

ESTATE AND TAX PAYING COUNCIL PRESENTATION

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Effect of Foreign Jurisdictions on NZ Estate Planning

The application of Civil Law in Europe, as opposed to Common Law in Commonwealth countries, results in certain principles being followed, regardless of the legal entities which might distinguish particular property, e.g. in France 'forced heirship' law will always result in no less than 50% of parents' assets going to their child if they only have one child, two thirds of their assets going to both children if they only have two children, and three quarters of their assets going to three children if there are three children. By comparison with New Zealand law under Civil Law the younger family have more protection than the spouse or partner.

Property which is held in Europe is subject to European state law. So it is important to know your client and identify the substance of the source and control of economic wealth – who are trustees, protectors, settlors, those who hold Powers of Attorney. The reality of the position is more important than the form of the position.

Because the conflict of law between countries within Europe arises often, a European Succession Law was introduced by the European Union in 2015. It applies throughout Europe, except the United Kingdom, Ireland and Denmark. This law is intended to have world-wide application, although it would be subject to interpretation by the courts. The intention is that it only takes one European asset for the law to have application to the estate. At the very least, New Zealand estate planning needs to involve consideration of the application of EU Succession Law to European assets. At least within Europe the country of 'habitual residence' determines the right to tax estates. In France, for example, the rate of estate tax is 60%. Under French law determination of the assets subject to taxation will ignore trusts. However, assets settled on trusts may be subject to the 60% tax at the time of settlement rather than the time of death.

Common Reporting Standards are supporting the application of EU Succession Law throughout the world. In New Zealand we have adopted the Multilateral Convention on Mutual Administrative Assistance in Tax Matters pursuant to which New Zealand Inland Revenue is obliged to assist with the collection of tax due to other jurisdictions.

In France it is proposed that trust and beneficiary information will actually be published. Another example is that ownership by New Zealand citizens of companies incorporated in the British Virgin Islands will be detailed by New Zealand Inland Revenue to the Inland Revenue in the United Kingdom.

A Beneficial Owners Register has been established in the EU for interests in all trusts.

Citizenship may prevail (by comparison with residency) to create jurisdictional application of estate duties. As a result a 'US person' could be someone who has just one US parent, perhaps a child born in New Zealand. US citizenship can result in life time tax obligations. On the other hand UK domicile may prevail over citizenship of another country

The application of Common Reporting Standards in New Zealand and Australia starts in 2018. That standard applies in Europe from 1 January 2017. On the 8 August 2016 the Bill giving effect to the Common Reporting Standards was introduced to Parliament in New Zealand.

From 1 July 2017 financial institutions must undertake due diligence to collect the relevant information on customers.

There is a possibility of trusts which have trustees resident in different countries also being obliged to report in several countries.

Clients need advice on both sides of any border where they intend to live or operate.

In France declarations must be lodged within a month of economic events. Penalties otherwise accrue. Inheritance tax, say 60%, is paid by a beneficiary within six months of death. There are limited gift exemptions which are worthwhile.

While the law in China is that there is a \$50,000 limit on funds leaving the country without approval, that is in practice not always imposed.

In planning New Zealand estates it may be prudent to deal with *inter vivos* disposition of property rather than provide for future grandchildren and thereby create testamentary trusts. If those grandchildren live or in some way become taxable in a European country, there can be significant unintended consequences for the original trust.

It therefore becomes necessary as part of an annual trustee review to consider where in the world beneficiaries are living, working, or investing.

A Memorandum of Wishes is generally regarded as private under New Zealand law but that may not be the case in overseas jurisdictions. So the published circumstances of a trust may include the Memorandum of Wishes. New Zealand estate planning needs to be undertaken on the understanding that transparency is now a very high priority in international taxation.

This is an area of potentially significant unintended consequences and specialist advice should be obtained, both in New Zealand and in the other relevant jurisdiction.