

“Estate conundrums particularly where the location of the deceased and assets are in different states or countries”

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WA Department of Commerce	Institute of Public Accountants	CPA Australia
Chartered Accountants Australia & NZ (CAANZ)	Governance Institute of Australia	Mortgage & Finance Association of Australia (MFAA)
Law Society of WA	National Electrical & Communications Assoc (WA)	City Insolvency Discussion Group
Innovation Centre of WA	Australian Hotels Association (WA)	Forum for Directors of Indigenous Organisations (FDIO)
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“Estate conundrums particularly where the location of the deceased and assets are in different states or countries”

- ❖ Issues with Overseas Assets
- ❖ What Should you do About Clients with Overseas Assets?
- ❖ Domicile
- ❖ Overseas Succession Systems
- ❖ Practical Global Succession Planning
- ❖ Key Takeaways

Issues with Overseas Assets (1)

Determining which law applies?

- eg Australia, UK, Switzerland, Belgium & France, the applicable law is determined by the nature of the assets:
 - For movable assets: jurisdiction of the deceased's domicile;
 - For immovable assets: jurisdiction is where the property is located.
- eg Italy & Germany, there is no division between personal property and land so domicile of the deceased prior to death determines the applicable law

Issues with Overseas Assets (2)

Determining which law applies? (cont)

- In Australia, each State/Territory is a separate legal jurisdiction for estate planning/administration.
- Each State/Territory has its own laws for Wills and Probate/Administration.

Property types: movable vs immovable

- Movable: personal property, shares, vehicles, cash, art, jewellery
- Immovable: land

Issues with Overseas Assets (3)

Death / Inheritance Taxes

- Australia has no death / inheritance taxes (but there may be CGT implications to be aware of).
- Countries such as USA, UK, France & Germany all have death / inheritance taxes which may be payable not only over assets within a country, but also on worldwide assets owned by the deceased.

What Should you do About Clients with Overseas Assets? (1)

- Not just about “rich” or “globetrotting” clients:
 - > 1/5th Australian residents were born overseas
 - > 1/3rd Australian residents have one or both parents born overseas
- Clients having family or assets located outside of Australia should consult estate planning advisers relatively regularly as laws may change.

What Should you do About Clients with Overseas Assets? (2)

- The following key factors (amongst others) should be considered when determining jurisdictional issues in relation to estate planning:
 - the domicile and residence of the client, and of the relevant family members and estate claimants;
 - the location, nature and holding structures of estate assets and liabilities; and
 - the location of the central management and control of the client's affairs.

Domicile (1)

- Can only ever have one domicile at a time.
- Two main types:
 - Domicile of origin (birth)
 - Domicile of choice (decides to establish a new place of residence indefinitely)
- Presumption of origin
- Previous place of domicile continues unless proven otherwise.
- Acceptance of a domicile must be voluntary.

Domicile (2)

- Determining domicile:

The following factors are relevant to domicile, and must be considered as a whole on the facts:

- oral or written statements indicating intention;
- long established residence;
- employment;
- whether or not the person has obtained citizenship;
- the degree to which the person has become integrated into a new society;
and
- the maintenance or abandonment of a residence.

Domicile (3)

- In Australia, as in many common law countries, the deceased's "domicile" as at date of death is critical to the Court's original jurisdiction to bind estate assets.
- In general terms, the law of a deceased person's domicile will govern all movables wherever situated, and the law of the lex situs (the location) applies to immovables (excl. eg Germany, Italy etc.)
- Construction of a Will is determined by the law which the willmaker intended to apply, which is presumed to be the law of their domicile at the time the Will was made.

Domicile (4)

- It is therefore important to identify domicile at the time the Will is prepared.
- If the Will is made in the jurisdiction of domicile, then the lawyer knows the local laws of construction.
- If the Will is made outside the jurisdiction of domicile, then the lawyer will either need to know the construction rules and statutory provisions applying to Wills in that other jurisdiction, or ensure that the Will evidences a clear intention for the local law (i.e. the law in which the Will is being prepared) to apply. .

