Ireland and International Succession Planning

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WITH SO MUCH INVESTMENT INTO IRELAND RECENTLY, it is important to consider both the Irish and the international legal and taxation issues affecting such Irish investments. Irish investors into the UK, Europe and beyond also need to account for succession issues in both their home country and their country of investment.

When dealing with cross border aspects, it is important to get up-to-date legal and taxation advice for all relevant jurisdictions. The following is an outline of the issues to consider in the context of international succession planning, looked at predominantly from an Irish perspective.

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 an opportunity to adjust the assets (in the method they are held, in the method they should pass upon death, in the manner in which they are invested, or indeed whether they should be divested, either through encashment and reinvestment elsewhere, or through gifts), that can be reassessed once the client is provided with a full understanding of the consequences.

Accessing the Assets upon Death

Where a person dies in Ireland holding an Irish domicile, their estate is generally administered first in Ireland, assuming there are Irish situate assets in the estate through the extraction of a grant in Ireland. The Irish grant can only give authority to the executors to collect the Irish situate assets. If an Irish based deceased's estate consists of non-Irish assets also, it is necessary for the estate to be administered abroad as well, 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 to consider what practical issues should be considered, including the need to instruct local legal and taxation advisers.

For instance, it is relatively straightforward to extract an English/Welsh grant of probate to a Will already proven in Ireland (and indeed vice versa) but this still requires the filing of legal and tax papers with the English probate office. The same applies to 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 those trained in the common law jurisdictions and indeed procedures can get 'lost in translation'. Furthermore it may be necessary for a formal opinion (affidavit of law) to be supplied 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 grant system. Instead the heirs receive their assets direct.

The procedure for dealing with the release of assets across certain EU borders has been codified resulting in simpler administration. A 'certificate of inheritance' can be issued to deceased persons who died habitually resident in one EU country and this will be recognised across most EU nations, except for Ireland, Denmark and the UK, as these countries have opted out of the relevant Regulation.[1]

Australian, US or Canadian (non-Quebec) legal systems, founded on the common law generally operate on similar terms to the UK in relation to the issuance of a grant for the handover of assets, however an affidavit of the law of the deceased's domicile may still be required in that country. For federal jurisdictions, the grant may apply on a state, and not on a federal basis; where there is no interstate recognition. Formal grants may be required over a number of states, causing more delays and costs.

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

• If the assets are in joint names

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

in a jurisdiction the asset might automatically pass onto the surviving joint owner without the need for a grant. This applies in Ireland and the UK for instance.

- The grant might also be avoided if some other equivalent to joint ownership is structured around the asset (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 for that jurisdiction, whether the asset could then once again pass outside the terms of the Will.

Such structuring may however result in a transfer to a person to whom the client does not wish their assets to pass – does the client want the particular surviving joint tenant to inherit if that person is a business and not a family partner? There may also be tax issues on an automatic transfer on death.

Where the Assets Should Pass

While a client may have particular views as to how they wish their assets to pass upon their death, the freedom of testation is typically not unrestricted, even though the level of restriction does however differ from country to country.

Forced Heirship, Clawback, Conflicts of law

In Ireland, a testator cannot 'cut' their spouse from their Will. If the testator does not make any provision for his/her spouse or if they provide a legacy that equates to less than the full estate, the surviving spouse is entitled to take a statutory share of the estate[2] or they can elect to take the statutory share instead of the legacy provided under the Will. This is considered a fixed 'forced heirship' share. Furthermore in Ireland a child has a right to make a claim against his/her parent's estate in certain circumstances.[3] The Irish courts can award the child a benefit from the estate in a manner the court thinks just before the provision under the Will of the testator. This is considered a discretionary 'forced heirship' share.

Similar forced heirship provisions apply in many jurisdictions throughout the world and this can affect how the client passes on their assets in that jurisdiction or indeed other assets, depending on their connection with the jurisdiction. Common law countries tend to do this on a discretionary basis, such as in England and Wales, whereas civil law countries generally allocate fixed percentages of the estate to children, parents and usually (though not always) a spouse.[4] Often the beneficiary has a right to elect if there are separate rights given under the will of the deceased. There are broadly two categories of jurisdictions which apply forced heirship rules:

- countries such as France and Spain which operate a system of strict forced heirship; and
- countries such as Germany, which confer rights on certain family members who are entitled to a minimum statutory share, which, if not received under the will or by gift beforehand, may be claimed against the deceased heirs.

