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Estate Planning with Foreign Property

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When faced with the problem of advising clients who own property in a foreign country, a lawyer might simply advise a client to contact a foreign attorney in that country. Seems simple enough, but in reality, a thorough estate planner should have some basic knowledge of the ramifications of foreign ownership and inheritance laws in both the United States and abroad to properly advise the client, particularly as the population becomes more mobile.

Taxation

One issue that arises with the devise of foreign property is the peril of double taxation. It is possible that when foreign property is transferred, U.S. estate tax will apply, but so will the tax of the foreign country. When a citizen of the United States dies and owns property in a foreign country, the property in the foreign

country will be subject to
U.S. estate tax if the estate is subject to taxation at all.

The United States has estate tax treaties in place with the following countries: Australia, Austria, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Japan, the Netherlands, Norway, South Africa, Switzerland, and the United Kingdom. The treaties in place with these countries allow the country where property is located to tax the estate, provided that it is the non-domiciliary country. Further, if the domiciliary country taxes the estate for the foreign property, it must then provide a credit to the estate to cover the foreign country's tax. For example, if a U.S. decedent owns property in Italy, Italian estate tax laws will apply. The United States will then provide a credit in the U.S. estate tax to cover the Italian estate tax. In essence, the estate will pay the higher of the two countries' estate taxes. Only the domiciliary country may tax the personal property, such as vehicles and any furniture.

In these treaties, the United States also reserves the right to tax the estates of its citizens as though the treaty was not in effect at all. Under the terms of its treaty with France, the United States may tax French property owned by U.S. citizens, thus creating the potential of a double tax on the bequest. However, France may only tax the real property. Any other property, such as items in the house and other cash assets, may only be taxed by the United States.

Many civil law countries impose a higher tax on gifts to remote heirs. For example, if a client wants to give property in France to a cousin, this property would be taxed at a much higher rate than if the property bequest was to a spouse or siblings.

Multiple Wills

Some suppose that simply having a will drafted in each jurisdiction will alleviate any problems. Although it is true that having a will in the country where property is owned is preferred, it must be carefully drafted; otherwise, one last will and testament may ultimately revoke the other. If two wills are needed, it is critical that the two attorneys—one from each jurisdiction—work together and simultaneously. Everything must be carefully coordinated, and complementary language must be included.

It is possible to avoid revocation by drafting in the foreign jurisdiction a supplemental will covering only the property owned in that jurisdiction. Simply put, this is a foreign codicil to a domestic will. One must be careful with this method as well, however, to avoid revocation of any portion of the original domiciliary will. For instance, the supplemental will may only include the immovable property located in the foreign country, such as real property. The domiciliary will should also include a section referencing the supplemental will, and vice versa, so as to avoid any confusion.

Another problem arises when the foreign property is not addressed in either will. If an individual purchases property after the execution of a will and if he or she fails to update one or both wills, intestacy rules will then apply for that property, and any desires the client may have had regarding disposition will not be realized. Although intestacy laws among the states are fairly consistent, foreign intestacy laws often yield very

different results.

Whether using two wills or a supplemental will, the cost of the estate plan may rise as the additional work and coordination requires the precision of space flight. However, the additional cost now will prevent any additional costs and headaches during probate.

Foreign Recognition of U.S. Wills

Occasionally, some foreign jurisdictions will recognize wills drafted in the United States. Generally speaking, for a U.S. will to be valid in a foreign country, it must be formally valid under the laws of that jurisdiction. Some foreign jurisdictions, however, will not recognize a will drafted in the United States under any circumstance or will recognize the U.S. will only under certain unique circumstances. In the United States, an individual is free to dispose of his or her estate as desired. However, France makes almost no provision in its succession laws for a surviving spouse. So, if an individual had no will in and the property there was purchased individually, then the surviving spouse would have no claim to that foreign property.

International Wills

One of the best ways to prepare for death while owning

property in a foreign country is to execute an international will. In 1973 in Washington, D.C., the International Institute for the Unification of Private Law (UNIDROIT) held the Convention Providing a Uniform Law on the Form of an International Will. The Washington Convention was held in hopes of creating an international will that would make estate planning with international ramifications more straightforward and uncomplicated. The Convention did not and has not attempted to revoke or override the laws of signatory nations. It merely seeks to create a system of estate planning for those individuals who hold property and assets in a nation or nations other than their domiciliary country. There is a list of requirements that must be met in order for the will to be considered an international will:

- the will may not be a disposition of more than one person;
- the will shall be in writing (may actually be handwritten or typed), need not actually be written by the testator, and may be in any language;
- the will must be signed in the presence of and signed by two witnesses and an authorized person (in the , the only authorized persons are attorneys—a notary is not sufficient);
- all signatures must be at the end of the will;
- if the will is more than one page, each page must be numbered and the testator must sign each page; and
- if the testator is unable to sign the will, the reason shall be noted on the will.

In addition, a certificate must be attached to the end of the international will, signed by an authorized person, attesting that the requirements and procedures for drafting and execution of an international will have been satisfied. There are other formatting and signature concerns, but as to the actual content of the will, the above is all that is required. One may notice how simple and uniform this is to those already drafting wills.

The greatest benefit to an international will is the knowledge that, when drafted to meet the requirements set forth, the will is valid in any jurisdiction that has signed or enacted the Washington Convention, also known as the Uniform International Wills Act. Belgium, Bosnia-Herzegovina, Canada, Cyprus, Ecuador, France, Italy, Libya, Niger, Portugal, and Slovenia have enacted the Uniform International Wills Act; the Holy See, Iran, Laos, the Russian Federation, Sierra Leone, the United Kingdom, and the United States are all signatories of the treaty. Because of the federal nature of the United States, individual states also had to enact the Washington Convention; 23 states and the District of Columbia have done so.

Other Issues

In certain instances, a client owning foreign property may not need a will to complete a bequest. In civil law countries, such as France, the property vests in the decedent's heirs immediately upon the death of the decedent. This is unlike the United States and other common law countries, where there generally must be a personal representative or executor to transfer title or, at a minimum, some sort of court recognition of the death and

transfer of property. For example, if a client owning property in France desired that property vest in heirs precisely as described under French laws of succession, then drafting a will to deal with the French property would be not only moot, but also would create an unneeded expense for the client and unnecessary work for the attorney.

It should also be noted that death in a foreign country may be an issue for clients who travel or live portions of the year abroad. Generally speaking, if the individual dies alone in a foreign country, the local police will notify the embassy, which will then notify the next of kin. Arrangements for return of the body are a matter for the next of kin, also at their expense. In some foreign countries, Spain and Greece in particular, consent of the next of kin to remove organs during an autopsy is not required. These organs also may or may not be returned to the body prior to releasing it to the next of kin.

Conclusion

When advising a client with foreign property and preparing appropriate estate planning documents, a general rule of thumb is that consultation with an attorney in the jurisdiction where the client owns property is desirable in order to consider local laws of succession and tax ramifications. It is always best to address these issues during estate planning rather than going through the difficult and expensive process of dealing with them after death through the probate process.

Simply referring a client with foreign property to an attorney in that country may not be the best or most thorough advice, given that wills need to be coordinated with regard to property and remains. As we live in a more global society and smaller world, these issues are becoming more prevalent and, as attorneys, we must be prepared to adequately meet our clients' estate planning needs, particularly when foreign real property is involved.