



Succession's slippery slope

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In an unprecedented move, Pope Francis, the leader of the Catholic Church, declared two new saints in April, both popes in the 20th century, and canonised them at the same time at a mass in St. Peter's Square in Rome.

Perhaps because the 266th pope is from Argentina the unexpected is not surprising. After his election, Pope Francis acknowledged that "my brother cardinals have chosen one who is from faraway..." But as I have often written, South America is no longer the remote continent it once was; nor are its citizens.

Gabriel García Márquez, the Colombian who died earlier in the year, encapsulated in his widely read novel, *Cien Años de Soledad* (One Hundred Years of Solitude), and which I featured in my column last June ("The Magical Mystery Tour" – Issue 237), how indeed his continent was once a faraway place. Had he not been a writer, who expressed the belief that he made up nonsense but in a serious way, he once said that he would have wanted to be a piano player in a bar. Even so, in my opinion, he put his fingers to better use as a writer with words that, unlike a piano's keyboard, were neither black nor white but still remained in tune with a past that explained so much about the present.

A cat may have nine lives whereas "Gabo", the Colombian writer's nickname, argued that man has three. One is public and the other two, private and secret might just be why he had a Swiss bank account into which his Nobel Prize money had been paid. Swiss accounts have lost their gloss and today an account in the Institute for Religious Works, the formal name of the Vatican's bank, trumps Switzerland for privacy; it has been described as the most secretive bank in the world. Doubtless followers of the faith have contributed to the bank's balance because in centuries past the Catholic church amassed a fortune from wills which left money for prayers to be said for the souls of the departed.

This year the United Kingdom is celebrating the birth, 450 years ago, of William Shakespeare, and just as the pope and Gabo are prominent figures of their common culture, so is Shakespeare of his. His father, John, who died in 1601, the year that *Hamlet* was written, was known as a man of secrets (he also fell foul of the tax authorities) and near death he asked that his relatives should pray for his salvation. In today's world, salvation can concern temporal matters as well, and needs the intercession of not just prayer if one has assets offshore.

Taxation, rather than wealth preservation, is an entirely separate issue, and so paying every last cent of tax due does not automatically avoid the need for offshore advice and management. A lot of personal wealth is held in companies registered offshore; but what happens to the assets when the owner dies? Although Plato contends that nothing in the affairs of men is worthy of great anxiety, I can guarantee the layman reading this column that not getting your affairs in order before your rendezvous with death can cause great anxiety for those left behind.

If only a domestic will exists, it will embrace those assets offshore also and thus control of the deceased's offshore assets will pass to his executor. Inevitably, there will be a delay whilst the domestic will is probated and the executor obtains the court's authority to represent the deceased's estate; meanwhile the offshore assets remain in limbo. Once probate has been granted, there will be a further delay before the domestic will is recognised by the foreign court or courts so that the offshore assets can be dealt with. A different language will mean official translations which results in further delay, as well as costs, to the process. The ensuing passage of time might impact on the operations of the offshore company holding the assets. This is particularly relevant for foreigners with assets in Latin America.

Then there is intestacy which is the worst-case scenario. Without a will anywhere an executor has still to be named and so even before a grant of probate can be obtained there will be a delay while families decide who to appoint as executor. Often family rivalries (and the fact that some members may live in different countries) can exacerbate the process. And intestacy doesn't guarantee that the eventual beneficiaries will be the ones that the deceased would have chosen.

Very often, the far-sighted offshore company owner has established either a trust or a foundation to own the shares. Trusts and foundations can be said to be, at the very least, wills with all the extras, but, crucially, without the need for probate. They set out clearly the manner in which the offshore company assets are to be dealt with, possibly including future management, after the owner's death. For those wondering, no respectable offshore practitioner would try to short-cut a documented succession plan by merely handing over bearer shares; we'll come back to them.

The frequent failure to cover the contingency of death, either onshore or offshore, is what I describe as the Achilles heel of estate planning which is illustrated by the following actual case. Not so long ago, an American opened a bank account in Panama and placed a large sum on deposit in her personal name, even although she had been urged, because of her future intentions, to in fact put a probate-free plan in place. A short time later she died in a helicopter accident looking for local potential property acquisitions. Her children in America, her heirs, thought that by sending a copy of her death certificate to the Panamanian bank the money could be released. It was explained to them, however, that the only legal representative of their mother was her executor and that the authenticity of the appointment would need to be recognised in the Panamanian courts before anything further could be done.

It was the start of a painful process which required a translation of the executor's official appointment for acceptance by the local court so that, ultimately, the bank could release the money. Because of her intentions, a simple trust from the outset would

have avoided all the problems and delays that were encountered. Common sense and the Book of Common Prayer say it all: "We have left undone those things which we ought to have done; and we have done things which we ought not to have done".

Gabo also wrote the romantic novel, "El Amor en los Tiempos del Cólera" (Love in the Time of Cholera). Two lovers keep sailing up and down a river forever because neither wishes to return home to the "horror of real life". For the rest of us we do not have this luxury. This is so for Panama, the region's banking centre, which cannot avoid the policies of the Organisation for Economic Co-operation and Development which still looks at it askance. Meanwhile, the US Treasury reports that Panama, as well as Peru, are on track to sign inter-governmental agreements (Model I) in respect of the Foreign Account Tax Compliance Act, evidencing their willingness to co-operate.

The Global Forum on Transparency and Exchange of Information for Tax Purposes, established under the auspices of the OECD, was created in 2002 and followed from the Group of Seven Lyon Summit in 1996 when tackling harmful tax practices and tax havens was first addressed. In 1998 an OECD report included a definition of tax havens and subsequently in 2000 the OECD issued a list of tax havens. Between 2006 and 2010 the Global Forum issued annual assessments and since 2010 there have been Global Forum peer reviews.

A key issue for the OECD is bearer shares. According to the Global Forum, although Panama has taken a number of significant steps to show willing (such as legal amendments lifting restrictions connected to domestic tax interest and attorney-client privilege), ownership and identity information is still not available in all cases, especially regarding holders of bearer shares. This is hard to reconcile in the case of bearer shares when the Registered Agents in the United Kingdom and several states in America are not obligated by law to hold information on beneficial owners of companies they represent; in Panama they must. Surely, Gabo was not alone in making up nonsense in a serious way.

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