Link to final Uniform Wills Recognition Act (2015) PDF with comments (36 pp.):

https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=451fd50c-77c7-1f31-fe11-fc904c136e2a&forceDialog=1

"Convention providing a Uniform Law on the Form of an International Will" a/k/a "the International Wills Treaty" and "the Washington Convention of 1973"

Text of Convention: https://www.unidroit.org/instruments/international-will/

1974 explanatory report on the Washington Convention: https://www.unidroit.org/wp-content/uploads/2021/07/Wills-Convention-1973_explanatoryreport-en.pdf

Richard Kearney 1984 article on the Washington Convention: https://core.ac.uk/download/pdf/216913188.pdf

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From: Urda Jr, Richard B. <rurda@MayLorber.com>
Sent: Friday, March 17, 2023 1:06 PM
To: Dible, Jeffrey S. <jdible@fbtlaw.com>; Jeff Kolb <Kolb@emisonlaw.com>; Jeff Hawkins <jeff@hawkinselderlaw.com>
Subject: Uniform Wills Recognition Act

Dear Jeffs:

I just read an article in the March/April 2023 issue of *Probate & Property* concerning real estate issues in estate administration. One of the topics covered was the use of multiple wills when a client owns real estate in both the U.S. and a foreign country. The author briefly discussed the Wills Recognition Act which has been adopted in 20 or so other states. The Act provides for the use of an acceptable form of international will that can be used to transfer real estate in countries which are signatories to the Convention Providing a Uniform Law on the Form of an International Will. California and Illinois have adopted the Wills Recognition Act, but New York has not. I don't recall the question of whether Indiana should consider adopting the Act coming up at the PRC. Is it worth seeing if there is any interest at next month's PRC meeting?

Rich

Richard B. Urda, Jr.

Partner

March 01, 2023

FEATURE

Real Estate and Related Issues in the Estate Administration Process

Michael A. Sneeringer

Share:



In the case of an invalid homestead devise, title must be cleared before closing the sale of the same real estate.

(Source: Getty Images)

Real estate attorneys are fast talking, dress well, and are aggressive, but up until 2020 may not have been as busy as in 2021 and 2022. There appears to have been a real estate boom in the United States. Interest rates helped. *See* Diana Olick, *Confused About the Housing Market? Here's What's Happening Now—and What Could Happen Next*, CNBC (Sept. 9, 2022), https://cnb.cx/3CqwEEc. But the recent real estate boom coupled with COVID and now a post-COVID world has shown attorneys that estate administration can play a crucial role with real

estate. During the COVID years, there was an increase in deaths, leading presumably to more sales of real estate inherited by beneficiaries. Shannon Sabo & Sandra Johnson, *Pandemic Disrupted Historical Mortality Patterns, Caused Largest Jump in Deaths in 100 Years*, U.S. Census Bureau (Mar. 24, 2022), https://bit.ly/3WSYCQZ. In any given estate administration, a multitude of things can go wrong in a hurry when it comes to real estate.



There are a lot of attorneys who have clients that spend time in Florida and acquire Florida real estate in the form of either property or timeshare interests. For non-Florida attorneys, Florida's "Legal Chameleon" homestead poses an issue. *Snyder v. Davis*, 699 So. 2d 999, 1001 (Fla. 1997). Most Florida attorneys understand by now how to properly dispose of a homestead . . . or do they?

For clients with nontaxable estates and estates with few assets, real estate can make up the bulk of a family's inheritance. For some families, it is the only asset. Estate planning attorneys try to do right by their clients and honor their testamentary intentions, but sometimes the best laid plans in 2023 may not work out so well in 2035 because of factors outside of the estate planning attorney's control . . . or were they?

If lucky enough to be local counsel for a snowbird client in one of the southern states, the estate planning attorney may have the benefit of visiting the client in the summer in a much milder climate. But when the client ceases to be a resident of state X and instead desires southern state residency, what does an estate planning attorney have to help the client accomplish to avoid real estate problems?

Even if the estate planning attorney follows real estate law adroitly when dealing with the client's real property, might other issues derail what would otherwise be an easy process? Could state or federal estate taxes slow down the process?

For many attorneys, international clients are a constant. International clients have tricky real estate issues. Likewise, clients with foreign real estate have issues, too, and there are also clients

with property in countries with unique inheritance laws for real estate.

This article will discuss some of the real estate issues that can be encountered in estate administration. Some attorneys never encounter these issues in their general practice, while other issues may seem routine.

