

the case of *Re Poole* (1998), the second wife of the deceased was convicted of his manslaughter in Spain. The Guernsey Royal Court held an action brought by the children of his first marriage that the second wife was not entitled to inherit his property either by will or otherwise she was indigene by virtue of her act.

It is possible to circumvent the forced heirship provisions by life time gifts or the creation of a trust. The former was examined in the case of *Re Kurzschinkel* (2000) by the Guernsey Royal Court. This concerned the legitime of two daughters of the deceased. The Court said that where a person, who was entitled to legitime, received a gift of personal property from the deceased during the deceased's life time, there was a presumption, but not a rule of law, that that was an advance of the legitime and it should be accounted for in working out the child's entitlement to legitime from the estate. It is possible to rebut the presumption e.g. by a declaration in the will that such life time gifts were not an advance of legitime.

There have been no cases in recent times where heirs have sought to challenge lifetime dispositions of real property. There is a principle of the customary law (the 'reserve'), that has never been formally abolished, that there can be a claw back of gifts of real property with the exception of a percentage of a property that the donor himself acquired as opposed to inherited. However, this principle did not apply to sales of property, even at an under value. Presumptive heirs used to have a short time after the conveyance to set the aside a sale of real property (the '*retraite lignager*') but this was abolished in 2008.

5. Community of property between husband and wife

- Which law governs matrimonial domicile?
- What property is subject to community of property regime? How is the surviving spouse's property to be identified and segregated from the deceased's estate?

In keeping with its Norman law origins Guernsey has never been a community of property regime. Surviving wives and husbands always had rights to inherit the other's personal property and to have lifetime enjoyment of the other's real property and those principles in their modern form have already been described.

In common with other jurisdictions if the parties divorce, the Court has wide discretions (under the Matrimonial Causes Law 1939, as amended), to divide the property of the spouses but such a power cannot be exercised after the death of a spouse.

On death it should be noted:

- Guernsey recognises joint ownership, thus it is common for bank accounts and securities to be in joint names which will then pass to the survivor [see The Husband and Wife Joint Accounts (Guernsey) Law, 1966] and not into the deceased's estate;
- when a husband dies there is a presumption that the household paraphernalia belongs to the surviving wife.

Otherwise the identification of each spouse's property would be by the application of the usual rules of evidence if there was a dispute over it.

6. Recognition and enforcement abroad

- **Will foreign community property and/or forced heirship rights be recognised?**
- **Describe scope and effect of relevant firewall legislation protecting trusts against foreign judgments based on forced heirship or matrimonial property rights. Describe any relevant reported decisions.**
- **Describe practical steps to protect foreign situs assets from claims based on forced heirship/matrimonial property.**

It is essential to distinguish as to whether the property has been put into a Guernsey Law trust (see below) or not. If it has not, the Royal Court decision of *Midvale Vineries* (1995) indicates that there may not be any fundamental objection in Guernsey Law to the recognition of community of property valid in another jurisdiction. In that case, the Guernsey Court permitted the liquidator of a company to seek information in pursuance of a community of property claim coming from Spain.

With regard to forced heirship, as Guernsey is currently a forced heirship jurisdiction there should not be public policy reasons why it would not recognise such claims in from other jurisdictions and in any event the legislature has provided special rules for property in trust.

Under Section 14(1) of the Trusts (Guernsey) Law 2007 questions that relate to:

- a. the capacity of the settlor;
- b. the validity, interpretation or effect of the trust, or disposition or any variation or termination thereof;
- c. the administration of the trust whether it is conducted in Guernsey or elsewhere including (without limitation) questions as to the functions, appointment and removal of trustees and enforcers;
- d. the existence and extent of any functions in respect of the trust, including (without limitation) powers of variation, revocation and appointment, and the validity of the exercise of any function;
- e. the distribution of the trust property
is to be determined according to the law of Guernsey without reference to the law of any other jurisdiction.

The section makes clear that the Guernsey Rules of Private International Law are excluded.

Whilst this is intended to deal with forced heirship claims and also variations of trust made by matrimonial courts and other jurisdictions, it may

not prevent a claim brought on community of property as sub-section 2 says that the override inter alia:

(a) does not validate any disposition of property which is neither owned by the settlor nor the subject of a power disposition vested in the settlor;

(b) does not affect the recognition of the law of any other jurisdiction in determining whether the settlor is the owner of any property or the holder of any such power.

.....

(e) does not affect the recognition of the law of any other jurisdiction prescribing the formalities for the disposition of property.

Other than the domestic case of *Kurzschinkel* and *Midvale Vineries* (see above), there have been no relevant decisions in Guernsey on this area.

The practical steps that would be taken to safeguard such claims would be the creation of a Guernsey Proper law trust and also the keeping of the trust assets either in Guernsey or in another jurisdiction that would recognise Guernsey Trust Law in preference to either the forced heirship claims or the attempts of variation by a Matrimonial Court.