

MORGAN MCMANUS PRIVATE CLIENT

CROSS-BORDER ESTATES

**By: Fergal McManus, LL.B., LL.M (Comm), Q.F.A., A.I.T.I.
And Seymour Major**

Morgan McManus Solicitors practice from offices at

- **The Diamond, Clones, County Monaghan**
- **12 Paget Lane, Enniskillen, County Fermanagh, and**
- **Main Street, Newtownbutler, County Fermanagh**

providing legal services in both the Republic of Ireland and Northern Ireland.

Appointments arranged by phoning:

To Clones:

From Republic of Ireland 047/51011

From Northern Ireland 0035347/51011

To Enniskillen:

From Republic of Ireland 048663/20102

From Northern Ireland 028663/20102

CROSS-BORDER ESTATES

Administration and Taxation Issues relating to Irish and UK Assets

1. Introduction

- 1.1 What is Domicile?
- 1.2 Domicile of Origin
- 1.3 Domicile of Choice
- 1.4 Domicile of Dependency
- 1.5 Deemed Domicile

2. In which jurisdiction should a Cross Border Estate be Administered?

- 2.1 Grant of Representation
- 2.2 One Grant of Representation or Two?
- 2.3 If Two Grants required, which Jurisdiction do you apply to first?

3. Which Intestacy Laws Apply?

- 3.1 What is Intestacy?
- 3.2 In a Cross-Border Estate, which Rules of Intestacy Apply?
- 3.3 Exceptions to the General Rule.

4. What are the Laws of Intestacy in Northern Ireland?

5. What are the Laws of Intestacy in the Republic of Ireland?

6. Aggrieved Person's Claims against the Estate – Northern Ireland.

7. Aggrieved Person's Claims against the Estate – Republic of Ireland.

- 7.1 Spouse's Legal Right Share
- 7.2 Rights of Children

8. Other Claims against the Estate

- 8.1 Claims against Validity of Will
- 8.2 Claims against Property of Deceased

9. How is the Estate to be taxed?

- 9.1 The Double Taxation Treaty
- 9.2 Taxation based on location of Property
- 9.3 Domicile and Tax
- 9.4 Residence and Ordinary Residence
- 9.5 When is an inheritance taxed in the Republic of Ireland?
- 9.6 How is Credit given under the Double Taxation Treaty?

10. Considerations when making a Will

1. Introduction

Where a deceased person held assets in two different countries or jurisdictions, he is said to have a ‘cross-border estate’. However, when we refer to a ‘border’, we include, as well as borders between countries, borders between legal jurisdictions. In the United Kingdom, there are three separate jurisdictions comprising England and Wales, Scotland and Northern Ireland. When a person with a cross-border Estate dies, the following fundamental questions arise:

- (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) What type of claim can an aggrieved person make against the deceased’s estate?
- (4) How the estate is to be taxed?

As far as the United Kingdom and the Republic of Ireland are concerned, the first three of these questions, and to some extent the fourth, are concerned with one basic question – Where was the deceased domiciled? In this article, we provide guidance on the law indicating how these questions are answered in relation to cross-border estates in the United Kingdom and the Republic of Ireland. Legal issues on cross-border estates between the United Kingdom or Ireland and other countries or jurisdictions are handled by Morgan McManus Solicitors but are outside the scope for discussion in this booklet. For more detailed information on the application of the laws relating to Intestacy, Administration, challenges against the estate and taxation, the reader is invited to read Morgan McManus’s booklets ‘Making a Will’ and ‘Administering an Estate’ for both Northern Ireland and the Republic of Ireland.

1.1 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.

1.2 Domicile of Origin

In modern law, domicile is concerned with legal jurisdictions rather than cities. Everybody acquires a **domicile of origin** when they are born. At birth a legitimate child born during the lifetime of his father takes the domicile of his father. If the child is born outside marriage, or the father is no longer living, then the child takes the domicile of his mother.