Homestead

Some states, such as, but not limited to, Florida and Texas, have generous homestead exemptions. In Florida, three distinct homestead protections are available. The first provides some exemption from ad valorem real property taxes and limits annual increases in the property-tax-assessed value of the client's Florida home (the "property tax savings" applicable to a homestead exemption). The second protects the home from the claims of a client's creditors (so called asset protection). But the third, important to the discussion in this article, provides mandatory inheritance rights to a client's surviving spouse and minor children. *Snyder*, 699 So. 2d at 1001–02.

If a client is married or has minor children, Florida law restricts what the client may do with Florida homestead property. During marriage, absent a prenuptial or postnuptial agreement, clients can't sell, gift, mortgage, or otherwise encumber any part of their Florida home without the consent of the spouse, even if the spouse isn't an owner of the home. If a client is survived by a spouse, the spouse won't be able to freely devise the home. Fla. Stat. § 732.4015.

If survived by a spouse and a minor child, absent a prenuptial or postnuptial agreement, a client can't devise the client's home at all. If a client is survived by a spouse but no minor child, the client is permitted to devise the home outright only to the spouse. In an attempted devise of the Florida home in a manner that isn't permitted, that direction—whether in a client's will, in a trust, or in the deed to the home—will be invalidated by Florida law. Instead, Florida law will automatically grant the client's surviving spouse the lifetime right to use the residence and the client's descendants will receive the Florida homestead only at the spouse's death. If the client has no descendants, the property will pass outright to the spouse. *Id.*

If the client is survived by a minor child, the client can't devise the home at all and such property under Florida law will be divided among the client's then-living children (adults and minors) on a per stirpes basis. This causes the guardian of the client's minor child to have control over that child's ownership interest in the homestead until the minor child turns age 18. *Id.* In a divorced

spouse situation, this can be a huge problem and is often a sticking point for the client. In Texas, neither the probate court nor any other court in Texas has jurisdiction to order the sale of a homestead to pay debts when there is family left who have the right to occupy it. *Cline v. Niblo*, 8 S.W.2d 633, 636 (Tex. 1928).

Specific Situations

The following situations illustrate real estate issues related to homesteads that come up in the estate administration process.

1. How can this right interfere with an estate plan benefitting the surviving spouse? In the case of a married couple with children from prior relationships, it is common for the spouse who owns the family home to direct that it be held in trust for the surviving, nonowner spouse. That trust often provides that the home will then pass to the children of the owner-spouse. The trust terms generally instruct upon the responsibility for residence expenses that are incurred during the surviving spouse's lifetime. The trust may also give the surviving spouse the right to direct that the home be sold and replaced. But if the surviving spouse hasn't waived the homestead right, this trust arrangement will be invalidated. Instead, the surviving spouse will have a statutory right to use the home for the spouse's lifetime; the descendants of the deceased spouse will have a remainder interest. *See, e.g.*, Fla. Stat. § 732.401.

Although the statutory life estate seems similar to the trust arrangement, it is different in several ways. First, the statutory life estate gives the surviving spouse the lifetime right to use of the home, and not merely a right to reside in the home. Use of the home is broader than the right to reside in the home. In particular, a surviving spouse who has use of the home can rent the home to third parties and retain the rental proceeds for the spouse's use.

Second, generally, a trust doesn't give a surviving spouse any equity interest in the home. Under the statutory life estate, however, a surviving spouse can elect to receive a one-half ownership interest in the home instead of a life estate if the surviving spouse makes an election within a short window after the spouse's death. *See, e.g.*, *id*. § 732.401(2).

Third, in a trust arrangement, the client can set the terms for how expenses of maintenance and repair will be paid during the surviving spouse's lifetime. Under the statutory life estate, the surviving spouse will be responsible for most expenses of maintenance, including property taxes,

homeowners' insurance, and homeowners' association dues and assessments. A client's descendants, as the remainder beneficiaries of the home, could be called upon to contribute to capital repairs that are expected to outlive the client's spouse's use. Finally, through a trust, clients can control how the home might be sold or disposed of either during the spouse's lifetime or at the spouse's death. Under the statutory life estate, a client's descendants will have a vested interest in the home. *Id.* § 732.401(1). Their participation or consent might be required if the client's spouse wants to sell or otherwise transact with the home. Further, at the client's spouse's death, the descendants will receive the home outright without any control or restriction.

