Multi-Jurisdictional Wills

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I. Introduction

As "globalization" continues to expand our ability to connect with other parts and people of the world, estate planners see more and more clients who have not limited their lifestyle or their investments to BC or even Canada. These clients may be "locals made good"—calling BC home, but spending the fruits of their labour in other parts of the world, whether it be a vacation home in Portugal or an investment portfolio in the Isle of Man. Other clients are "immigrants" who have chosen BC as the place to work or retire. Some invest in businesses or land in the hope of moving here permanently in the future. These clients may come from other parts of Canada, over the border to the south, or from any other country in the world.

The full collection

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What all these individuals have in common is that their estate plans are likely to be complicated. The multi-jurisdictional ownership of assets and sometimes residency means that foreign laws may have application to the client's estate plan. The estate planner must be able not only to identify when such complications will arise, but also ensure that the client is properly advised and provided with a comprehensive estate plan. Given the regional nature of the practice of law, this will often mean involving professionals in other jurisdictions to ensure that the client's estate plan is properly prepared and implemented. At the very least, it will entail advising the client to seek advice in the other jurisdictions.

This paper examines some of the issues arising in multi jurisdictional estate planning for the lawyer practising in BC. Readers may be disappointed that the paper contains no "easy answers" for dealing with the multi jurisdictional client. The very nature of the beast posits questions that a lawyer practising in BC cannot answer without input from "foreign" sources. The goal here is to highlight when and why a multi-jurisdictional situation may exist, and discuss the practical aspects of drafting a will in such circumstances.

One obvious issue in multi jurisdictional estate planning is that of taxation. This paper does not delve into this topic. There are a number of useful sources on this topic,[1] but it is the writer's experience that advice from a tax specialist is needed on a case by case basis.

II. Identifying when Multi-Jurisdictional Issues Arise

A multi-jurisdictional issue will arise whenever the laws of more than more jurisdiction apply to the distribution of a client's assets at death. The laws of more than one jurisdiction give rise, unfortunately, to that thorny branch of the legal tree producing the conflicts of law principles. A detailed review of conflicts of law is well beyond the scope of this paper (and well beyond the ability of this writer, for that matter). Three excellent sources for such a review can be found at:

Canadian Conflict of Laws, 6th ed., 2005, Jean-Gabriel Castel and Janet Walker, Lexis Nexis Butterworths, (looseleaf service)

Conficts Issues, Continuing Legal Education Society of British Columbia, 2006

"Multi-Jurisdictional Wills," Chapter 10, Estate Planning and Wealth Preservation, British Columbia Estate Planning and Wealth Preservation, 2002, CLE, looseleaf service

For the purposes of multi jurisdictional estate planning, the estate planner must understand the concepts in conflicts law relating to domicile and situs of assets. The following discussion is adapted from the sources noted above.

A. Domicile

The concept of domicile is sometimes overlooked by estate planners. This is easy to do, when one considers that domicile is defined as the place where an individual lives and intends to continue living indefinitely. The assumption may be made that the resident of BC is domiciled in BC. But domicile is more than residency: it is fixed, permanent and exclusive. Residency may be temporary and can often be multiple.

Domicile may be of origin, dependency or choice. The first two are involuntary, in that they do not depend on the individual's actions.[2] Domicile of origin is based upon the intention to make a residence permanent or indefinite, coupled with carrying out that intention.[3]

The purpose of domicile is to identify the law which should apply to the individual for a specific purpose. Thus, in countries structured on a federal system (for example, Canada, the US, and Australia), domicile is complicated by the fact that it may be federal or state/provincial, depending on the law to be applied. For example, an individual may be domiciled in Canada for the purposes of divorce or criminal proceedings, but be domiciled in BC for the purposes of succession.

Estate planners may assume that a client, having moved to BC and taken up residency here, is a BC domiciliary for the purposes of estate planning. This assumption may be justified where the client has simply moved from another Canadian province or territory. But wherever the client has moved from, the assumption should not be made.

The estate planner should always inquire where the client was born, and if outside Canada, what citizenship the client holds. The client's domicile of origin may not be Canada, and unless the client has made Canada or BC his or her permanent or indefinite residence (or domicile of choice), the domicile of origin may still remain. Alternately, the client may maintain a permanent and indefinite residence in another jurisdiction (and thereby have a domicile of choice there), and simply be living in BC temporarily. Consider the Pakistani citizen who moves to Vancouver and purchases a home here, but also maintains a home in Pakistan, where the client was born and where his or her parents still live. Has the client chosen Canada as his or her domicile? Is the client's domicile of origin¾Pakistan¾still his or her domicile? If the client does not know, it is up to the estate planner to find the answer to these questions.