Domicile (5)

- Questions going to the essential validity of the dispositions a Will makes are determined by the law of the last domicile of the willmaker in relation to movables, and in relation to the law of the lex situs (location) in relation to immovables.
- Questions of capacity are determined in the same way, even if the Will was made in a different jurisdiction with different jurisprudence about capacity.
- Whilst the laws of intestacy should not apply to an estate planning client, it is the intestacy laws of the deceased's last domicile which will apply in intestate estates.
- The question of domicile is critical to whether UK inheritance tax will apply to an estate located in Australia.

Succession Systems in Overseas Jurisdictions (1)

- Overseas succession systems have some similarities, but many differences, with the Australian system.
- Even in Australia some areas of succession law can differ greatly between the States and Territories.
- Some knowledge of the key elements of other Australian / overseas succession systems can be useful for the purposes of identifying issues for clients, however, in most cases any advice should be preliminary and qualified in nature: seek specialist local expert advice.

Succession Systems in Overseas Jurisdictions (2)

- Some general considerations are:
 - most European (civil law) countries have systems of ‘forced heirship’;
 - concepts such as domicile, and the movables/immovables distinction apply in some countries but not others;
 - recognition of foreign grants of representation varies, and will depend on to what degree the terms of the Will (or intestacy provisions) are consistent with the internal succession law of the relevant country; and
 - an estate planning adviser does not need to be familiar with each overseas jurisdiction – that would be impossible. Client instructions will usually raise a need to investigate one or maybe two overseas jurisdictions at a time.

Succession Systems in Overseas Jurisdictions (3)

- Forced heirship
 - Most European countries (not the UK), have forced heirship being a system of prescribed inheritance to benefit (in most cases) blood lineal descendants.
 - Forced heirship is also apparent in Islamic law.

Succession Systems in Overseas Jurisdictions (4)

- Different Wills for Different Jurisdictions?
 - It is possible to make different Wills which apply in different jurisdictions or for different assets across jurisdictions (including within Australia).
 - Can be beneficial but great care must be taken when doing so.
 - Risks include:
 - Revocation - need to be careful to ensure each Will applies to assets held in a jurisdiction and not to worldwide assets. To simply “revoke all previous Wills” may have an undesirable effect, and it may raise a question after the Willmaker’s death as to whether they really intended the Australian Will (or the revocation) to apply in the other jurisdiction;
 - Change (revisit regularly as laws do change); and
 - Confusion / uncertainty – if the client wishes to have different Wills for different jurisdictions, then each Will must clearly reflect that intention and what property each concerns.

Succession Systems in Overseas Jurisdictions (5)

- One Will to Rule Them All?
 - “International Wills”
 - Convention Providing A Uniform Law On The Form Of An International Will (Washington, D.C., 1973) aka *Wills Convention 1973*;
 - Much more prescribed form of Will, extra “authorised person” witness required;
 - Uncommon and relatively untested;
 - Limited cross-jurisdictional scope as only a few countries have introduced the Convention:
 - Australia (all States/Territories), Belgium, Bosnia-Herzegovina, Croatia, Cyprus, Ecuador, France, Italy, Libya, Niger, Portugal & Slovenia.
 - But not in force in USA, UK, Canada or Russia, despite all 4 being signatories to the Convention.

Succession Systems in Overseas Jurisdictions (6)

- “Resealing” a foreign Grant
 - Where a Grant of Representation is issued in one jurisdiction (“A”) but assets are located in another jurisdiction (“B”) – especially immovables.
 - Depending on the jurisdictions concerned, Grant of Representation in jurisdiction “A” can sometimes be “resealed” in jurisdiction “B”.
 - Effect of “resealing” a foreign Grant means the Grant is formally recognised in jurisdiction “B” and can be enforced.

Succession Systems in Overseas Jurisdictions (7)

- “Resealing” a foreign Grant (cont)
 - Applies to all Australian jurisdictions (so can have a single Australian Will even if immovables held in different States/Territories)
 - Otherwise, applies if the deceased domicile of death was “one of her Majesty's Dominions”:
 - includes most Commonwealth countries eg UK, Canada, New Zealand, PNG, some Caribbean nations plus some African nations and the odd Pacific nation

Succession Systems in Overseas Jurisdictions (8)

- UK Inheritance Tax (IHT)
 - UK charges IHT at 40% on estates that are above the lifetime “Nil Rate Band” of £325,000. Other reliefs such as the main residence nil rate band (which is £175,000 from 6 April 2020 to 5 April 2021 for estates valued at £2million or less);
 - business and agricultural property reliefs may also apply;
 - transfers between married couples are exempt from IHT where both spouses have the same domicile for UK tax purposes.