2. What if the client is divorced from the other parent of the minor child and the client doesn't want the ex-spouse to have control over the homestead if the client predeceases the ex-spouse and is survived by the client's minor child? Florida law allows the creation of an irrevocable inter vivos trust to hold a homestead for the benefit of the client's minor child with the same beneficial terms that the client has in the client's will or revocable trust. *Id.* § 732.4017. The client deeds homestead property to the trustee of the irrevocable trust but reserves a life estate in the deed of conveyance. *Id.* The trustee can be someone other than the minor child's guardian or client's ex-spouse. *Id.* The reserved life estate preserves the exemption from creditors and the homestead property tax exemption. The trust instrument would provide for mandatory distribution of the homestead property back to the client on the first to occur of their child's death or the child's 18th birthday (when the child is no longer a minor and the homestead restrictions on devise go away), whichever occurs first.

The issue here is one of control: giving up control of the homestead, in trust, using a third party as trustee. The estate planning attorney has to explain the issues presented by this type of arrangement, clarifying to the client that although the trust would be structured to revert the homestead to the client or the client's revocable trust when the youngest minor beneficiary passes away or attains age 18 (the reversion event), until the reversion event, a trustworthy trustee is in de facto "control" of the homestead. The client should also be advised that banks are loathe to deal with this type of trust in applying for a mortgage or financing using the homestead as collateral.

3. What if the client and the spouse owned their homestead property in a joint revocable trust that became irrevocable on the first spouse's passing? In the case of an invalid homestead devise, title must be cleared before closing the sale of the same real estate. From a practical standpoint, this title-clearing could wait until the surviving spouse's passing or much later in the future. What the astute estate planning attorney is looking for in an invalid devise is either the homestead

remaining in a continuing trust for the surviving spouse or language whereby the surviving spouse retains the power to revoke the trust, but the trust doesn't cause an automatic disposition of the homestead to the surviving spouse at the first spouse's death. For example, assume the following language was included in a revocable trust that remained revocable even after the first spouse's passing:

> Upon the death of the first of the settlors to die, the Trustee shall continue to administer the trust as provided in the preceding articles. After distributing any gifts, and as soon as practicable after the death of the first of us to die, the Trustee shall receive any amounts devised to it under the terms of the decedent-settlor's Last Will, or receivable in any other fashion, and the Trustee shall continue to hold the trust estate for the benefit of the living settlor, to the exclusion of all other persons, including any children of ours born or adopted after the execution of this Trust.

The above example would cause an invalid homestead devise. The reason for the invalid homestead devise is because the surviving spouse doesn't receive an interest in the homestead outright and free of further trust; the trustee is "continu[ing] to administer" the trust. Often non-Florida clients have this invalid devise issue. Their non-Florida attorney prepares a joint revocable trust and advises their client to purchase property in the name of the trust to avoid probate. The clients (a married couple) move to Florida, establish residency, and apply for homestead (inadvertently triggering the homestead devise issue). For estate planning attorneys, to avoid the estate administration issue, all joint trusts should be reviewed. Another idea would be to advise out-of-state clients to execute a deed waiving homestead restrictions on descent and devise, even when such property is deeded into a joint revocable trust, to avoid the invalid homestead devise problem. *See id.* § 732.7025(1). But such a deed brings up a host of issues, including adequate legal representation and whether each spouse should be represented by separate legal counsel. *See* Jeffrey S. Goethe & Jeffrey A. Baskies, *Homestead Planning Under Florida's New "Safe Harbor" Statute*, 93 Fla. Bar. J., no. 3, May/June 2019, at 36, 38, 40.

4. What is my modular home: a motor vehicle or real estate? A mobile home (also called a modular home) permanently affixed to real estate qualifies as a homestead. *Gold v. Schwartz*, 774 So. 2d 879, 880 (Fla. 4th DCA 2001). The fact that a decedent's residence is a permanently affixed mobile home rather than a traditional house constructed thereon doesn't render the property ineligible for homestead status; the key is whether the decedent owned and resided on the subject real estate in the mobile home.

In other states, probate issues can arise in determining whether a mobile home is personal property or real property. *See, e.g.*, *In re Estate of Parker*, 25 S.W.3d 611 (Mo. Ct. App. 2000). Such characterization can have implications in the taxation, disposition, and creditor protection of such asset. *See, e.g.*, *In re Estate of Dahn*, 464 P.2d 238 (Kan. 1970) (applying Kansas law to find that although decedent's surviving spouse had a homestead interest in a mobile home, it remained subject to a purchase contract).

Issues Related to Sale During Estate Administration

What if a client seeks to sell real estate during the pendency of estate administration, only to find out during the due diligence process that the client can't close on time? In addition to an invalid devise of homestead described above, what other issues might there be?

