International Succession Planning: Legal and Taxation Considerations in the Context of the Global Citizen

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Introduction

No man is an island, nor is our country an island in legal and taxation terms. In the context of succession, Irish people should not isolate themselves by dealing only with the Irish aspects of succession planning. They need to consider international legal and taxation issues where:

- they hold assets that are situate outside Ireland,
- they have "connections", such as domicile, nationality or residency, outside Ireland, or
- their beneficiaries have similar "connections" outside Ireland.

This article seeks to highlight issues that should be considered in the context of such international succession planning. When dealing with foreign aspects, it is important to get up-to-date legal and taxation advice from the relevant jurisdiction. A checklist is set out in the Appendix to assist in what should be initially ascertained for a client in the context of international succession planning.

Legal Issues

In planning the estate, it is useful to assess the effect of death, the procedures and the rules of succession, and whether these fit into the client's wishes and needs. If there is then opportunity to adjust assets – how they are held, how they should pass on death, how they are invested or, indeed, whether they should be divested now, either through encashment and reinvestment elsewhere or through gifts – this can be considered once the client knows what would be the effect if the actions were not taken now.

Therefore a useful starting point in any estate planning could be to consider what would happen if the client were to die suddenly before any planning would take effect. Where there is an international aspect to the client's estate, the first issue in practical terms would be how to access the assets; then, in seeking to put into effect the client's wishes, where the assets should pass; and then the tax consequences. Accessing the assets can be crucial in allowing the estate be sufficiently liquid to meet payments required to be made before the grant of probate issues, such as taxes[1] and debt repayments.

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Accessing the assets on death: the grant

Ireland

Where a person dies in Ireland holding Irish domicile, his or her estate generally would be administered first in Ireland, assuming that there are Irish-situate assets in the estate, by the extraction of a grant in Ireland. The Irish grant can only give authority to the executors to collect in the Irish-situate assets. If the estate consists of non-Irish assets also, it is necessary for the estate to be administered abroad also, whereby a separate grant (or its equivalent in the relevant country) is required for the assets to be released to the executors. This is a procedural matter but is relevant in the context of succession planning in determining what practical issues should be considered, including the need to instruct local legal and taxation advisers.

1 UK inheritance tax is due by the end of the sixth month after the person has died.

England and Wales

For instance, it is relatively simple to extract an English/Welsh grant of probate to a will already proven in Ireland (and vice versa), but this still requires the filing of legal and tax papers with the English probate office. The situation is similar in the case of Scotland, the Isle of Man and the Channel Islands. When dealing with the European continental countries, it can be more difficult as the procedures are not as familiar to us and can get "lost in translation" – in fact, typically, formal translations are required for the documentation filed in court. Furthermore, it may be necessary for a formal opinion (affidavit of law) to be furnished by an Irish solicitor setting out the Irish rules in relation to the entitlement to extract a grant. In some European civil law countries there is not a similar system to the grant and, instead, the heirs take direct.

EU

The procedure for dealing with the release of assets across EU borders has been codified, resulting in simpler administration: a "Certificate of Inheritance" can issue for the deceased who died habitually resident in one EU country that will be recognised by other EU countries. However, this does not apply for Ireland, the UK or Denmark, all of which opted out of the relevant Regulation.[2]

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Other jurisdictions

For Australian, US or Canadian (non-Quebec) assets, as those countries' legal systems have common law foundations, generally they operate on similar terms to the UK in relation to the issuance of the grant (and no translation should be required); however, an affidavit of Irish law may still be required in those countries. For federal jurisdictions, the grant may apply on a state, not federal, basis; and where there is not inter-state recognition, formal grants may be required over a number of states, causing more delays and costs.

Whether a grant or its foreign equivalent will be ultimately required to allow payment to the executors for distribution should be considered in the succession planning stages for a client. Could a grant be avoided by prudent structuring during the client's lifetime?

- If the assets are in joint names in the foreign jurisdiction, they might pass to the beneficiary in a manner similar to what happens in Ireland, where the assets pass outside the will of the deceased to the survivor without the need for a grant. This applies in the UK, for instance.
- The grant might also be avoided if some other equivalent to joint ownership is structured around the asset (such as in the case of France and ownership "en tontine").
- Also, the client might consider whether the asset could be nominated to a beneficiary in a manner that is acceptable to that jurisdiction such that the asset could, again, pass outside the terms of the will.