1.3 Domicile of Choice

A person can acquire a domicile of choice in another country by residing there with the intention of not returning to live in the country of his previous domicile e.g. his domicile of origin. In other words when a person chooses a new domicile, his

intention must be to spend the rest of his days in the jurisdiction of his new home. This is known as a **domicile of choice**. A person changing domicile must be able to prove that they made such a deliberate choice and that it is a permanent choice.

1.4 Domicile of Dependency

A child's domicile is its **domicile of dependency**. The domicile of dependency will be the parents' domicile. The child's domicile of dependency will last until it is 16.

1.5 Deemed Domicile

A person's domicile is his domicile for all legal issues arising from it, with one exception. Under UK law, a person will also be deemed to be **domiciled in the United Kingdom at a "relevant time" for UK tax purposes only** if:

- (a) he was domiciled in the United Kingdom within the 3 years immediately preceding the relevant time; or
- (b) he was resident (for income tax purposes) in the United Kingdom in not less than 17 of the last 20 years of assessment ending with the year of assessment in which the relevant time falls.

The thinking behind this concept of "**deemed domicile**" is to ensure that the UK Inland Revenue does not lose their ability to tax certain transactions. For instance, a taxpayer might decide to change domicile immediately before an event that might give rise to tax e.g. a terminally ill person changing their domicile to a low tax jurisdiction just prior to their death. In such a case, the deceased person's Estate will still be taxed in the UK under the deemed domicile rule. For a discussion of the consequences of having a domicile for UK tax purpose only, see below the section – *How is the estate to be taxed?*

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

2.1 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.

2.2 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 definitely be required if the Deceased had assets comprising land or buildings in the UK and the Republic of Ireland. It may not, however, always be necessary to obtain two Grants of Representation. For instance, if a person domiciled in Northern Ireland had money in a bank account in the Republic of Ireland and the amount is relatively small, the bank may be prepared to accept production of a Grant

of Representation from Northern Ireland in order to release the money.

In the UK, it is unlikely that a Grant of Representation from the Republic of Ireland will be acceptable to a financial institution for the release of bank account proceeds and an additional grant will usually be needed in the UK.

In the UK, a Grant will be acceptable to a financial institution from another jurisdiction within the UK. Where the asset relates to land or buildings in the UK, provided that the Grant was taken out in the jurisdiction in which the deceased was domiciled, one grant is sufficient. For example, the Personal Representatives of the Estate of a person domiciled in Northern Ireland but with a house in England, should only require a Grant of Representation from Northern Ireland in order to sell the property in England, as such there should be no need for a Grant to be taken out in the jurisdiction of England.

2.3 If two Grants required, which jurisdiction do you apply to first?

Where it is necessary to obtain a Grant of Representation in more than one jurisdiction, it is essential to obtain the original grant in the jurisdiction where the deceased was domiciled, **if it is necessary to prove a Will**. Otherwise, it would not normally matter in which order the grants are obtained.

3. Which Intestacy Laws Apply?

3.1 What is Intestacy

When a person makes a Will, upon their death their Estate will be divided up or administered in accordance with 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.

3.2 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.

3.3 Exceptions to the general rule

The only exception to the general rule relates to immovable property in the Republic of Ireland. Immoveable property generally speaking means land and buildings. 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 in the Republic of Ireland, and that person dies without a Will, then the Republic’s Rules of Intestacy will apply to that farm and not the laws of intestacy of Northern Ireland. This means that the deceased person’s farm 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 later that Republic of Ireland intestacy laws are very different than the UK equivalent.

4. 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 and surviving issue, the spouse gets

- (a) The first Stg£125,000; 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 and no issue but surviving parents, siblings (or their issue) the spouse gets

- (a) the first £200,000
- (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 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. For a more complete explanation of the Rules of Intestacy in Northern Ireland, please refer to our “Making a Will” Booklet (Northern Ireland).

5. 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 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 is entitled to the entire Estate. If there is no spouse or issue, the Estate will go to the next of kin. Please refer to our “Making a Will” Booklet (Republic of Ireland) for further information regarding the Rules of Intestacy.

