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WHERE THERE'S A WILL... SHOULD THERE BE TWO?

THIS TWO PART ARTICLE LOOKS AT INTERNATIONAL SUCCESSION FIRST FOR THOSE DOMICILED OUTSIDE THE UK WITH ASSETS IN THE UK, AND SECOND FOR THOSE DOMICILED IN THE UK WITH ASSETS ELSEWHERE.

Most non-domiciliaries are aware of the impact their domicile has on tax, but few realise its importance with regard to succession to property.

Generally speaking it is the law of a person's domicile (call it "the home law") which will govern succession to all but immovable property. (Immovable property typically land/bricks and mortar, passes according to the laws of the place where it is situated). In countries which operate forced heirship (rules which dictate who will inherit – typically family members) this could mean that a will, valid or not, will have no effect at all.

However it would be an over simplification to state that the home law will actually apply. It could be that the home law will recognise as effective a will validly made in a foreign jurisdiction. Or it may be that the home law applies different criteria before deciding whether to become involved at all. While domicile is central to UK law, other countries use different criteria, for example nationality, habitual residence, or centre of operations.

Close examination of a person's intentions, movements and location of assets can throw up some surprising results.

So why make a UK will at all?

First, and broadly speaking, it is internationally accepted that immovable property passes according to the law of situs – where the asset actually is. While the UK may recognise a valid non-UK will, it is likely to be quicker and easier to administer such UK assets under the terms of a UK will.

Second, it is increasingly common for testators with substantial assets to wish to create trusts in their wills. In many countries such wills may not be possible because the countries themselves do not recognise trusts.

Third, with the increasing incidence of international families, it may be that the beneficiaries have settled in the UK, and it will be easier for them to administer the estate under UK law rather than the testator's home law.

Is a UK will by itself going to be appropriate or enough?

It is vital when planning an international estate to look at the worldwide estate as a whole, first to decide whether a single or multiple wills are best, and if multiple wills are required to ensure that they work properly together, are appropriately limited in scope, and none revokes another.

It is also important to consider the tax regimes of different countries not only to minimise tax, but also to ensure that any unavoidable tax burden falls on the right parts of the estate.

Every case is different

A common euphemism for making a will is "putting one's affairs in order". Failing to consider international aspects to ensure that all has been properly planned can result in the most unholy muddle. We would therefore strongly encourage those with an international estate to give proper consideration to these aspects, before they die.

Perhaps unsurprisingly this sort of advice is expensive – and anyone who tells you it is not is either deluding you or themselves, or simply has not got a grasp of what is involved. However as with any good estate planning exercise the benefits should well outweigh the costs. If it is done properly.

We are well placed to provide this kind of advice, working either with existing family lawyers in different jurisdictions, or locating lawyers where the family have none. If you would like more detailed and specific advice then we will be pleased to provide it.

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PROBLEMS OCCUR WHEN AN ESTATE STRADDLES TWO OR MORE LEGAL SYSTEMS THAT DO NOT SIT HAPPILY ASIDE ONE ANOTHER CREATING FERTILE GROUND FOR CONFLICT OR CONSEQUENCES UNINTENDED BY A TESTATOR.

The probate of the English estate, of an English domiciliary, governed by English law should cause few problems for executors; but what happens when an English domiciliary's estate contains both English assets and assets located abroad? This situation is increasingly faced by executors as a result of the growth in the ownership over the last 10 years of second homes in desirable climates such Spain and France.

Problems occur when an estate straddles two or more legal systems that do not sit happily aside one another creating fertile ground for conflict or consequences unintended by a testator. However this situation can be avoided by taking specialist advice when will drafting.

A fundamental consideration is: does an asset located abroad pass under English law, or under the law in which the asset is located? It is not impossible for an English will to deal with assets located abroad, but this is not always the case and the will may be voided by, or contravene, the law of the foreign jurisdiction and thus be ineffective.

The problem may be solved by preparing separate wills which deal concurrently with the UK and foreign estates. The wills must be looked at together to ensure their combined effect is what the testator wanted; namely that it is clear which will governs which assets and that those assets pass to the correct beneficiaries. Equally care must be taken to limit the scope of both wills so they do not inadvertently produce conflicting provisions for the same assets. An additional consideration is that some foreign jurisdictions do not recognise the role of executors, and thus careful drafting should be used to avoid assets passing directly to beneficiaries who may be 'ill-prepared' to receive them.

Understandably, few people consider the relative degrees of testamentary freedom between different European jurisdictions when deciding whether to purchase their dream château. However it is worth bearing in mind that English law is relatively unusual in that testators enjoy almost unimpeded testamentary freedom – the right to leave their property to whomever they wish. In contrast, jurisdictions such as France, have 'forced heirship' whereby spouses and/or children are automatically entitled to a fixed share of the deceased estate regardless of any will to the contrary. Spanish law presents different potential problems, due in part to the Spanish state's patchwork of historical territorial regions. Whilst the Constitutional Code ensures there are some similarities across all regional systems, each region's particular body of law can introduce different provisions regarding the rights of cohabitees for example.

Specialist advice should also be taken to ensure that assets pass to beneficiaries in a tax efficient manner. In almost all cases there is no UK inheritance tax on gifts between spouses, but that does not mean that the same will be so in foreign jurisdictions; an asset which husband and wife thought would not be taxed until the death of the survivor may in fact be taxed abroad on the first (or indeed both) deaths. While it is rare to have to pay tax on the same asset in more than one jurisdiction on the same event, relief is generally only available if the tax charges coincide, charges arising at different times may not therefore be relieved. Where tax cannot be avoided it pays to know by whom what tax will be payable and when, so that if necessary appropriate provision can be made elsewhere in the estate.

Many of the problems in international probate can be avoided by testators taking specialist advice when making their wills. If such advice is taken, then their place in the sun can be enjoyed safe in the knowledge that, as a foreign asset, it is secure for its intended beneficiaries.

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