Such structuring, however, may result in a transfer to a person to whom the client does not wish his or her assets to pass – does the client want the particular surviving joint tenant to inherit if that person is a business, not a family, partner? One simple but very effective way of avoiding the procedures is to hold assets through a nominee company, which does not compromise who can then inherit the assets. If going this route, it is important to consider where the nominee company is situate as the grant would be required for the jurisdiction where the company is

2 EU Regulation on Succession Law (No. 650/2012), also known as "Brussels IV".

registered. This route should be considered in the context of share and managed-fund portfolios to avoid the need to take out grants in multiple jurisdictions, depending on where the registrars of the shares or the domicile of the managed fund is based, and to avoid the costs and delays in doing so. Often, locating the nominee company in Ireland or, indeed, in an offshore common law jurisdiction can simplify the procedures, and the company would still be looked through for the client's ongoing taxation purposes as it would be a mere nominee company.

Of course, it is also possible that the assets may be of sufficiently low value to allow financial institutions to release the assets that they manage on foot of the original Irish grant and an indemnity from the executors. The threshold would be determined by the institution in each case but generally is relatively low. It is relevant to consider this in the planning stage to ensure that the location of the asset in the procedural sense is not "over planned". Furthermore, clients may take the view that there is no need to plan these aspects if it is likely that the asset will be disposed of in the short to medium term, albeit that other international assets may be then acquired in other jurisdictions. The use of nominee companies in such cases can allow the portfolio to change without having to consider the location of each underlying asset in terms of the procedures to release those assets on death.

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Where the assets should pass

Although clients may have particular views on how they wish their assets to pass on their death, the freedom of testation is not unrestricted and the level of restriction differs from country to country. In estate planning, clients must therefore take account of these restrictions.

Forced heirship

In Ireland, the legal right share of the spouse is well known. Testators cannot effectively "cut out" their spouses under their wills, and if they do not make any provision for their spouses or provide for a legacy of less than the full estate, surviving spouses are entitled to take a statutory share of the estate[3] or elect to take the statutory share instead of the legacy provided under the will. This is known as a fixed "forced-heirship" share'. Furthermore, in Ireland a child has a right to make a claim against his or her parent's estate in certain circumstances,[4] and the Irish courts can provide for the child to then take from the estate in a manner that it thinks just before the provision under the will of the testator. This is known in legal terms as a "discretionary forced-heirship" share.

Similar provisions on forced heirship apply in many jurisdictions throughout the world, and this can affect how clients can pass their assets in an individual jurisdiction or indeed assets in other jurisdictions, depending on their connection with those other jurisdictions. Common law countries tend to do this by the application of court discretion, such as in England and Wales, whereas civil law countries generally allocate fixed percentages of the estate to children, parents and usually (but not always) spouses.[5] Often the beneficiary has a right to elect if there are separate rights given under a will of the deceased. There are broadly two categories of jurisdiction that apply rules on forced heirship:

- countries, e.g. France and Spain, that operate a system of strict forced heirship and
- countries, e.g. Germany, that confer rights on certain family members who are entitled to a minimum statutory share; if they do not receive such a share under the will or by gift

3 One-third of the net estate if the testator has children, one-half if not: s111 Succession Act 1965.

4 The child must show to the court that the testator has failed in his or her moral duty to make proper provision for the child in accordance with the testator's means: s117 Succession Act 1965.

5 On the basis that the spouse usually takes the right through a matrimonial contract or under a separate matrimonial regime.

beforehand, these family members may claim against the deceased's heirs.

Clawback

Clawback provisions often feature in forced-heirship regimes. These provide that where a statutory heir is not able to receive his or her correct share on the death of the deceased because the assets are eroded by lifetime gifts, assets given away during the deceased's lifetime can be brought back into account for the purposes of calculating the share of the statutory heir. We would be familiar with this in Ireland,[6] where assets divested by the deceased within three years of his or her death may be deemed to form part of the deceased's estate if the court is satisfied that the disposal was made for the purposes of defeating or substantially diminishing the legal right share of a spouse, or the intestate share of a spouse or children, or of leaving any child insufficiently provided for.