Clawback provisions often feature in forced heirship regimes. These provide that, where a statutory heir is not able to receive their correct share on the death of the deceased because the assets are eroded by lifetime gifts, then 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. This also applies on a limited basis in Ireland.[5]

If relevant the client may also need to consider whether a state recognises cohabiting or same sex relationships and/or if 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 laws will apply to determine which jurisdiction's law is to apply. When cross border issues arise in determining succession law, private international law (PIL) rules for each country are applied. These are also 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. When it comes to ascertaining what law should apply to the estate of a deceased, confusingly PIL rules 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 in the first place. Irish law provides that the *lex domicilii* determines the succession of moveable property whereas the succession of the immoveable property is determined by the law of the country where the property is situate (the *lex situs*).

The EU Regulation on Succession[6] has sought to harmonise matters. Crucially Ireland, Denmark and the UK opted out of this regulation, yet the Regulation will have an effect on how these countries will deal with signatory states and how signatory states deal with these countries. The Regulation provides that in all EU Member States (other than Ireland, Denmark and the UK):-

- habitual residence is the connecting factor to determine which jurisdiction would deal with wills and succession for both moveables and immoveables
- testators can designate the law of their nationality as applying to the whole of their estate

Trusts are not dealt with in the Regulation and the Regulation does not affect assets passing by survivorship or under matrimonial contracts. It does not affect the tax that may arise in a member state (other than to the extent the assets pass a certain way, this might affect how the tax is calculated).

There is however an opportunity for nationals of Ireland, the UK and Denmark to apply the Regulation. The Regulation allows a testator to formally elect in writing to apply his nationality to govern the succession of his estate so that the habitual residence rules do not need to apply if the testator has assets or other connections with participating member states. Care should be taken to emphasise to the client that the matter of taxation is not covered so, for instance, the provision of a property in a European country to pass under an Irish trust may trigger significant taxes 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.

What is in the Estate in the First Place?

Again, while clients may have particular views as to how they wish their assets to pass upon their death, the assets may

2 One third of the net estate if the testator has children, one half if not: Section 111 Succession Act 1965.

3 The child must show to the court that the testator has failed in his moral duty to make proper provision for the child in accordance with his means: Section 117 Succession Act 1965

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

5 Section 121 Succession Act 1965.

6 Regulation No. 650/2012

already be restricted in such a way that they do not form part of the clients' estate in the first place.

This arises typically in Ireland 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[7]. 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 the clients for themselves and their spouse for life and then to their children will not pass under their Wills and can only be dealt with through the trust itself.

In many civil law countries, even if clients owns title to assets, they may be subject to a matrimonial regime whereby the surviving spouse is entitled to rights in the property.

International 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.

Taxation Issues

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

Irish inheritance tax arises on a benefit taken:

- from a disponer who is resident or ordinarily resident in Ireland at the date of the disposition under which the successor takes the inheritance;
- in the case where the successor (beneficiary) 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 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 USA (federal), or a beneficiary/acquisitions based tax similar to Ireland, such as in Germany.[8] If there are taxes in more than one jurisdiction including Ireland, the two Irish treaties[9] on inheritance tax may be applied, or, if the tax is from a country other than the UK or the US, unilateral relief may be available.

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

Conclusion

Estate planning can be complex depending on the profile of the client, family needs, wishes and asset types. Where there is an international dimension, it gets more complicated. The legal and tax issues must be considered to ensure that the plan is not foiled by foreign rules of succession or doubly taxed by foreign impositions.

Disclaimer

This article is based on our interpretation of current Irish tax law and revenue practice. Reference to foreign law and taxation provisions is for general information purposes only and does not constitute legal, taxation or other professional advice. While every care has been taken to ensure that the information in this article is accurate and up-to-date, you should seek specific legal and/or taxation advice in relation to any decision or course of action. No liability whatsoever is accepted by Aileen Keogan, Solicitor & Tax Consultant for any action taken in reliance on the information in this article. ■

7 Assuming no resulting trust.

8 A German resident beneficiary is currently subject to German inheritance tax on benefits taken worldwide

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