Homestead

As mentioned above, homestead may be one of the biggest impediments to a smooth transaction. For estate administration attorneys, it is important to set expectations with eager beneficiaries and personal representatives on the timeline to closing. For example, if an estate administration hasn't commenced and is required, it might be unrealistic to guarantee closing in 30 days. But homestead problems differ because they are often undetected by novice or unsophisticated estate administration attorneys. Take, for example, the joint revocable trust example from above. When a surviving-spouse client passes away, the beneficiaries and often the estate administration attorney may all miss the fact that the beneficiaries are unable to convey good title because they did not initiate a probate administration on the first spouse's passing, despite an invalid homestead devise on the first spouse's passing. Often a title insurance company asked to insure title will catch the mistake only weeks from the closing date. If a 30-day closing was "promised," the promise will surely not be kept.

Lien into It

If an estate tax return is required for a decedent—that is, the Form 706, U.S. Estate Tax Return, filing requirement—a federal estate tax lien attaches to all of the decedent's gross estate. The estate tax lien doesn't have to be publicly recorded to be valid, and it is in effect only for estates that are required to file Form 706. If, at closing, a title agent won't give the clear sign to close, the estate administration attorney can apply for a discharge of the estate tax lien by submitting Form

4422, Application for Certificate Discharging Property Subject to Estate Tax Lien. *Sell Real Property of a Deceased Person's Estate*, IRS, https://bit.ly/3ICXI6K (last visited Sept. 28, 2022).

Similarly, a decedent may have federal (and even state) income tax liens. Federal tax liens must be satisfied before sale. Thus, if a decedent had a federal tax lien on their real estate, during the estate administration process, care should be taken to determine the nature and number of the federal tax liens in conjunction with the equity in the real estate. Clearly, if there is equity in the property, a tax lien could be paid out of the sales proceeds at the time of closing. But if instead the real estate is under water, other considerations may come into being. *What If There Is a Federal Tax Lien on My Home?*, IRS, https://bit.ly/3jVyd6G (last visited Sept. 28, 2022).

A Minor Issue?

The sale of real estate involving any minor beneficiaries may require the appointment of a guardian to adequately represent the minors' interest in the sale. This issue has been found to be present in an estate administration where property is left to a minor beneficiary and there is no specific authority for distributing property to said minor beneficiary (such as there being no testamentary trust in a will or no holdback for minor beneficiary provision in a trust (and the property passes outright to somebody who is a minor by mistake)). Instead of solely having the minor beneficiary's parent "sign off on" the closing sale documents, a guardianship would be necessary where the sales proceeds are over $15,000 (otherwise, a Uniform Transfer to Minors Account could be established for the sales proceeds, requiring solely the sign-off by the minor's natural guardian to approve the sale, using a "Petition Authorization Distribution of Proceeds of Sale to UTMA Account Custodian"). *See* Fla. Stat. § 710.108(3).

A common scenario occurs when a grandparent mandates the sale of real property and the proceeds of sale are to be split among their grandchildren, some of whom are minors. What is the personal representative or executor to do? Using the state of Florida as one example, one approach might be as follows. There are processes for guardian appointment outlined by state law that would be followed depending on whether the minor is a resident of the probate administration state. *See id.* §§ 744.3021 (resident minor beneficiary), 744.308 (nonresident minor beneficiary). The guardianship requirement is necessary because where a sale generates a monetary amount in excess of $15,000, the court requires more formal supervision of the sales proceeds (as opposed to an UTMA account owned by an adult parent until the minor reaches a specific age, where no reporting is necessary).

Under Florida Statutes § 710.107, a personal representative may transfer the sales proceeds to another adult or custodian of a minor where the governing document is silent on transferring the property (meaning a trust isn't created or the terms of the document (will or trust) do not allow a custodian to hold back funds for the benefit of the minor)). *See* Fla. Stat. § 710.107. But a court would have discretion to approve or disapprove of this arrangement. *Id.* Why does this matter? It matters because if there is no trust arrangement outlined for the minor beneficiary and a sales transaction is to occur, the title insurance company underwriting the sale will want the signoff of such minor's "representative" in order for the transaction to close; a buyer can't be assured good title where a minor is involved as minors can't contract to the sale (hence the reason for the appointment by the court of the guardian or representative for the guardian).

