Solving the Puzzle of International Estates

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The non-residency of a deceased or the international nature of a deceased's assets can add significant complications to the administration of that estate. But international estates are becoming more common as capital moves more freely across borders and people's lives become increasingly more international in scope.

In dealing with an international estate, the first question to ask is, "what was the deceased's residence?" Income tax implications will flow from that assessment, as the vast majority of countries tax based on residence, not citizenship (the U.S. being the leading exception to that rule). As a result, the taxation in Canada of the deceased's estate will be quite different depending on whether he or she was a resident or non-resident of Canada at the time of death. This may be relatively easy to determine based on where the deceased was reporting income and filing tax returns prior to death.

However, the second question of "where was the deceased domiciled?" is not as easy to answer, as domicile is not a concept that usually triggers ongoing filings of any kind. While residency is primarily important for income tax purposes, domicile can significantly affect the administration of an estate.

If the deceased left a will, forced heirship laws in the jurisdiction of domicile can affect the deceased's intended scheme of distribution in the will. Consider also questions of the formal validity and essential validity that might be applicable to a will in light of statutory provisions providing for recognition of foreign wills, such as s. 15 of the Nova Scotia Wills Act. If there is no will, conflicts of laws rules provide that the intestate succession laws of the deceased's jurisdiction of domicile would govern the deceased's moveable personal property, but the intestate laws of the situs of real property would govern that asset. Determination of the appropriate intestate law to apply is often a very real consideration, given that intestate regimes can differ widely.

Probate jurisdiction can be founded on various grounds, primarily the location of assets or the domicile of the deceased. Sometimes, choices can be made about which jurisdiction will be the primary jurisdiction and which jurisdictions may require ancillary or extra-jurisdictional grants. Depending on the nature of the assets in the deceased's jurisdiction of domicile at the time of death, no probate grant may need to be issued in that jurisdiction.

Does this mean that another jurisdiction where the deceased had assets, but where the deceased was neither resident nor domiciled, can become the primary probate jurisdiction for that deceased? The answer is yes, but there are practical limitations to using an international jurisdiction as the primary jurisdiction.

For example, what probate fees or taxes might be incurred by the estate in each jurisdiction in which probate might be required, and do they differ whether the jurisdiction is a primary probate jurisdiction (and hence could include the value of all worldwide assets) or only an ancillary jurisdiction (which typically would be limited only to the value of assets in that jurisdiction)? Are the assets in the various jurisdictions those that typically would require probate (such as assets in financial institutions or real property), or are they ones that might be administered without any grant (such as private company shares)?

International estates may face three types of taxes-probate taxes (or fees), income taxes and possibly estate taxes. Almost every jurisdiction will have some form of probate fee or tax which is payable when a grant of probate or administration is issued in that jurisdiction.

Once the international estate gets started, complications and challenges will inevitably arise. These could include:

- Communication/language challenges in trying to determine exactly what might be required by banks or other financial institutions in order to access accounts or assets in the name of the deceased;
- The further offshore the estate is, the more limiting time zone differences will be for the times of the day during which effective communication between professional advisors can occur. Further, some jurisdictions require personal appearances by the executor or administrator to obtain probate. Unless this can be solved by delegating that requirement by power of attorney to an agent, travel by the personal representative will be required;
- While the personal representative will usually have the choice of professional advisor in international jurisdictions, in some cases the estate may be somewhat captive to the service provider with whom the deceased dealt during his or her lifetime, such as offshore corporate service companies;
- How does a personal representative resident in Canada take effective control of the personal residence of the deceased in another jurisdiction, particularly if that county is one beset by crime, extortion and/or natural disaster? Challenges with insurance, property management and the like will undoubtedly arise;
- Some financial institutions (even large ones) can take a very parochial attitude to the administration of the estates of their deceased customers. That could include imposing requirements for document production that simply cannot be met by persons who are not citizens and/or residents of the country in question.

Professional assistance in international jurisdictions will generally be required, particularly where foreign tax filings or formal probate/administration applications are made. The cost of these estate administration and compliance services, along with the extra time required to administer the estate, must be considered.

International estates can be extremely complex. The challenge is to solve the puzzle by putting the pieces together in the right way.

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