Conflicts of law

If relevant, the client may also need to consider whether a state recognises cohabiting or same-sex relationships and whether a foreign divorce is valid in accordance with the law applying the forced heirship in determining who benefits under the forced-heirship provisions and how the principle of private international law will apply to determine which jurisdiction's law is to apply. When cross-border issues arise in determining succession law, rules under the private international law (PIL) for each country are applied. These are known as conflict-of-law rules, which apply to decide if rules of succession, generally arising as forced-heirship rules, will affect the distribution of the estate.

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When it comes to ascertaining what law should apply to the estate of a deceased, PIL rules confusingly differ between jurisdictions, with different jurisdictions looking to different connecting factors and applying their laws according to whether the deceased fits into such factors. The connecting factor for Ireland, as with many common law countries, is the domicile of the deceased, and then the rules split, depending on the assets involved. Irish law provides that the lex domicilii determines the succession of moveable property, whereas the succession of immoveable property is determined by the law of the country where the property is situate (the lex situs). In other jurisdictions, particularly many civil law countries, either the habitual residence or the nationality of the deceased determines the succession of moveable property, and in some countries this factor also determines the succession of immoveable property. Even if a state recognises the law of another state, it may recognise only the internal law and not the PIL of that state. The doctrine of renvoi then steps in as a process to determine which jurisdiction should apply when either both countries or neither country wishes to apply its succession laws to all or part of the estate of a person with double or indeed multiple connecting factors. The courts in one state might not recognise a decision made by the court of another state; or it might consider the other court to be more appropriate, yet the other court might refuse to take jurisdiction. The doctrine is challenging and not satisfactory, so it may not be entirely clear which succession law applies for the client with cross-border issues.

Where the deceased died domiciled in Ireland or there are Irish assets, the Irish courts will apply Irish law in determining whether Irish law or foreign law should apply. Subject to an election of nationality under the Regulation on Succession (Brussels IV) in the case of participating Member States, discussed below, the following issues arise in Ireland:

6 Section 121 Succession Act 1965.

- When, after the application of the Irish PIL, it is decided that a foreign law governs the matter, e.g. where the deceased died not domiciled in Ireland and the assets in Ireland are moveable, the decision is made as to whether to apply the domestic law of the foreign country and send the matter to that jurisdiction on the basis that it will accept it. For example, if the deceased died domiciled in Scotland, the Scottish court would accept the jurisdiction as it also applies succession rules that moveables are dealt with by the lex domicilii.
- Alternatively, where the Irish court applies the law of the foreign country, it also should apply its PIL rules. In such a case the foreign country's conflict-of-laws rules may refer the matter back (renvoi) to the law of Ireland. For example, where the deceased died domiciled in France but habitually resident in Ireland and held moveables, Irish courts would apply French law as the deceased died domiciled in France. However, French law looks to habitual residence for moveables and would apply Irish law. If so, the Irish courts must decide whether to accept the renvoi and so apply Irish law or otherwise deal with the matter. Usually, if the matter has been referred back to the Irish courts, they will accept the renvoi.

It is more complicated when a connection also arises in a third country – e.g. where the asset is situate in a country not of the deceased's domicile, habitual residence or nationality – and depending on whether each country distinguishes between moveables and immoveables in determining succession.

Given the potential conflicts, Brussels IV – the EU Regulation on Succession[7] – has sought to harmonise matters. Crucially, Ireland, the UK and Denmark opted out of this Regulation, yet it will have an effect on how Ireland will deal with signatory states and how signatory states will deal with Ireland. The Regulation provides that in all EU Member States (other than Ireland, the UK and Denmark):

- Habitual residence is the connecting factor to determine which jurisdiction would deal with wills and succession for both moveables and immoveables.
- The doctrine of renvoi is abolished other than in the case of third-party states.
- Testators can designate the law of their nationality as applying to the whole of their estate.
- There is now a uniform European Certificate of Inheritance (mentioned above in the context of grants).

Trusts were not dealt with at all in the Regulation, and it does not affect assets passing by survivorship or under matrimonial contracts. It also does not affect the tax that may arise in a Member State (other than to the extent that the assets pass a certain way, which might affect how the tax is calculated).