In a situation where multiple beneficiaries all stand to benefit from the sale of a decedent's property, some of the beneficiaries are minors, and other beneficiaries are the minors' parents, it would be necessary for the nonbeneficiary parent to be the UTMA custodian or appointed guardian, as the case may be, for purposes of representing the minor. An overreaching issue, outside the scope of this article, is whether a beneficiary's other parent provides adequate representation where the beneficiary's other parent is married to a beneficiary (i.e., where the decedent's beneficiaries are children and grandchildren, who can adequately represent the grandchild . . . his or her other parent (married to a child of the decedent?)). For example, in the situation where a grandfather provides for his son and grandson to be beneficiaries of real estate, should his daughter-in-law (the grandson's mother) be allowed to represent the grandson? Should the answer vary depending on whether the sales price would yield the grandson $10 million as opposed to $10,000?

Pollution on the Property

What if the estate administration attorney is advising a personal representative who is about to sell property (homestead, vacant, or otherwise) and an environmental issue is discovered? What if a beneficiary is inheriting property and an environmental issue is discovered or known? What can the personal representative or beneficiary do?

Discovery by Personal Representative

In general, state law provides that the personal representative has, without court authorization, powers specific to environmental issues relating to property subject to estate administration. *See*

id. § 733.6121. State law provides no personal liability of a personal representative to any beneficiary or other party for a decrease in value of assets in an estate due to the personal representative's efforts to comply with environmental law, including reporting. *See* Unif. Prob. Code § 5-430(e); Fla. Stat. § 733.6121(3). Thus, a personal representative should identify whether there are any environmental issues and immediately begin to comply with any reporting obligations.

Refusal by Beneficiary

Federal and state law typically provide that a beneficiary can disclaim any interest in or power over property. *See* 26 U.S.C. § 2518; Fla. Stat. § 739.104. That would encompass property in that state and elsewhere. If the estate administration attorney happens to be counsel to an estate beneficiary and that beneficiary discovers there are environmental issues, the attorney would be wise to advise the client, and possibly the client's heirs, to make a disclaimer where it appears the property is of no value. An issue comes up when there are no further beneficiaries following a disclaimer: Where does the property go? Who is in charge of the cleanup (the beneficiary now, the personal representative, or other beneficiaries (the non-disclaiming ones) of the decedent's estate)?

Charitable Issues—Disposing of Real Estate

Donating real estate to charity occasionally results in difficulties. As an example, child-beneficiaries can't simply donate their inheritances in the family home to a local university and expect that university to accept their gift and, in turn, the Internal Revenue Service to allow a charitable deduction either for the contribution of the property or an easement given on the property for the home's historic significance. These issues are illustrated in the following text.

Refusal by Charity

If parents donate their home to a university, that university may not accept the gift. In fact, this can cause estate administration issues for, if the university won't accept the gift, who should receive the home or proceeds of sale? Should the heirs be able to sell it and receive a monetary distribution following the sale, even though the parents had charitable intentions? Or should the principle of cy pres allow another charitable institution to receive the home as a gift in lieu of the university? In a recent Florida case, the principle of cy pres was allowed by a court in order to

substitute one charity for another in accepting a gift of real property. *Reno v. Hurchalla*, 283 So. 3d 367, 371–72 (Fla. 3d DCA 2019). When a charity's declination makes a charitable transfer impossible to receive, a trustee of a testamentary trust or successor trustee of a lifetime inter vivos trust would have the authority to modify the transferee to be an accepting charitable institution. In the estate administration context, this would come up if a testamentary trust was used. Otherwise, if a will purported to distribute assets to beneficiaries free of trust, a Petition to Determine Beneficiaries could be used to petition the court to determine where proceeds from the sale or the home itself should go. Similarly, a Petition to Determine Beneficiaries can be a useful tool where a will creates a testamentary trust for beneficiaries who have outlived conditions placed in the trust (i.e., the trust terminates when the beneficiary attains age 25 and all beneficiaries have attained age 25; instead of creating a trust only to immediately terminate it to distribute assets to beneficiaries, a court could be presented with a Petition to Determine Beneficiaries whereby the judge is asked to set aside the testamentary trust terms in favor of a distribution directly to the testamentary trust's ultimate beneficiaries).

Similar to charities, government entities have been known to decline charitable bequests. In one Massachusetts case, the decedent conditioned a gift of land and buildings to a town "[t]o be used as a home for aged women." *Ford v. Rockland Tr. Co.*, 116 N.E.2d 669, 670 (Mass. 1954). The town voted not to accept the gift. *Id.* The issues presented in both *Reno* and *Ford* could have been avoided had the decedents spoken to the prospective beneficiaries, apprised them of their desire, and worked with the charitable beneficiary and town to come to an agreeable donation situation, or find another beneficiary or town.

