

WILLS AND CROSS BORDER ESTATES

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The logo for Morgan McManus Solicitors is displayed on a dark red rectangular background. The text "MORGAN" and "MCMANUS" is in a large, bold, gold-colored serif font. A thin white horizontal line is positioned below "MCMANUS". Below the line, the word "SOLICITORS" is written in a smaller, bold, gold-colored serif font.

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What are the issues in drafting a Will for a person with cross border assets?

Do they need two wills?

The Hague Convention – provides for the recognition of foreign wills. Ireland and the UK are signatories.

A Foreign Will will be regarded as valid in a signatory country with regard to **form**, where it complies with the internal law of:

- (a) the place where the Testator made the Will
- (b) a nationality possessed by the Testator, either at the time when he or she made the Will or at the time of his or her death
- (c) a place in which the Testator had his or her domicile, either at the time when he or she made the disposition or at the time of his or her death
- (d) a place in which the Testator had his or her habitual residence, either at the time when he or she made the disposition or at the time of his or her death
- (e) in so far as Immovable Property is concerned, the place where it is situated

Two Wills Regardless?

While the Hague Convention provide for a broad recognition of foreign Wills in signatory countries, nevertheless, where a Testator has, in particular, **Immovable Property**, in another jurisdiction, it would tend to be prudent for a Will to be made in the country where the property is situate.

General Rule of Thumb, under Private International Law, is that a Will dealing with Movable Property will be construed in accordance with the laws of the domicile of the person making it, whereas a Will dealing with Immovable Property will be construed in accordance with the laws of the place where the property is situate. Legal Terms dealing with, for example, Irish property, may not be understood or may not have a counterpart in the foreign jurisdiction and therefore it is preferable that a Will dealing with Immovable Property in another jurisdiction be drawn up by a lawyer in that jurisdiction. For example, not every jurisdiction might recognise a “Life Interest”.

Is there a downside to having two Wills?

Exercise great caution that the foreign Will does not revoke the domestic Will and vice versa.

Each Will should contain a Declaration that such Will is to apply to property within a particular jurisdiction or to which that jurisdiction's laws apply and it should also say "This Declaration also applies to the revocation clause contained in this my will."

Are there special considerations in making Wills for Business People?

Executors and Trustees should have power to run your business
Company Issues - Shareholding - Articles of Association
Successor Issues

Main Considerations when making a Will for someone with Cross Border Assets

If you have cross-border assets, you and your solicitor should consider the following:

- (1) Do you need more than one Will?
- (2) Where are you domiciled? If there is any potential doubt about this, steps should be taken to ensure you have the right evidence.
- (3) Where are you *Resident* or *Ordinarily Resident*? Once again steps may have to be taken to ensure that you have the right evidence.
- (4) You need to consider the tax implications of your wishes.

What are the issues in administering a Cross Border Estate?

Where a deceased person held assets in two different countries or jurisdictions, he or she is said to have a 'cross-border estate'.

- (1) In which jurisdiction should the property of a cross border estate be administered?
- (2) If there is no will, which intestacy laws apply?
- (3) How the estate is to be taxed?

As far as Northern Ireland (together with the rest of the UK) and the Republic of Ireland are concerned, the first two of these questions, and to some extent the third, are concerned with one basic question – ***Where was the deceased domiciled?***

What is Domicile?

Most legal systems in the world have taken and adapted the concept of domicile from ancient Roman law. In Roman times special privileges were accorded to individuals who were citizens of a Roman city. Domicile in ancient Rome meant that each man belonged to the city where he paid his

taxes, and in return he had the right to the advantages of belonging to that city. In turn a child would acquire his father's domicile even though the child was not necessarily born in that city. This has developed over the centuries and there are various ways of acquiring domicile of a particular jurisdiction e.g. Domicile of Origin, Domicile of Choice, Domicile of Dependency and Deemed Domicile.

In which Jurisdiction should the property of a cross-border estate be administered?

What is a Grant of Representation?