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There is, however, an opportunity for Irish nationals to apply the Regulation. The Regulation allows testators to elect formally in writing to apply their nationality to govern the succession of their estate so that the habitual-residence rules do not need to apply if the testators have assets or other connections with participating Member States. There is no requirement that the nationality be one of the signatory states. This leaves room for Irish nationals to seek to apply Irish law to foreign assets situate in a signatory Member State and will no doubt prove a significant comfort for Irish testators. However, in making such an election, care should be taken to emphasise to the client that the matter of taxation is not covered so, for instance, providing for a property in a European country to pass under an Irish trust may trigger significant taxes

7 Regulation No. 650/2012.

in that country, which may penalise the use of a trust in taxation terms or deem certain beneficiaries to have taken the assets by looking through the trust for tax purposes.

By way of example, an Irish national testator domiciled in Ireland and habitually resident in Spain owns, according to French law, immoveable property in France. He might consider providing for Irish law to apply to the French property by way of election under his will. Since 2015 the law of the forum (France, where the property is situate) applies the law of the habitual residence, i.e. Spanish law. An election of nationality (Irish) would allow Irish law to apply to the French property even though it is immoveable property, and so the entire of the property (moveable and immoveable) would be governed by Irish law for simplicity purposes. It is expected that the Irish courts would, in the case of an election to apply Irish internal law, treat the election as effective and so apply Irish law to the French property.

Such matrimonial-property regimes limit and possibly exclude the need for a spouse to be protected from the other spouse's power of testamentary disposition. In such cases any forced-heirship restriction is usually only in favour of descendants.

What is in the estate?

Again, although clients may have particular views as to how they wish their assets to pass on their death, the assets themselves may already be restricted so that they will not form part of the clients' estate in the first place.

We are familiar with this in the case of assets held on a joint tenancy basis, where the survivor will take the asset in full on the death of the first joint tenant irrespective of the terms of the will of the deceased.[8] It also arises where assets such as life assurances have been nominated to pass to a particular named person and the terms of that nomination apply rather than the will. Any assets already settled into a trust will not likely pass back to the estate of the client so, for instance, property held by clients for themselves and their spouses for life and then for their children will not pass under their will and can be dealt with only through the trust itself.

In many civil law countries, even if clients own title to assets, they may be subject to a matrimonial regime whereby the surviving spouse is entitled to rights in the property. A typical regime may provide for the property acquired by the spouses before the marriage, property connected with their profession or business and property received by way of gift or inheritance to be treated as separate property of the spouses. Any property acquired during the marriage may be treated as common or community property, and the spouses usually own a one-half share of such community property. In France, Luxembourg, Spain and certain states in the USA the division of property is limited to marital gains. In South Africa and the Netherlands the entire estate of both spouses may be treated as community property, including assets acquired before the marriage. Marriage contracts can also change these provisions. Such matrimonial-property regimes limit and possibly exclude the need for a spouse to be protected from the other spouse's power of testamentary disposition. In such cases any forced-heirship restriction is usually only in favour of descendants.

Irish estate planning must therefore account for these restrictions in the context of assets situate in these countries and where the client has connections with these countries. The balance between these distinct systems can be upset within one state if another state's law becomes applicable. The law of succession is determined at the date of death, whereas the law relating to matrimonial property may have been determined much earlier. Problems arise where the deceased moved from a jurisdiction having a community-property regime, such as Denmark and certain states in the US, to a jurisdiction having a

8 Assuming that there is no resulting trust.

separate-property regime, such as Ireland, and vice versa. In such a case the question of what jurisdiction should apply will need to be determined based on the principles of applying private international law to each stage.

Taxation Issues

All of the above relates to how to access assets for distribution and where to distribute those assets. The tax effect of the distribution needs consideration also in the context of planning.

Irish inheritance tax arises on a benefit:

- from a disponer who is resident or ordinarily resident in Ireland, at the date of the disposition under which the successor (beneficiary) takes the inheritance,
- where the successor is resident or ordinarily resident in Ireland, at the date of the inheritance, or
- in respect of property situate in Ireland, at the date of the inheritance.

An individual is treated for these purposes as not being resident or ordinarily resident in Ireland if that individual is not Irish domiciled and has not been resident in Ireland for five consecutive tax years preceding the year in which the date of the inheritance falls.