6. What type of claim can an aggrieved person make against the Deceased Person's Estate in Northern Ireland?

The Inheritance (Provision for Family and Dependants) (NI) Order 1979 only applies if the deceased was domiciled in Northern Ireland. If the deceased was domiciled in England, Wales or Scotland, a person can make an equivalent claim under the Inheritance (Provision for Family and Dependants) Act 1975.

Article 3(1) of the order lists those who can make a claim for financial provision against the estate. These are as follows:

- (a) the wife or husband of the deceased;
- (b) a former wife or former husband of the deceased who has not remarried;
- (ba) any person (not being a person included in sub-paragraph (a) or (b)) who during the whole of the period of two years ending immediately before the date when the deceased died, was living in the same household as the deceased and as the husband or wife of the deceased;
- (c) a child of the deceased;
- (d) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage;
- (e) any person (not being a person included in sub-paragraphs (a) to (d)) who immediately before the death of the deceased was being maintained, either wholly or partly, by the deceased;

The ground which all claimants have to satisfy is that the provision of the deceased's will or intestacy does not make adequate financial provision for the claimant.

In deciding the adequacy of financial provision, the court has to have regard to specific guidelines contained in the 1979 Order. Generally speaking, the court makes a balancing exercise between the financial needs and resources of the claimant and the beneficiaries BUT when dealing with spouses, former spouses and co-habitees under category (ba) the court has to also take into account (a) the age of the applicant, (b) the length of the marriage or the period during which the applicant lived as the husband or wife of the deceased and in the same household as the deceased; and (c) the contribution made by the applicant to the welfare of the family of the deceased, including any contribution made by looking after the home or caring for the family.

7. What type of claim can an aggrieved person make against the Deceased Person's Estate in the Republic of Ireland?

7.1 Spouse's Legal Right Share

In the Republic of Ireland, where the deceased died having made a will, leaving a spouse and children surviving him, the surviving spouse is entitled to one-third of the Estate regardless of what directions are contained in the Will. As such the surviving spouse cannot be entirely disinherited by the deceased spouse. Such surviving spouse

can also demand that the family home, if any, be vested in them in satisfaction or part satisfaction of their one-third legal right share. If the deceased died and left no children, the surviving spouse is entitled to one –half of the Estate regardless of what is contained in the will. These rights are ordinarily enforceable by the surviving spouse without the need to resort to Court.

The benefits available to the surviving spouse under the Succession Act are only available where the deceased was domiciled in the Republic of Ireland or where the assets involved are land or buildings in the Republic of Ireland.

7.2 Rights of Children

Children of a deceased person are entitled to apply to Court if they believe that their parent did not make “proper provision” for them under his/her Will. The meaning of “proper provision is largely at the discretion of the Courts.

8. Other Claims

8.1 Claims where the validity of a Will is contested.

In the United Kingdom and Ireland, the validity of a Will can be disputed on the basis of fraud, undue influence or failure to comply with the legal formalities. A Will can refer to property in more than one jurisdiction, but the Court in which the validity of the will is disputed should be a court in the jurisdiction where the deceased was domiciled.

8.2 Claims against property of which the deceased was an owner or part owner.

Sometimes, a claimant will have an interest in a property which is subject to a trust. For instance, the deceased may have contributed the entire purchase monies for the property, but the property was registered in the name of a third party- a trustee. This may have occurred because the deceased may have wished to keep his ownership of the property secret. In such circumstances, the deceased is described as being the beneficial or equitable owner of the property. Any dispute of claims over such property should be made in a Court in the jurisdiction where the property is situated.

9. How is the Estate to be taxed?

In both the United Kingdom and the Republic of Ireland, a deceased person’s Estate is potentially subject to a tax liability. In the UK, this is inheritance tax (“IHT”). In the Republic of Ireland, this is Capital Acquisitions tax (“CAT”). For a fuller summary of how these taxes work and for up to date tax rates, please refer to Morgan McManus’s booklets on “Making a Will” produced for both our Northern Ireland and Republic of Ireland clients. For present purposes, one needs to understand that U.K IHT operates in a very different way to Irish CAT. U.K IHT is levied on the deceased person’s Estate whereas in Ireland, CAT is levied on the person receiving the inheritance (“the beneficiary”). Later examples will highlight this distinction.