Succession Systems in Overseas Jurisdictions (9)

- UK Inheritance Tax (IHT) (cont)
 - for a deceased not domiciled in the UK at the date of death, the rates will apply to certain assets located in the UK, however if the UK assets are less than £150,000 a full exemption will apply regardless of the assets held outside of the UK.
 - If deceased is domiciled or ‘deemed domiciled’ in the UK, tax is payable on the deceased’s worldwide assets.


Succession Systems in Overseas Jurisdictions (10)

- UK Inheritance Tax (IHT) (cont)
 - “Domicile” has its usual meaning, but there is also a ‘deemed domiciled’ provision which applies when:
 - the deceased was domiciled in the UK in the 3 years before death; or
 - the deceased was a UK resident for tax purposes for at least 15 of the last 20 years*.
 - IHT must be paid before a Grant of Representation can be obtained.

* old rule was 17 out of 20 years but this changed from 6/4/17. Old rule still applies to persons who ceased to be UK tax resident before 6/4/17.

Succession Systems in Overseas Jurisdictions (11)

- UK Inheritance Tax (IHT) (cont)
 - The application of both Australian CGT and UK IHT can lead to an aggregate tax rate of up to 87%.
 - The possible application of UK inheritance tax can therefore have significant tax consequences for clients.
 - There are steps that can be taken to reduce or avoid exposure to IHT (eg inter vivos gifting / 7 year rule) and specialist advice should be obtained where necessary.



Succession Systems in Overseas Jurisdictions (12)

- USA Death Duties
 - The USA has a death duties regime with features similar to that of the UK, and the implications of this should be investigated for clients who have been (or continues to be) residents or citizens of the USA, or who own assets there,

Practical Global Succession Planning (1)

- Identifying that there is a “global” issue
- Things to look out for include:
 - the client was born outside Australia;
 - the client has property or business interests outside Australia;
 - the client has lived or worked overseas for extended periods, or intends to do so;
 - the client has close family members who live either part or full time overseas, or who travel for work or study. Parents and children are the usual suspects;
 - the client has previously made a Will in another country; or
 - the client has a spouse to whom any of the above apply.

Practical Global Succession Planning (2)

- Establishing domicile
 - Unless they already have cause to suspect otherwise, advisers may be able to start from an assumption of domicile when taking instructions from a client who appears to reside in the local jurisdiction. This starting point should be reviewed as instructions are taken.
 - Instructions which may require a more detailed consideration of the client's domicile include the general issues listed above, but in particular the following:
 - the client was born outside Australia;
 - the client has property or business interests outside Australia; or
 - the client has lived or worked overseas for extended periods, or intends to do so.

Practical Global Succession Planning (3)

- Establishing whether property is movable or immovable.
- Establishing whether property is located in more than one jurisdiction (whether within Australia or overseas) and, if so, where.
- Establishing residency status of beneficiaries and ‘controllers’ (executors, trustees, administrators, etc) as this:
 - could have tax consequences; and/or
 - cause difficulty with administering assets and/or obtaining a Grant if the ‘controller’ is located in another jurisdiction

Practical Global Succession Planning (4)

- Consider whether you need to seek overseas / interstate specialist advice.
- Specifically for IHT: beware of clients holding UK property and being ‘deemed domiciled’
- Is there an existing Will?
 - where the client has made a Will overseas, a copy should be obtained. It may be that the client intends to (or should) retain that Will to apply in that overseas jurisdiction, and then make a Will in Australia dealing with Australian assets earlier! – beware risks mentioned

Key Takeaways

- Know what to look out for in identifying when a particular client has circumstances which raise international issues.
- If in any doubt, seek specialist advice!

Thank You

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