There is a risk that the tax codes in the relevant country might not allow the Irish appropriation rules to apply to its situate assets, and the other country may seek to apportion the foreign asset over all residuary beneficiaries, including the trust.

There may also be a tax in the jurisdiction where the assets are situate; this may be an estate-based type of tax, such as applies in the UK or the US (federal), or a beneficiary/acquisitions-based tax similar to that in Ireland, such as in Germany.[9] If there are taxes in more than one jurisdiction, the two treaties[10] on inheritance tax that Ireland has may be applied or, if the tax is from a country other than the UK or US, unilateral relief may be available.

One difficulty may be where both Ireland and the other country seek to tax a benefit situate in a third country. For instance, a parent resident in Ireland dies holding UK property, which passes to a child resident in Germany. Both Ireland and Germany will tax on a worldwide basis, and the UK property will be taxed in the UK. Although the UK tax may be relieved under the Ireland–UK Treaty and under the Germany–UK Treaty, and the unilateral credit in relation to the Irish tax may allow a deduction for the German tax on the UK property against the Irish tax on the UK property,[11] it is understood that currently there is no similar deduction for the Irish tax on the UK property in calculating the German tax.

Similarly, the application of the case *Re Blake*[12] should be considered in seeking to maximise the credits by providing for assets to be left specifically under the will or providing for legacies to be paid out of particular parts of the estate situate in a particular country.

In providing for the law of Ireland to apply to EU-situate assets, through election of nationality in the will of the client, if a trust is included in the will as a beneficiary of part of the residue, the testator should consider providing for the EU-situate asset not to pass into the trust to avoid adverse tax implications in the local EU state should it not recognise the trust or should it seek to tax it on an attribution basis or otherwise. For instance, German corporation tax may apply to income received by a foreign trust from German sources; France has introduced inheritance/wealth taxes on assets in discretionary trusts; and Belgium imposes fictitious legacy taxes and postpones

9 A German-resident beneficiary is currently subject to German inheritance tax on benefits taken worldwide.

10 Ireland has only two treaties for inheritance tax: with the UK and with the US.

11 Since 1 December 2004, when s107(2) CATCA 2003 was amended to deal with "any" property.

12 *Re Blake* [1955] IR 89.

these until distribution. Therefore, if possible, if the election of Irish nationality is used, it would seem better to provide in the will for the trust not to take the assets situate in these countries. This would be best done by granting the non-trust beneficiaries a specific legacy of the foreign assets, leaving the Irish assets to the trust. Otherwise, by leaving the foreign assets to fall into the residue, it would be necessary for the non-trust beneficiaries to appropriate these assets. There is a risk that the tax codes in the relevant country might not allow the Irish appropriation rules to apply to its situate assets, and the other country may seek to apportion the foreign asset over all residuary beneficiaries, including the trust.

Overall, where a foreign connection arises, it is prudent to take up-to-date specific local taxation advice before undertaking any estate planning.

Conclusion

Estate planning can be complex, depending on the profile of clients, their family needs, their wishes and their asset types. Where there is a non-Irish dimension, it gets more complicated, and the legal and tax issues must be considered to ensure that the Irish plan is not foiled by foreign rules of succession or doubly taxed by foreign impositions. Also, in practical terms, the management of these assets now by placing them in nominee companies can make the implementation of the estate plan much easier later on and, in the complex world of cross-border successions, anything that will ease the procedures should be welcomed!

Read more on taxfind From Irish Tax Institute The Taxation of Gifts and Inheritances, 2012; *Law of Capital Acquisitions Tax, Stamp Acts and LPT*, Finance Act 2016

Appendix: Checklist for Initial Client Consultation

- Where is the client resident, ordinarily resident, domiciled?
- Where is each beneficiary resident, ordinarily resident, domiciled?
- Where is each asset situate?
- Is the asset held in sole name, joint name, partnership, subject to matrimonial contract?
- Is the asset held in a nomineeship?
- Is the client divorced or in a civil partnership or in a second relationship?
- Does the client have children?
- What is the long-term prospect for each foreign asset – is it to be sold or retained for inheritance later, could it be gifted now?
- Is the foreign asset to be allocated to a particular beneficiary or shared between beneficiaries?