9.1 The Double Taxation Treaty

The Double taxation treaty between the UK and the Republic of Ireland came into force in 1978 and provides as follows:

- (a) It applies to both IHT (and its predecessor Capital Transfer Tax) and CAT
- (b) It provides for tax credit
- (c) It is for tax only (not penalties)
- (d) Credit is given at the lower of the two effective rates in each country
- (e) Credit is only given when the same property is taxed on the same event in both countries e.g. death

The exchange rate used to calculate the amount of tax credit is the exchange rate(s) applying at the date(s) of payment of tax. There are double taxation treaties with many other countries but this article only deals with the U.K Ireland Double Taxation Treaty.

9.2 Taxation based on location of Property

Under the treaty, each country retains the right to tax property situate in that country. Therefore the tax is paid first in the country in which the property is located. The other country then gives a credit against the tax due to it in respect of the tax paid on the property in the first country. For example, a deceased person who was resident and domiciled in the Republic of Ireland died leaving property in London. Under their will, the deceased left the London property to their Irish cousin. The London property will be exposed to IHT in England because the property is located in that jurisdiction. The London Property will also be exposed to CAT in Ireland, as the deceased person was resident in Ireland at the time of his death. Without the Double Taxation Treaty Credit system the property would end up being taxed twice.

In our example the IHT will be paid in England to the Inland Revenue. The tax paid to the English Inland Revenue may then be used to reduce the tax due by the beneficiary to the Irish Revenue Commissioners in respect of the same property. As stated at clause (d) of paragraph 9.1 above, the credit given in Ireland for the U.K tax must not exceed the amount of Irish tax attributable to that property.

9.3 Domicile and Tax

In the U.K the deceased person's domicile can affect how much (if any) of his Estate or assets are liable to tax. In the UK, where a person is domiciled or deemed domiciled in the UK for tax purposes, his entire Estate is taxable (including foreign assets). If he is not domiciled and not deemed domiciled in the UK, only his UK Estate is taxable. In the Republic of Ireland domicile is no longer the determining factor as to whether an inheritance is liable to CAT.

9.4 Residence and Ordinary Residence

In the Republic of Ireland the concept of "Residence" and " Ordinary Residence" are the determining factors in ascertaining whether an inheritance will be subject to CAT.

An individual is said to be Resident in the Republic of Ireland in any tax year if he (a) spends a total of 183 days or more in the country; or (b) spends more than 30 days in the State in that tax year and, in that tax year and the previous tax year taken together, spends 280 days or more in the State; or (c) elects to be so resident, he being in the State in that tax year with the intention, and in circumstances which make it likely, that he will be resident in the following the following year.

An individual is “Ordinarily Resident” in the Republic of Ireland if he has been “Resident” in the State in the three previous years. Once he becomes Ordinarily Resident he remains so until such time as he has been non-resident in each of the 3 following tax years. In effect, it takes 3 full tax years of non-residence to cease to be Ordinarily Resident. For example, an English person could have lived in the Republic of Ireland for 4 years and as such would be treated under Irish Law as being “Ordinarily Resident”. If that person were to move back to England at the end of the fourth year, he will still remain “Ordinarily Resident” in Ireland until a further full three tax years have passed.

9.5 When is an inheritance taxed in the Republic of Ireland?

An inheritance will be subject to CAT where:

- (a) the deceased person was Resident or Ordinarily Resident in the State at the date of the inheritance (usually the date of death); or
- (b) the beneficiary is Resident or Ordinarily Resident in the State at the date of the inheritance; or
- (c) the subject matter of the inheritance is located in the State.

9.6 How is credit given under the Double Taxation Treaty

If it turns out that the same property is taxable both in Ireland and the U.K, then the appropriate tax credit must be ascertained.