In most cases, to enable a deceased person's assets to be encashed or sold, it will be necessary to obtain a Grant of Representation. A Grant of Representation is an official legal document issued by a government agency, usually known as the Probate Office, to the Personal Representatives of the deceased person that allows the Personal Representatives to administer or deal with the assets of the deceased.

One Grant of Representation or two?

If the deceased person had assets in two countries, the general rule is that a Grant of Representation will be required in each country. For instance, two separate Grants of Representation will ordinarily be required if the Deceased had assets comprising land or buildings in the UK and the Republic of Ireland.

There is one exception to this whereby, under the *Colonial Probate Acts*, there is a validation mechanism whereby Northern Ireland, England and Wales recognise Irish Grants of Representation and "Reseal" them, thus avoiding the need to obtain a fresh Grant. The Republic of Ireland does not have a reciprocal arrangement.

Which Intestacy Laws Apply?

What is Intestacy?

When a person makes a Will, upon their death their Estate will be divided up or administered in accordance the wishes contained in that Will. When a person dies without having made a will, they are said to have died "intestate". If a person dies intestate then their estate will be divided up or administered in accordance with the Rules of Intestacy. These Rules of Intestacy tend to vary hugely from country to country. Therefore making sure to apply the correct Rules of Intestacy is vitally important. Applying the correct Rules is not as straightforward as one might think.

In a cross border estate, which Rules of Intestacy apply?

The general rule is that in all jurisdictions within the United Kingdom and the Republic of Ireland, the correct jurisdiction to apply the intestacy rules is the

jurisdiction in which the deceased was **domiciled**.

Exceptions to the general rule

The only exception to the general rule relates to **Immovable Property** in the **Republic of Ireland**. The Republic of Ireland Intestacy rules apply to land and buildings, regardless of where the owner was domiciled. For example, if a person domiciled in Northern Ireland has a farm or other business in the Republic of Ireland, and that person dies without a Will, then the Republic's Rules of Intestacy will apply to that farm or business and not the laws of intestacy of Northern Ireland. This means that the deceased person's farm or business in the Republic may well be divided up among his next of kin in a different proportion than his Northern Ireland property. We will see below that Republic of Ireland intestacy laws are very different than the UK equivalent.

What are the laws of Intestacy in Northern Ireland?

In order that you can understand the rules set out below you need to understand that the word "issue" includes children, grandchildren and great grandchildren etc. living at the date of the deceased person's death.

If there is a surviving spouse (or Civil Partner) and surviving issue, the spouse gets

- (a) The first Stg£250,000; and
- (b) The personal chattels; and
- (c)
 - (i) If there is one surviving child (with no predeceased child leaving issue) or no surviving children and one predeceased child leaving issue, half of the residue
 - (ii) if the deceased had no surviving children but more than one predeceased child leaving surviving issue, or one surviving child and one or more predeceased children leaving issue, or at least two surviving children, one third of the residue.

And in the case of (c) (i) above, the child (or if predeceased the issue) gets one half of the residue. **And** in the case of (c) (ii) above, the children, child or issue get two thirds of the residue.

If there is a surviving spouse (or Civil Partner) and no issue but surviving parents, siblings (or their issue) the spouse (or Civil Partner) gets

- (a) the first £450,000
- (b) the personal chattels
- (C) one half of the residue

And the other half of the residue is divided as follows: If the deceased is survived by one or more parent, they take in equal shares but if there are no surviving parents then siblings take in equal shares.

If there is a surviving spouse (or Civil Partner) and no surviving issue, parents or siblings or their issue, the spouse takes the entire estate. If there is no surviving spouse, the next of kin take according to the rules of priority.

What are the laws of Intestacy in the Republic of Ireland?

The Succession Act, 1965 contains the Rules of Intestacy for the Republic of Ireland. Under that Act if a person dies without making a Will, and he is survived by a spouse (or Civil Partner) and issue e.g. children or grandchildren then the surviving spouse shall be entitled to two-thirds of the Estate. If there are no issue then the surviving spouse (or Civil Partner) is entitled to the entire Estate. If there is no spouse or issue, the Estate will go to the next of kin in accordance with the rules of priority.

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