Conservation Easements May Not Ease Anything

A conservation easement allows property owners to donate their property interests in exchange for a charitable deduction. Charitable contribution deductions are generally restricted for a donation of an interest in property that is less than a taxpayer's entire interest in said property. *See Long Leaf Prop. Holdings, LLC v. Comm'r*, No. 11982-16, 2022 U.S. Tax Ct. LEXIS 192, at *5 (Aug. 31, 2022). "Qualified conservation contributions" (e.g., conservation easements) are an exception to the general rule whereby a donation of an easement is in perpetuity. *Id.* The thinking goes that urban development of a particular area or parcel of property is desired, but that needs to be balanced with the preservation of scenic areas, natural resources, and cultural heritage within such area or parcel of property. Richard J. Roddewig, *Conservation Easements & Their Critics: Is Perpetuity Truly Forever. . . And Should It Be?*, 52 UIC J. Marshall L. Rev. 677, 679 (2019). The IRS

pushes back at these easements when taxpayers, typically having been encouraged by a promoter armed with a questionable appraisal, take an inappropriately large deduction in exchange for the easement. *Conservation Easements*, IRS, https://bit.ly/3WRvfP7 (last visited Oct. 1, 2022). Further, abusive conservation easements have been found if deductions are taken when a taxpayer isn't entitled to one at all (the property was used in a manner inconsistent with I.R.C. § 501(c)(3)). *Id.* Additionally, historic easements, particularly façade easements, have been abused when some taxpayers have taken improperly large deductions by agreeing not to modify the façade of their historic house (already subject to restrictions under local zoning ordinances). *Id.* The taxpayers may be giving up nothing, or very little, based on local zoning restrictions and ordinances. *Id.*

If an easement was donated based on the location and historical significance of the family home, a family personal representative should take care to determine whether the easement was proper: Is there a façade easement on the home even where there is a local restriction in place, is the appraisal of the easement from a reputable appraiser at a well-known valuation company, or was the charitable deduction misleading or suspect? Ways to avoid issues in the charitable deduction arena would be to abandon the charitable deduction, obtain an appraisal from a reputable appraiser, and check the local restriction in the area regarding development and changes to the local aesthetic. In an estate administration, the personal representative will have authority to make decisions using the suggestions in the immediately preceding sentence.

International Issues—Disposing of Real Estate

Differences in Legal Regimes

The means by which real estate descends or is distributed from a decedent to the decedent's beneficiaries or heirs varies from country to country. The varying approaches of the multiple jurisdictions that may need to be considered in an international estate plan will have significant bearing upon the estate planning options available to the client. To properly advise a client of the implications of an international estate plan, the estate administration attorney should be acquainted with the different approaches that countries take when distributing the assets of a decedent—that is, estate jurisdictions as opposed to inheritance jurisdictions.

In the United States, the assets of a decedent pass to a temporary and separate legal entity known as an "estate," which is generally subject to judicial supervision. In "estate jurisdictions," certain steps are completed before assets are distributed from the estate to heirs or beneficiaries. In these

jurisdictions, a legal representative (e.g., the personal representative) is appointed by a court to undertake such steps. First, the personal representative collects the decedent's assets and addresses ownership issues. Second, claims against the estate are identified. Third, those claims that are presented and validated are paid from the assets collected within the estate, as are expenses of administration. Valid claims that are secured by estate assets, whether by contract or by law, such as estate tax obligations and mortgages, are also paid. Finally, the remaining estate assets are divided and distributed according to the decedent's will, if the decedent had a valid will; otherwise, the personal representative divides the remaining assets among the decedent's heirs according to the law and distributes any resulting shares. *See, e.g.*, Fla. Stat. § 732.101 et seq. If a tax is levied, it is generally levied as an estate tax to be paid by the estate; a separate inheritance tax isn't typically levied upon the recipients.

In contrast to estate jurisdictions, descent and distribution in other countries happen differently. In "inheritance jurisdictions," a decedent's assets pass to beneficiaries or heirs according to the decedent's will or, if none, according to the country's laws of descent and distribution. Italy is an example of an inheritance jurisdiction. In countries like Italy, there is no separate legal entity or "estate" through which a decedent's assets pass. Unlike estate jurisdictions, inheritance jurisdictions do not provide a process for the identification and payment of creditors' claims. Instead, beneficiaries or heirs take title to the decedent's assets subject to the claims of the decedent's creditors and tax obligations. Inheritance jurisdictions "pass down" obligations that the beneficiaries or heirs are then personally obligated to pay. Although this doesn't preclude an heir from challenging the claims of the decedent's creditors, a separate court procedure would have to be filed to address these claims. To completely avoid personal responsibility for these claims, beneficiaries or heirs must reject their inheritance within a certain period after the decedent's death.