Why is domicile important in estate planning? There are three principle reasons:

· the law of a person's domicile at the date of execution of the will governs its formal validity;

· the law of a person's domicile at the date of execution of the will governs such issues as capacity and undue influence; and

· the law of a person's domicile at the date of death governs the distribution of movable property.[4]

For the client from Pakistan, if he or she is domiciled there when the will drafted in BC is signed and is still domiciled there at the client's death two months later, the will may or may not be valid. Are the formal requirements for a will in Pakistan the same as in BC? Are there any restrictions on the distribution of movable property under Pakistani law? The estate planner cannot know, and cannot be expected to know, the answers to these questions. The answers must be sought from a legal adviser in Pakistan.

The estate planner may decide, of course, that there is no need to obtain such advice because the BC will is intended to address only the distribution of assets in BC. This is a short sighted approach: the fact is that the will may fail to carry out the client's testamentary wishes if challenged pursuant to the laws of Pakistan. And even if a conflicts of law principle such as renvoi can be applied, the cost of sorting out the problem is one which the client will not wish his or her estate to bear.)

B. Situs of Assets

The more obvious circumstance which gives rise to multi jurisdictional estate planning is the client who owns property in other jurisdictions. A red flag should be obvious when the property is land or an interest in land, but even personal property may give rise to problems. The estate planner must consider whether the laws of the foreign jurisdiction may affect the proposed distribution of the client's assets at death.

The application of foreign laws turns upon the classification of the property as movable (personal property) or immovable (generally land). As noted above, the laws of the person's domicile at death will govern the succession of movable property. For immovables, however, the governing law is the lex situs.[5] In BC, these general rules are modified by the Wills Act which provides that, where a

"movable consists mainly or entirely in its use in connection with a particular parcel of land by the owner or occupier of the land, succession to an interest in the thing, under a will or on an intestacy, is governed by the law of the place where the land is located"[6]

In some jurisdictions, a "forced heirship" regime exists which prescribes how immovables are to be distributed at death. Any attempt to make a different distribution in a will cannot succeed.

So, where the BC domiciled client dies owning a vacation home in Mexico and having made a will in BC purporting to distribute that home, the laws of Mexico will nevertheless govern the distribution of the home and land and any movables mainly or entirely used for the home. Any other movables in Mexico would be governed by the laws of BC. But if the client is in fact a Mexican domiciliary residing in Canada, then the laws of Mexico will govern the distribution of all movables in Mexico.

Clearly, the estate planner in BC cannot be expected to know if the laws of Mexico permit the distribution of the assets in Mexico proposed in the will drafted in British Columbia. To draft and attend to execution of the will is mere folly. The estate planner should seek advice from a legal professional in Mexico.

C. Other Conflicts Rules to Consider (and discard)

In conflicts of law, the court must decide which jurisdiction's law to apply to the issue before it. To do this, the court must first define the issue (for example, is the will valid) and then choose the appropriate law. The doctrines of renvoi and double renvoi raise their ugly heads in this context. For those interested in understanding the doctrines, refer to the resources mentioned at the outset of the discussion on conflicts of law.

The interpretation of a will is governed by the law intended by the testator, with a rebuttable presumption that the testator intended the governing law to be that of his domicile at the time the will was executed.

These conflicts of law principles, as well as those relating to domicile and situs of assets, become important where there has been insufficient multi jurisdictional estate planning. Untangling the proper application of the principles at the planning stage will avoid unnecessary costs after the client's death. Such planning will also avoid distribution of the client's assets in a manner contrary to that which the client intended.

D. Other Multi Jurisdictional Problems

A number of jurisdictions, including our own, have dependent's relief legislation. There may be other legislation which can have an impact on the distribution of assets. (Consider, for example, the client who wishes to protect his or her child's inheritance from claims by the child's spouse.) While it is not necessary to know the particulars of such legislation to properly draft a will in BC for a client with assets in BC, the client's wishes for the eventual distribution of his or her world wide estate may well be thwarted by such legislation. Even if the client does not have assets outside BC, if he or she is domiciled elsewhere, the legislation may be applied to the BC assets and should be applied to immovables sited in BC. At the least, the client should be advised to seek advice in the jurisdiction where the assets are located and/or where he or she is domiciled.