Step 1. The tax liability is firstly worked out for the country in which the asset is located.

Step 2. The effective rate is then worked out. The effective rate means the actual percentage of tax paid after all reliefs and exemptions are taken into account.

Step 3. The effective rate of tax is calculated for the second country by working out how much tax is due in the second country and then working out the effective rate.

Step 4. The tax credit is then given at the lower of the two effective rates.

An example will help to clarify:

Tom was born in Ireland but worked most of his life in England. About 10 years ago Tom retired and came back to Ireland to live out the rest of his days in a small farm he had purchased. As such, Tom was Resident and Domiciled in Ireland. Tom died in 2002. His Irish assets were worth €150,000 and he had an apartment in London worth Stg£500,000. Under his will Tom bequeaths his entire estate to his son Michael.

As Tom died Resident in Ireland, his son Michael will be taxed in Ireland on all of Tom’s assets including foreign assets (See 9.4 above). As there is property located in

England, the London apartment will be subject to inheritance tax (IHT) in the U.K (See 9.2 above). Following the above steps the tax position will be:

Step 1. The tax liability is firstly worked out for the country in which the asset is located i.e. England. (Stg£1 = 1.40euro)

Value of London Apartment (Stg£500,000 x 1.4)	€700,000
Less Tax Free Threshold (Stg£250,000 x 1.4)	(€350,000)
Taxable Amount	€350,000
Tax @ 40%	€140,000

Step 2. The effective rate is then worked out. The effective rate means the actual percentage of tax paid after all reliefs and exemptions are taken into account.

U.K Effective Rate	€140,000	=	20%
	€700,000		

Step 3. The effective rate of tax is calculated for the Republic of Ireland (the second country) by working out how much tax is due there and then working out the actual percentage.

Value of worldwide inheritance taken by Michael	€800,000
Tax Free Threshold	€442,148
Taxable Inheritance	€357,852
Tax @ 20%	€71,570

Irish Effective Rate	€71,570	=	8.9%
	€800,000		

Step 4. The tax credit is then given at the lower of the two effective rates.

€140,000 of IHT must first be paid in the U.K, as the asset is located there. Will Michael be entitled to a full tax credit for the amount paid? The rule is that the credit for the IHT paid in the U.K must not exceed the Irish CAT chargeable on U.K assets. The Irish CAT chargeable on the London apartment is effectively 8.9% of €700,000 = €62,300. Therefore Michael can only claim a tax credit of €62,300 against his Irish tax bill despite the fact that he has paid €140,00 of IHT in the U.K. In effect he will get no tax credit for €77,700 (€140,000 – €62,300) of the tax paid in the U.K.

Michael's total liability will be as follows:

U.K Tax (IHT)		€140,000
Irish Tax CAT	€71,570	
Less U.K Tax Credit	€62,300	€9,270
Total U.K IHT and Irish CAT		€149,270

The example given above shows how the Double Taxation Relief works. More complex scenarios can obviously occur. We at Morgan McManus will be delighted to provide you with more detailed analysis of potential tax scenarios relating to your Estate.

10. Considerations when making a Will

If you have a cross-border estate, you should consider the following:

- (1) Where you are domiciled. If there is any potential doubt about this, steps should be taken to ensure you have the right evidence.
- (2) Where are you Resident or Ordinarily Resident? Once again steps may have to be taken to ensure that you have the right evidence.
- (3) The tax implication of your wishes. Where applicable, we at Morgan McManus can identify ways in which large savings of tax can be made by making changes to your Will or reconstituting your assets.
- (4) See also the points made in our booklets "Making a Will".

Morgan McManus Solicitors*
Law Chambers and 12 Paget Lane
The Diamond Enniskillen
Clones Co. Fermanagh
Co. Monaghan

This booklet is intended to give an overview of the law only and is not intended as full legal advice. As such you should always take full legal advice before you take any decisions that may impact on matters referred to in this booklet.

* Revised November '03 FMM