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# Hidden Hazards in Foreign Probate

Estate planners and administrators should understand the added complexities that come with foreign-based assets. Other countries have different practices and requirements in the probate process, and proper administration and planning need to anticipate their impact.

One unintended consequence of globalization is the complexity that has been forced on tax and accounting advisors with respect to their clients who have acquired assets outside the jurisdiction of the United States. While the reasons for owning these foreign assets vary, the additional time and significant administrative expense can become a substantial hidden hazard, particularly during estate administration and planning.

## Holding Foreign Assets

While consideration of multistate probate has long been a topic of professional interest within the tax planning community, international probate has only recently begun to receive the same level of consideration during estate administration (retrospectively) and estate planning (prospectively). Individuals might own foreign assets for various reasons, including: (1) investment portfolio diversification (e.g.,

direct ownership of foreign businesses, real estate, etc.), (2) the enjoyment and adventure of foreign ownership (e.g., the dreamlike tropical vacation home), (3) retained assets of a naturalized citizen (e.g., a foreign-born national who moved to the U.S. while retaining assets in his or her homeland), (4) liability protection (e.g., doctors and other professionals in high-risk occupations), and, sadly, (5) engaging in unlawful behavior (e.g., illegal profits, fraudulent transactions, hidden marital assets, tax evasion, etc.).

Regardless of the reason for acquiring or holding any foreign assets, they may become includable within the decedent's U.S. estate. As such, the executor and beneficiaries may encounter taxes and transfer fees that will likely raise a host of new and, in some cases, costly problems. Additional costs can result from the failure to understand the impact of the foreign country's probate practices and procedures, which will likely reduce the value or potential usefulness of the foreign asset. Probate administration can be a complex process that's best described as: (1) linear at the local level (i.e., within the state of residency), (2) multiplicative at the multistate

level, and (3) exponential at the international level.

## New Country, New Rules

Forms and other documentation used in probating an estate in the U.S. are easily obtained through many sources: the Internet, telephone, fax, or e-mail. Likewise, advice from various taxing authorities is generally available through easily accessible customer service units. Naturally, these interactions are conducted in English, which reduces misinterpretations. Unfortunately, comparable facilities aren't always applicable to the estate processing and tax authorities of other countries. For example, the IRS uses a "holistic methodology" in order to evaluate the Federal Estate Tax Return (FET or Form 706): All identified errors are summarized and reported to the preparer for corrective action. The Scottish (U.K.) Estate Confirmation (i.e., probate) process, for example, operates on a "stop and go" methodology. Whenever an error is detected and notated, the entire estate documentation package is returned to the sender for corrective action. Once the identified error is corrected, the document package can be resubmitted so that processing

can move forward until the next error is detected.

In the course of probating an estate of a naturalized U.S. decedent who was a U.S. resident in New Jersey and held assets in Glasgow, Scotland, for example, the following striking differences appeared when dealing with the assets in Glasgow:

1. The contrast of the “stop and go” administrative process (compared to the holistic approach in the U.S.),
2. The lack of publicly available information with respect to proceedings from administrative court,
3. The overall reliance on paid professional (local) legal advice, and, most striking,
4. An emphasis on personal correspondence: All inquiries in Scotland must be written, signed, and postmarked. Telephone, fax, or e-mail aren’t acceptable forms of official communication.

Another significant difference is the language and application of foreign estate administration when compared to the common practice within the U.S. For example, “probate” occurs only for assets held in England and Wales, while a “process of confirmation” is utilized for assets held in Scotland and Northern Ireland.

In the U.S., probate administration and the taxation of an estate and/or inheritance at the state level are two independent processes. In the U.K., tax processing and payment must be completed successfully before any probate (or confirmation) application can be processed. In the U.S., commonly

referenced supplemental asset schedules can be cross-referenced and reused in the preparation of State Estate Returns and/or Inheritance Tax Return(s) as well as the FET. In the U.K., all information must be retyped onto the official forms—first for the tax return and then again on the probate (confirmation) application. (Curiously, supplemental schedules aren’t acceptable.) Now imagine if the individual owns assets in more than one foreign country!

Another interesting complication of international probate is that officially accepted U.S. public documents, such as a probated will, death certificate, letters of administration, and so forth, aren’t *prima fascia* valid outside of the U.S. Such domestic documents must be accompanied by an Apostille, which is the international certification equivalent to a U.S. notarial attestation (which is provided under state law). The rules for Apostilles were established by a treaty called the *Hague Convention of 5 October 1961 Abolishing the Requirement of Legalisation for Foreign Public Documents*, of which the U.S. is a member. The U.S. Department of State has usually designated the Secretary of State of each individual U.S. state as an official issuer of Apostilles (see [www.state.gov/m/a/auth/c16921.htm](http://www.state.gov/m/a/auth/c16921.htm)). Each notarized document requires its own Apostille, and the submitted Apostille must match the state of the underlying asset. In other words, a Pennsylvania bank account requires a Pennsylvania Apostille, while real estate in New Jersey requires a New Jersey Apostille. The state agency issuing the Apostille is required to

check the credentials of the certifying public notary (or attorney) who has attested to the affidavit, and it will reject unqualified attestations.

As a final issue, the estate administrator needs to consider the expense, time delay, and security of conducting administrative processing through the international postal system.

### An Ounce of Prevention

Probably the most important consideration for an estate plan is to know: (1) the existence of any foreign asset (i.e., discharging the appropriate level of due professional diligence), (2) its value, (3) the title of ownership, and (4) the intended use of the asset. If the ownership is such that it will cause the foreign asset to potentially be included in the estate of a U.S. decedent, then an immediate proactive response from the planning professional would be prudent.

Having identified a foreign asset, one alternative might be to retitle the asset into a conduit entity, such as a trust or other entity, in order to remove it from the estate’s potential control. The potential use of a conduit entity to hold title of the foreign asset has the potential to inadvertently create additional complications, but such issues are beyond the scope of this discussion. Nevertheless, such issues should be fully explored by the estate planner in consultation with other experts as appropriate. Obviously, the best time to address these matters is before the foreign asset is acquired.

Additional language referencing the foreign asset may need to be

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## Taxes

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inserted into the individual's Last Will and Testament. Likewise, other documents relating to the estate plan should be reviewed and edited so as to achieve cost-effective estate administration. Finally, if the asset is used infrequently, it might be prudent to dispose of the asset through sale or gift during the individual's lifetime, thus avoiding its inclusion in the estate.

### Careful Planning

It's important to consider the costs associated with the estate's administration of any foreign asset vis-à-vis the actual value of the asset.

For example, why keep something that has lost its value? While holding assets based outside the U.S.

can provide many benefits—tangible, esthetic, or even

psychological—they may create unintended complications for the administration of the estate and for the beneficiaries. Holders of non-U.S. assets should carefully weigh these costs and benefits, especially when designing their estate plan. **SF**

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