III. How Many Wills Does the Client Need?

The simple answer to this question is that there should be a will in each jurisdiction in which the client owns assets, and that each of those wills should comply with the law of the domicile of the client when the will is made and at death. There are some obvious obstacles in realizing that goal.

The first obstacle is the uncertainty of the client's domicile at death. There is nothing that can be done about this: it is up to the client to review his or her estate plan periodically and whenever there has been a change of circumstance (and every reporting letter accompanying the planning documents should say so).

The second obstacle will be the client's own reluctance to pay for legal advice in multiple jurisdictions to implement and maintain a multi jurisdictional will plan. The client generally wants one "simple" "global" will, naively believing that it will suffice. It should not be difficult to convince the client otherwise: a brief discussion of the myriad of conflicts of law principles, coupled with an estimate of the potential costs of court proceedings to determine which principle may apply, should help the client see reason.

There are, of course, good reasons to have multiple wills. A will in each jurisdiction will facilitate the speedy and efficient administration of the client's estate. It will not be necessary to wait for the original will to be probated in BC (or elsewhere) before applying for a resealing or otherwise recognition by the foreign jurisdiction or jurisdictions. There should be no complications as to the validity of a will in the foreign jurisdiction if it is prepared in accordance with that jurisdiction's laws.

Ensuring that the contents of the will complies with local laws is likely to reduce litigation costs. For example, in jurisdictions where forced heirship exists, a will making distribution of the assets in that jurisdiction in accordance with the heirship entitlement may forestall any claim that assets in a different jurisdiction should be similarly distributed.[7]

Similarly, having wills in each jurisdiction may shield local assets from foreign tax claims.[8]

It may, of course, not be necessary to have wills in each and every jurisdiction. For the BC domiciled client who owns assets in BC and Prince Edward Island, the likelihood is that one will is sufficient. But even here, the estate planner should have the will vetted by a professional in Prince Edward Island.

Where the client has a domicile other than BC, or assets in Quebec (with its civil law) or outside Canada, the prudent course of action is to seek advice in each relevant jurisdiction on the appropriate steps necessary for the distribution of assets at death. Whether this is done by the estate planner or by the client directly will depend on the circumstances of each client. Where the client makes independent inquiries, the estate planner must still ensure that the drafting and execution of the BC will does not adversely impact on extra jurisdictional wills, and vice versa.

IV. Drafting and Execution Considerations with Multiple Wills

A. Scope

The scope of the will's application should be clearly stated.

For example, where the BC will is intended to dispose of world wide assets except for those in one or two other jurisdictions, the following wording should be included:

I HAVE EXECUTED a Will, called my "India Will," disposing of all my real and personal property situate at the time of my death in India (my "India Estate") which I may own or to which I may be entitled at the time over my death, or over which I may have a power of appointment.

I NOW WISH to execute this Will for the purpose of disposing of all my real and personal property worldwide which I may own or to which I may be entitled at the time of my death, or over which I may have a power of appointment, other than my India Estate.

I HEREBY CONFIRM my India Will and declare that it shall apply to my India Estate and declare that it is my intention that this Will shall relate only in respect of my real and personal property worldwide which I may own or to which I may be entitled at the time of my death, or over which I may have a power of appointment, other than my India Estate.

This wording makes clear which assets are included and which assets are excluded from the scope of the BC will.

On the other hand, where the BC will is to address the distribution of assets only in BC or Canada, then the wording should be:

I DECLARE this to be and to contain my Last Will and Testament applicable only to my real and personal property situate at the time of my death in Canada (my "Canadian Estate") which I may own or to which I may be entitled at the time over my death, or over which I may have a power of appointment.

B. Revocation

A will usually contains a general revocation clause, revoking any prior wills. When signing sequential multiple wills, care must be taken to avoid the unintentional revocation of the previously signed wills.

For the BC will intended to dispose of world wide assets except for those in one or two other jurisdictions, the will dealing with foreign assets should be signed first, and the following wording included in the BC will:

I REVOKE all my prior Wills and Codicils except my India Will and any Codicil thereto.

Conversely, the BC will intended only to distribution of assets only in BC or Canada should contain a general revocation clause revoking all prior wills only if it is signed before any of the other wills. It should not include a revocation clause where there has been no prior will dealing with assets in BC or Canada. Where there has been such a prior will, the revocation clause should read:

I REVOKE my Will dated February 10, 2000 which provides for the disposition of all my real and personal property situate at the time of my death in Canada (my "Canadian Estate") which I may own or to which I may be entitled at the time over my death, or over which I may have a power of appointment.