Situs

The nature of an asset having its situs in a foreign country may determine whether that country will claim jurisdiction over that asset and subject the same to its laws of descent, distribution, and taxation. It is important to determine the nature of the assets that the client may own or intend to own in any outside jurisdiction. US real estate located in one state is subject to the laws of that state, regardless of its owner's state of domicile, and the same typically holds true of foreign real estate. That is, real estate is generally subject to the laws of descent, distribution, and taxation of

the jurisdiction in which it is located. But this doesn't mean that the foreign real estate isn't also subject to tax by the country of the owner's citizenship, residence, or domicile.

Multiple Wills When Disposing of Real Estate

The practice of executing multiple wills is a favored international planning strategy involving the client's execution of a different will for each of the countries implicated by the client's international plan. The theory is this: I have real estate in a southern state and Canada; why not have a will in each jurisdiction? The practice evolved as a result of the varying requirements for the proper preparation and execution of wills. In certain jurisdictions, a will-maker's execution of a will must be attested by lawyers or notaries; in other jurisdictions this isn't required. Some jurisdictions allow handwritten, or holographic, wills; others do not. Some jurisdictions employ notarial wills that are transcribed and retained by notaries; others do not. The use of multiple wills, each of which is valid in the jurisdiction in which it is meant to operate, overcomes the problems that otherwise arise when a will made in one jurisdiction doesn't conform to the requirements of the jurisdiction that controls the disposition of a particular asset. In some cases, the nonconformity of a decedent's will adds complication and complexity to the process of distributing the decedent's real estate. In other cases, the nonconforming will may be completely ineffective to dispose of real estate subject to that jurisdiction's law of descent and distribution.

When properly implemented, multiple wills can mitigate risks plaguing the estate planning attorney. The advantage of this approach is that it can substantially facilitate the transfer of real estate following death. When real estate subject to the laws of a particular jurisdiction is to be transferred by way of a will prepared under the laws of that jurisdiction, the transfer will be more efficient and expeditious than the same transfer made by way of a will prepared under the laws of a foreign jurisdiction. This approach also ensures that the client's dispositive desires are carried out just as the client intended.

One issue with multiple wills is the level of complexity and expense that clients may want to avoid. More importantly, the use of multiple wills can have undesirable consequences. For example, in many jurisdictions, the execution of a will has the effect of revoking all prior wills and codicils. If a client signs multiple wills, there is a danger that a will meant to dispose only of real estate in a particular jurisdiction may have the unintended effect of revoking a prior will meant to dispose of real estate in another jurisdiction. Further, in inheritance jurisdictions, beneficiaries under a will

who do not specifically renounce their inheritance may become liable for the obligations of the testator or inheritance taxes.

Despite the aforementioned risks, multiple situs wills are still common. That isn't to say that efforts haven't been undertaken to establish a universally acceptable form of will. In 1973, the International Institute for the Unification of Private Law, an intergovernmental organization aimed at harmonizing international laws (commonly referred to as UNIDROIT) developed the Convention Providing a Uniform Law on the Form of an International Will (the Convention). Jennifer Bost, *Nothing Certain About Death and Taxes (and Inheritance): European Union Regulation of Cross-Border Successions*, 27 Emory Int'l L. Rev. 1145, 1155–56 (2013). Under the Convention, participating countries have agreed to permit or recognize "international wills" that are prepared and executed under certain safe harbor guidelines enumerated in the Convention. *Id.* The Convention established a form of international will that could be used to dispose of property (including real estate) in any of the participating countries. The acceptable form of international will would be witnessed by two witnesses and a third "authorized" witness who is either a lawyer or notary. The authorized witness must ask the will-maker if she wishes to make a declaration concerning the safekeeping of the will. The authorized witness must then complete a certificate of execution that must be attached to the will. Although the Convention doesn't supplant any jurisdiction's own laws and doesn't require that practitioners use the international will form in all events, it gives estate planning attorneys the option of using such a form.

