

Let's chat

Estate planning and international considerations – September 2020

With:

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Information provided is general in nature; precise application depends on specific circumstances

Issues to consider

- No Will?
- International Will or separate Will per jurisdiction?
- Structures
- Taxation considerations
- Residency of legal personal representative
- Non-resident beneficiary

No Will?

- ‘Domicile’
 - ‘The intention that a person must have in order to acquire a domicile of choice in a country is the intention to make his or her home indefinitely in that country’ – *Domicile Act 1982 (Cth)*
 - Also a tax concept
- Location of assets:
 - Movables and immovables
 - Immovable assets determined by the law of the jurisdiction where the asset is located
 - Movable assets are more easily able to be determined based on the deceased’s domicile

Master or multiple Wills?

- International Wills recognised in Australia
- More complex than an ordinary Will as there are separate requirements
- Only recognised in some Countries – generally only Western Countries
- Australian Will for overseas assets?
- Possible for other Countries to recognise Australian Wills, but largely dependent on their legal system – process is called re-sealing
- Preferred approach – get a Will for each jurisdiction in which substantive assets are held

Structures

- Different Countries have different laws surrounding structures
- Testamentary trusts:
 - Tax planning
 - ‘Asset protection’
 - Succession planning vehicles

Taxation

- Every Country have different 'death tax' rules
- Australia has no death taxes (subject to non-beneficiary rules)
- US citizens are subject to a federal estate tax
- Other Western Countries may also have 'death taxes'
- China, Singapore and Malaysia – no death taxes
- *Inheritance rules for muslims

- Note: Non-Australian residents don't pay tax on capital gains made from 'non taxable Australian property assets'
- Note: Residency of trusts look at the residency of the trustee

Residency of LPR

- Country of residence of LPR can affect tax payable
- Weird tax outcomes so if non-resident LPR for deceased Australian, then strongly recommend client getting clarity from a tax advisor on the tax outcome
- In short though non-resident LPR:
 - Lack of ability to utilise tax-free threshold for deceased estate on Australian sourced income
 - Potential for certain capital gains and dividends to be ignored for Australian tax purposes
 - Loss of Australian capital gains tax exemptions
- Again, weird tax outcomes
- Non-resident deceased but Australian LPR – again, different rules

Residency of beneficiaries

- CGT event K3 – taxing foreign beneficiaries who may receive non-taxable Australian property under a Will
- For taxable Australian property, they can pass without tax to a foreigner, however, tax will be triggered on the sale of such property
- Foreign beneficiaries may also have foreign resident withholding taxes (if they are benefiting from estate income):
 - 30% for unfranked dividends
 - 10% for interest
 - 30% for royalties
- Depends on tax treaties also
- Foreign beneficiaries also have higher tax rates (i.e. 32.5% from 0 to \$90,000)
- Also consider lose of main residence CGT exemption for foreigners

Residency of beneficiaries

- A solution to the residency of beneficiaries?
- Testamentary trust with an Australian trustee (so the trust is considered an Australian entity)
- Only practical if intended beneficiary has any intent to hold the Australian property or return to Australia
- Only practical if there is a trusted Australian who is able to manage the trust fund
- Only practical if potential foreigner trust provisions can be managed

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