TRUST & ESTATE PLANNING (TEP)

The Pitfalls of Multijurisdictional Wills

By Robert Worthington

It is fairly common for clients to have assets and family members located in more than one country. In such circumstances, a sensible approach to estate planning may be to have separate Wills to cover the assets located in different countries to simplify the administration of a deceased's estate in each country. However, it also creates traps for the unwary.

To take a simple example, it is very common for a Will to state that it revokes all previous Wills. If there is another Will to cover assets in another country, is the revocation clause valid under the local laws of that country? For that matter, if it is valid, was it intentional or unintentional to revoke the will in the other country? This issue may create uncertainty or disputes among heirs.

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Multiple Wills immediately raise conflicts of law issues. In most countries, the proper law to apply to interpret a Will or determine its validity is the domicile of the deceased, however that will not always be the case. Further, the term "domicile" may mean different things under different domestic laws. In circumstances where the testator has multiple residences or dual citizenship, determining domicile may be especially complex. Administration of the deceased's estate, on the other hand, is often governed by the law where any given piece of property is located.

Different laws in respect to how estates are administered in different countries must be considered when drafting estate planning documents. In many civil law countries, the deceased's property is transferred directly to an heir upon the heir's acceptance of the inheritance, possibly subject to a probate process or court approval. By contrast, the traditional common law approach is the

entire estate vests in a third person – an executor, personal representative, or trustee – and that person manages the distribution of the estate and probate process. Typically, the executor would be appointed in the Will.

Suppose a Will were drafted in a civil law country (e.g. for a deceased domiciled in Austria), but there were assets in a common law country (a ski lodge in western Canada). The ski lodge would need to go through probate in Canada. If the Will prepared under Austrian law did not appoint an executor for the asset in Canada, a representative would need to be appointed by a local court. Additionally, the Will would need to be "re-sealed" and go through the local probate procedure, delaying and complicating the distribution of the ski lodge to the heirs.

Immovable property located in a jurisdiction that is different from the deceased's jurisdiction of domicile may present challenges to complete the transfer of that property to heirs. In addition to complying with the local probate procedures, the applicable probate fees or land transfer tax might be calculated as a percentage of the value of the property. In the case of immovables, the cost of these fees or duties can be significant. To avoid such issues, it might be prudent to transfer the property to an heir during the deceased's life, or alternatively, to an inter vivos trust, allowing the property to transfer outside the process of estate administration. Again, conflict of laws rules may affect the recognition or validity of such trusts and gifts.

Some relief from the uncertainties regarding the validity of a Will may be available under the UNIDROIT Convention Providing a Uniform Law on the Form of an International Will. If the countries that are relevant to the deceased's estate are signatories to the Convention, the deceased's Will should be recognized as valid in each such country if the required formalities under the Convention are satisfied. This can be beneficial in countries with forced heirship rules if the Will includes adequate distribution provisions for the assets which would otherwise be subject to those rules. Signatories to the Convention include (among other countries) Australia, Belgium, Italy, Russia, the UK, and most local jurisdictions within the US and Canada. Unfortunately, due to the fact most countries have not signed on to the Convention, in many situations it will be of no assistance.

The challenges with international estates make it tremendously important to seek legal and tax advice from experts in all relevant jurisdictions where the testator, heirs, and assets may be located. A well-planned strategy for distributing an estate can provide certainty, reduce the likelihood of disagreements, and simplify family members' lives at a time when they are grieving the loss of a loved one.

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