Although the United States isn't a full signatory to the Convention, some states have thus far adopted the Wills Recognition Act (the WRA), which implements terms of the UNIDROIT Convention. *See Prefatory Note*, in *Uniform Wills Recognition Act (1977)*, https://bit.ly/3jMFW6M (Feb. 3, 2015). Twenty states have adopted the WRA. *1977 Wills Recognition Act: Enactment History*, Unif. L. Comm'n, https://bit.ly/3QiSXBj (last visited Sept. 28, 2022). Even if the United States doesn't adopt the Convention, signatories to the Convention will recognize wills executed in the United States that are executed in accordance with the WRA.

Testamentary Freedom versus Forced Heirship

In the United States, there are few inheritance restrictions. For example, the elective share, homestead, family allowance, and exempt property (vehicles, personal property, and qualified tuition plans) are property interests that must be distributed or given to certain individuals (absent a prenuptial agreement in some cases). *See, e.g.*, Fla. Stat. §§ 732.201, 732.401, 732.402,

732.403. Otherwise, beneficiaries can be disinherited. *Hodel v. Irving*, 481 U.S. 704 (1987). In other countries, there is no concept of "disinheritance" or testamentary freedom. Beneficiaries inherit property based on birth order and gender, to the detriment of charities and other worthy causes that could have instead been chosen as the beneficiary. *See* Elaine Lam, *Disinheritance vs. Forced Heirship: Comparative Study Between the Succession Regimes of the U.S. and France*, 32 Prob. & Prop. 1, Jan/Feb 2018, at 40. Accordingly, when working with clients, it is important to retain local counsel where a client owns or can inherit property in a foreign country with forced heirship. Likewise, in working with a client domiciled outside of the United States, it should not be assumed that clients realize they can disinherit certain beneficiaries, and the estate planning attorney must advise clients of their options.

Ownership Structure of Real Estate

Instead of outright ownership, a non-US decedent may use a US corporation (or other entity) or a foreign corporation (or other closely-held entity). Either one of these ownership structures, without more, could result in adverse tax consequences. *See* Robert H. Moore & Michael J. Bruno, *When Intended Estate Planning Results in an Accidental Inversion*, 27 J. Int'l Tax., no. 6, June 2016, https://bit.ly/3vJvwYp. Depending on the ownership, both of these could result in estate administration issues. For example, if real estate is owned by a limited liability company and the decedent was the sole member, the decedent's heirs can't simply sign off on a sale of the underlying property in their capacity as the successor managers, or successors-in-interest. Instead, the decedent's estate plan would control where the decedent's interest in the limited liability company would descend upon the decedent's death and that successor member would have to sign off on the sale of property. If there is direct US property ownership by a foreign corporation or other foreign entity, care will need to be taken that the formalities in the foreign jurisdiction are followed to properly transfer the ownership interest of the decedent before sale. As mentioned above, the use of an entity could be problematic where the entity is used to try and avoid forced heirship; however, such a discussion is outside of the scope of this article.

FIRPTA

The purpose of the Foreign Investment in Real Property Tax Act of 1980 (FIRPTA) is to govern the taxation of dispositions of U.S. real property interests by foreign persons. *Id.* at 5. Tax applies under FIRPTA if there is a sale of US real property by a foreign individual. The reason for its application (under these circumstances) is that because Congress was desirous of collecting this

tax, the buyer of U.S. real property from a foreign person is required, as withholding agent, to withhold 10 percent of the total amount realized by the foreign person. Jennie Cherry & Stephen K. Vetter, *Dispositions of US Real Property Interests by Foreign Persons*, Lexology (Sept. 14, 2006), https://bit.ly/3Gnvo5V. The seller may obtain from the IRS a certificate adjusting the amount that may be withheld from the sale. *Id.* But the thinking here is that Congress wanted the tax collected so it put it on the buyer to be the enforcer. Although most real estate agents understand this requirement, a decedent foreign property owner's heirs may not and may only find out about the requirement following a real estate sale (as opposed to factoring it into the sales price before listing the real estate). This becomes an issue particularly because buyers may be less inclined to purchase a property owned by the estate of a foreign person (and the selling heirs may not understand this point of contention). A full discussion of this issue is outside the scope of this article, but note its existence where a foreign owner is the seller.

Conclusion

This article discussed real estate issues encountered in estate administration. It isn't an all-exhaustive list of issues. For example, the author isn't an international law expert, and experts in that field should be consulted for any of the international issues described above. By identifying some of the issues that can be encountered in the estate administration, estate administration attorneys are able to collaborate with their colleagues to come up with unique solutions for unique issues.

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