

Succession Procedures and Creditors' Rights

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In this article, we highlight and simplify the succession process, the rights of financial institutions in succession proceedings and safeguards that should be taken by the banks when dealing with such succession proceedings and the estates of deceased persons.

General Approach on Death of UAE Resident

In determining the legal position of a deceased person leaving assets (including bank accounts) in the UAE and matters of inheritance, the UAE Civil Code (Federal Law No. 5 of 1985) as amended ("Civil Code") and The Law of Personal Affairs (Federal Law No. 28 of 2005) as amended ("Personal Affairs Law") are applicable.

Article 17 of the Civil Code states the following:

- Inheritance shall be governed by the law of the deceased at the time of his death.
- Property rights located in the territory of the state which belong to an expatriate having no heir shall become vested in the state.
- The substantive provisions governing testamentary dispositions and other dispositions taking effect after death shall be governed by the law of the state of which the person making such dispositions is a national at the time of his death.
- The form of wills and other dispositions taking effect after death shall be governed by the law of the state of which the person making such disposition is a national at the time the disposition is made, or the law of the state in which the disposition is made.
- The law of the United Arab Emirates shall apply to wills made by expatriates disposing of their real property located in the state.

In essence, the above article does recognise that the law of the deceased will apply to succession proceedings. Having said that, Article 27 of the Civil Code, to an extent, dilutes the effect of Article 17 by stating the following:

It shall not be permissible to apply the provisions of a law specified by the preceding articles if such provisions are contrary to Islamic Shariah, public order or morals in the state of the United Arab Emirates.

This is primarily the reason behind the difference in application of law by the different Courts in the UAE. Some Courts take a relaxed attitude towards applying Article 27 above, while others are quite strict.

The Personal Affairs Law on the other hand governs how the estate of a UAE national or resident will be managed and distributed upon the death of the individual. Article 1(2) of the Personal Affairs Law sets out:

The provisions of this law shall be applicable to all UAE nationals unless the non Muslims thereof have different provisions for their different religions. Further the provisions of this law shall be applicable to non UAE nationals unless they insist on the applicability of their own laws.

Accordingly, the Personal Affairs Law recognises the provisions of the Civil Code as stated above (pertaining to governing law provisions) when a non-UAE national insists on the same and is qualified to do so under the Civil Code and allows for application of foreign law.

Succession Procedures

Upon death, the personal assets of the deceased, including local bank accounts, are frozen (Article 379(4) of Federal Law No. 18 of 1993 ("Commercial Transactions Law")) until the local court issues a succession order.

When a person dies, a death certificate is issued. A named executor or a close relative of the deceased should submit this certificate to a UAE Sharia Court. The Shariah Court in the relevant Emirate has jurisdiction to review any application for a death declaration (declaring the death of and identifying the survivors of the deceased) ("Death Declaration") and to conduct any proceedings relating to succession for a Muslim or a non-Muslim expatriate. Once the Death Declaration is obtained, any of the potential heirs may apply to the Shariah Court to institute succession proceedings, which will only be necessary if the deceased has assets in the UAE in order to obtain a certificate of succession.

In order to ascertain the identity of the heirs, documents will have to be provided to the Sharia court such as passport copies, birth certificates, marriage certificates, and such other evidentiary documents that will assist the court in issuing the conclusive certificate of succession. Additionally, if the deceased left a valid and acceptable will, it should be submitted to the Sharia Court. On the basis of these documents, the court will issue a certificate of succession setting out the manner of the distribution of the estate.

Similarly, if an expatriate non-Muslim having property in the UAE passes away outside the UAE, the named executor or a relative of the deceased would usually file the appropriate succession proceedings before the relevant court in the individual's home country. It is required that the order (Letters of Probate, Letters of Administration, Succession Certificate etc.) issued by that court is legalized and submitted before the Shariah Court in the UAE along with the necessary documents for issuance of a certificate of succession and an order for distribution of UAE assets.

Form of the Estate

An estate under the Personal Affairs Law takes form of tangible properties and rights under such properties and other financial rights through a judicial declaration. There is no concept of common law trusts under UAE law, which would arise automatically in common law jurisdictions. Further, under the applicable provisions of the Personal Affairs Law, burial expenses followed by the deceased's debts (discussed below) and executable wills have priority over any assets to be distributed to the successors. The court may also appoint a trustee who will receive the properties of the deceased and will liquidate such properties under the court's supervision.

Protection of Creditors' Rights

Under Article 275 of the Personal Affairs Law (as stated above) the creditors of the deceased would take priority over any other distribution except for any burial expenses. In order for the lending bank ("Bank") to ensure that their debt is due and thus has priority on the death of the obligor (whether acting in the capacity of a borrower or a guarantor or a security provider) it should be stated as an event of default (under the relevant facility agreement or security document) entitling the Bank to accelerate the loan and seek recourse against the estate and the heirs of such deceased obligor.

It is important to note that in case of lending to a corporate secured by personal guarantees, the death of the personal guarantor should be stipulated as a mandatory event of default which would afford the Bank a priority of claim in the estate of the deceased personal guarantor.

Once the Bank comes to know of the Death Declaration and the distribution of assets, the Bank should

immediately file proceedings against the estate and the heirs (as the case may be) to exercise its rights under the applicable provisions of the Personal Affairs Law in its capacity as a creditor.

In relation to any proposed or ongoing legal proceedings by the Bank (as creditor) at the time of death, the Bank would be restricted by certain requirements to pause such proceedings pending settlement of all the debts of the estate, as set out in Article 284 of the Personal Affairs Law, which provides that:

- From the time of appointing a trustee for the estate, creditors may not take any procedure regarding the estate or pursue any procedure they have taken except vis-à-vis the estate trustee.
- All procedures taken against the deceased shall be discontinued pending settlement of all the debts of the estate once any concerned party so requests.

Article 287 of the Personal Affairs Law sets out the procedure to make a claim as follows:

The estate trustee shall invite the estate creditors and debtors to submit a statement of their rights and debts within two months from the date of publishing the relevant order.

Such an order is posted in court premises where the majority of the assets of the deceased are located and also in the daily newspaper. The Bank needs to be vigilant of such an order and ensure that it submits its claims to the estate trustee within a period of two months from the date of such an order.

Once a claim has been made, the estate trustee will prepare a report in accordance the provisions of the Personal Affairs Law and deposit at the court three months from the date of appointment an inventory statement of the estate's assets and liabilities and an estimation of these funds. In the event that the Bank is not satisfied with its liabilities listed in the inventory statement, the inventory statement can be challenged by the the Bank under Article 291 of the Personal Affairs Law within 30 days from the date of submission of the report to the court.

It is very important for the Bank to check that its liabilities have been clearly reflected in the inventory statement as per Article 297 of the Personal Affairs Law. There have been instances where creditors have not recovered their rights because of not having been recorded in the inventory list. However they may have a separate recourse against the successors for their portion of assets realised from the estate.

Article 292 of the Personal Affairs Law stipulates that, at the end of the aforementioned 30-day period, the estate trustee may settle the estate's debts with the permission of the Court. However, if the estate is insolvent or is likely to be insolvent, the estate trustee may not settle any debt until a final decision has been reached in relation to any insolvency proceedings connected with the estate's debts.

Lastly, the Personal Affairs Law provides that the debts are settled from the proceeds of any claims of the estate, the liquidation of moveable assets and finally from the liquidation of real estate (forming part of the estate), if such proceeds are insufficient. Moveable assets and real estate shall be sold at public auction pursuant to the terms of the Civil Code unless the successors agree on another method. If the estate is insolvent, the approval of all creditors to such alternative method will be required.