

SOLICITORS
JOURNAL

A world of difference



By Saleem Sheikh

With increasing complexity between residency and domicile, practitioners must ensure they understand the international aspects of drafting wills in the UK and overseas or they could face costly disputes, says Saleem Sheikh

When a deceased is domiciled in one country, resident in another, has bank accounts in various tax shelters and has a holiday home in, for example, Spain, there is potentially a recipe for confusion of jurisdictions and a costly administration of the estate.

With an increase in the mobility of people across a world with less internal frontiers, the growth in wealth and the opportunity for global investments, this type of scenario is now much more commonly presented to private client lawyers.

This situation has, however, not gone unnoticed by the European Commission which in October 2009 proposed regulation on succession and wills to harmonise and establish common rules concerning cross-border inheritance disputes. This is a vast and complex project for the EC to undertake and the UK government, after reviewing the EC proposals, opted out of this regulation.

During the negotiations, then justice minister Jack Straw cited his concerns over 'clawback' – designed to permit an heir entitled to a fixed share of an estate, to claim property that the deceased had alienated by gift or by trust. England and Wales is the only EU state that rejects the principle of forced heirship, which makes it impossible for a testator not to benefit their immediate family.

This common approach to inheritance is not likely to come to fruition in the near future, and this article analyses how the law currently operates in this area and the steps that can be taken in drafting wills to make the eventual administration of a cross-border estate easier for all involved.

International law

For UK purposes, a cross-border estate is defined as one where the deceased died either domiciled in England and Wales, but owning property elsewhere, or domiciled elsewhere, but owns property in England and Wales.

When preparing a will or administering an estate, the first issue is to establish which legal system will govern each part of the assets. English law applies different rules for movable assets, which are governed by the law of domicile, as against immovable assets, which are governed by the law of the country which they are situated.

Generally, all interest in land and property is classed as immovable including, for example, a mortgage and the goodwill in a business. Movables include tangible items of property such as bank accounts or chattels and, for example, once a property is sold the interest changes from immovable to become movable.

Deciphering domicile

Given that the law of the testator's domicile is of such significance, insofar as it disposes of movable property, it is necessary to establish what is the testator's legal domicile.

Domicile is normally regarded as the country a person regards as their home, not the place where they happen to be temporarily living. It has been described as "the country in which a person intends to die". It is quite possible that a person has been living in, for example, the UK for the last 40 years, but still remains legally domiciled in another country.

While it is possible to be resident in two countries at the same time, it is only possible to be domiciled in one.

There are three types of domicile:

- **Domicile of origin** is acquired when a person is born. This is the father's domicile at the date of the child's birth or the mother's domicile in the case of unmarried couples. This will continue unless the individual concerned acquires either domicile of dependency or of choice. The new domicile will remain in force unless it is abandoned, in which case the domicile of origin is revived.
- **Domicile of dependency** only applies to children under the age of 16 and will occur if a child's domicile of origin is replaced by a change in the father's domicile. The child will keep this new domicile unless they leave the country or show intent to leave the country, when the original domicile of origin is revived.
- **Domicile of choice** occurs when a person voluntarily takes a new country as his residence and intends to remain there for the rest of his life. Whether they have attained domicile of choice is a question of intent; however, once established it is relatively difficult to abandon.

Preparing the will

It is necessary to establish whether there should be more than one will to cover the client's assets. It is usual that two wills, one English and one foreign, will suffice if the bulk of assets are in two countries with the possibility of some movables. In this case, it is preferable for one will to cover property in one country and the other, preferably where the person is domiciled, to cover property and assets situated everywhere else.

However, for some cases it may be better to have more than two wills to cover the different jurisdictions. This is because having multiple wills avoids the need to have a grant of probate resealed in different jurisdictions. This should definitely be considered when the person's domicile is in an undeveloped jurisdiction where probate may be difficult to obtain. In this case, property could be tied up for some time waiting for probate to be granted in the deceased's domicile country. However, too many wills can lead to coordinating problems for the administration of the estate.

Drafting issues

Revocation – if the client has an existing will in another jurisdiction or various wills in different jurisdictions, extreme care needs to be taken to ensure that one will does not accidentally revoke the other. For instance, the will may have a clause that reads: "I revoke all former wills and codicils other than any will that I have made which deals with assets of mine that are situated in Spain." This makes sure that any will that is drafted in Spain and specifies that it only deals with Spanish assets will not revoke the English will.

Partial intestacy – there is danger that with more than one will some property in another jurisdiction is accidentally excluded and the person will die partially intestate. To avoid this, the will should set out clearly which property it covers and which it excludes.

Governing law – there should be an express clause stating that the will should be construed in accordance with, for example, the laws of England and Wales.

Domicile – given that this may be difficult to establish, a statement of domicile should be included in the will. While this is not conclusive evidence of domicile, it is useful to set the scene for the provisions in the will.

Funeral wishes – another way of establishing domicile is to detail in the deceased's funeral wishes to be buried in their country of domicile, or for the ashes to be scattered there. Again this is not conclusive evidence of domicile but can go some way to make the point.

Appointment of executors – when drafting wills in various jurisdictions, consideration needs to be given to who should be the executor to administer the estate. It may, for example, be difficult for an executor in England to administer property in India, whereas an Indian executor can liaise with local solicitors and deal with assets more effectively.

Probate

Following the death of the testator, it is usually necessary to apply for probate in each jurisdiction where assets are situated. A separate application for a grant of representation will usually be needed in each jurisdiction.

It may be possible for a grant of probate in England to be resealed in another jurisdiction rather than making a fresh application. However, if the deceased has wills in different jurisdictions, the executor may apply for probate as soon as they have a copy of the death certificate. This avoids the need to have the will translated and notarised which can be time consuming.

Inheritance tax

If you are UK domiciled, then inheritance tax (IHT) is charged on your worldwide estate wherever it is situated, but, if you are non-UK domiciled, your estate is taxed only on your UK assets.

HMRC in the UK applies the '17 out of 20' rule which is designed to bring non-UK domiciled individuals within the inheritance regime. This states that if a non-UK domiciled individual has lived in the UK for at least 17 years out of the previous 20, they are deemed UK domiciled and their worldwide assets are caught within the inheritance tax net.

The only exception to this rule is for transfers on death where the deceased was domiciled in Italy, France, Pakistan or India. The UK has double tax treaties with these countries and so any tax paid in any one country is deducted from the amount due in the UK on the worldwide estate. There is no such treaty in other countries, however it is possible to apply for unilateral relief that allows a credit for IHT paid overseas – but care should be taken as this does not apply in all circumstances such as tax on lifetime gifts.

When preparing wills for clients with foreign assets, the client's domicile is crucial and it is often worth obtaining advice from lawyers within the relevant jurisdictions before embarking on such an exercise.

One thing is certain, if you do not have the correct wills in place at the time of death, there could be serious and costly consequences over inheritance – and disputes over international estates can be even more expensive than those in the UK.