Of course, there may be revocation by other means: destruction; automatic revocation upon marriage[9]; and partial revocation upon divorce.[10] There is (again) nothing that can be done about these future contingencies. It is up to the client to review his or her estate plan periodically and whenever there has been a change of circumstance.

C. Payment of Debts

Wills generally direct the executor to pay all testamentary debts and expenses from the general estate. This is not necessarily appropriate for multiple wills. To avoid claims by the taxing authorities of other jurisdictions, it may be wise to modify the debt clause to restrict the payment of debts from the local estate to local testamentary debts and expenses. Alternately, the executor may be given the discretion to pay any expenses arising from the client's estate in a different jurisdiction. In such cases, it may be advisable to include a clause in the will exonerating the executor for any diminution of the estate and the corresponding entitlement of the beneficiaries named in that will.

D. Choice of Law

There is some question about the ability of a testator to choose the governing law in his or her will. Clearly, the domicile of the testator at death determines the essential validity of a trust of movables created in a will. However, where the will creates testamentary trusts, the law governing the essential validity of a trust created by the will must be distinguished from the law governing the administration of that trust. The testator should be able to choose the governing law for the latter. In the absence of clear authority preventing the application of that governing law to the essential validity of the trust, it has been suggested that the testator provide a general choice of law clause with a "severability" clause to address any concerns that a court might have about the general choice of law clause.[11]

V. Conclusions

The challenges presented by the client who lives "internationally" should not be underestimated. Both the domicile of the client and the location of his or her assets may require an estate plan far more complicated than either the estate planner or the client anticipates. While the client may demure from undertaking such planning, the estate planner must nevertheless recognize the circumstances in which it is needed, and make the appropriate recommendations.

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[1] See, for example, Chapter 9 and 11, British Columbia Estate Planning and Wealth Preservation, 2002, Continuing Legal Education Society of British Columbia (looseleaf service); Chapter 9, Taxation and Estate Planning, Catherine Brown and Cindy Fajan, 1996, Thomson Carswell (looseleaf service).

[2] Domicile of birth is based upon the father's domicile for a legitimate child and the mother's domicile for an illegitimate child: Udny v Udny (1869), LR 1 Sc. App. Cas. 441 (H.L.). Domicile of dependency is generally only applied to children today.

[3] Bell v Kennedy (1868), L.R. 1 Sc. App. Cas. 307 (H.L.).

[4] The Wills Act of BC, R.S.B.C. 1996, c. 489 (the "Wills Act"), s. 40, expands this general principle within BC to validate a will made outside of BC which deals with movables if it was made in accordance with the law at the time of its making in the place where the will was made, the testator was domiciled when the will was made, or the testator had his or her domicile of origin.

[5] Section 39 of the Wills Act codifies this common law principle: "Subject to other provisions of this Part, the manner and formalities of making a will, and its intrinsic validity and effect, so far as it relates to an interest in land, are governed by the law of the place where the land is located."

[6] Ibid., s. 41.

[7] See, for example, Re Estate of Prince (1964), 267 N.Y.S. 2d 138 (Surr. Ct.).

[8] See Re Barna Estate, [1990] 40 E.T.R. 89 (B.C.S.C.).

[9] Wills Act, s. 14, supra, n. 4. The BC Law Institute has recommended that s. 14 be revoked. See Report on Wills, Estates and Succession: A Modern Legal Framework, 2006, available at http://www.bcli.org/pages/projects/succession/Wills_Estates_and_Succession_Report.pdf

[10] Ibid., s. 16. The BC Law Institute has recommended that s. 16 be amended to harmonize it with the provisions of the Family Relations Act, R.S.B.C. 1996, c. 128, s 56(1): the triggering events noted in that section would be the events that would trigger a revocation of a gift to, or an appointment of, a spouse. See website noted in n. 9.

[11] See K. Thomas Grozinger, "Trusts of Movables and Conflict of Laws in Canada: Essential Validity and Administration," tab 9, Trusts, Trustees, Trusteeships - All You Need to Know and More..., Ontario Bar Association - Continuing Legal Education, September 18, 2006. A previous version of this article entitled "Conflict of Laws and Trusts of Movables in Canada: Determining the Applicable Law for Essential Validity and Administration" can be found at, ET&PJ, Vol. 23, No. 4 (October 2004), 301-80, with an update "Conflicts of Laws and Trusts of Movables in Canada: An Update," ET&PJ, vol. 24, No. 3 (August 2005) 285-87.