Birketts

WELCOME TO THE SUMMER 2019 ISSUE OF

Private Lives

IN THIS ISSUE

Welcome to the summer 2019 edition of Private Lives, our newsletter covering the key legal and tax issues that individuals face.

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As the summer arrives, many of us will be looking forward to a holiday, hopefully somewhere sunny!

Increasingly, our private clients have stronger international connections of some sort rather than just summer holiday plans. In some cases it will be a mainly UK based client owning an overseas holiday home and possibly bank account. In other cases, our clients may be based overseas predominantly.

This summer edition of *Private Lives* principally focuses on some of the international issues that our specialist lawyers deal with frequently. Our advice is on English law and UK taxation, but we have good experience in dealing with these matters which cross jurisdictions. We have a strong network of contacts with lawyers and other professionals across a wide range of jurisdictions, not least through our membership of the International Advisory Group (IAG).

Our specialist international private client team is based across our four offices and headed up by partner, Tim Galloway. We often assist families administering the estate of a person with international links and give advice on wills, powers of attorney and interrelating the UK tax position with taxes abroad. Where a client has assets in multiple jurisdictions, more than one nationality or family originating from outside the UK, then estate planning often needs to be more sophisticated in order to deal with competing systems of law.

In this edition, Katie Hawksley considers the importance of the legal concept of domicile and some of its unexpected consequences, and Katie Payne looks at some pointers on tax and succession law when considering buying a property abroad. On the family side of things, Denise Findlay looks at the question of moving abroad with children following a divorce, while Clare Hedges, our immigration specialist, looks at the increasing trend in applications for British citizenship. We often act for individuals who have assets abroad and require special cross-border facilitation and in this edition Louise Long, our Notary Public, writes in detail about this specialist role.

We hope you enjoy this edition of *Private Lives*. If you have any comments on the articles in this issue, or suggestions for future topics, we would be delighted to hear from you.

Home is where the heart (or domicile?) is

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Why is domicile important?

In an increasingly globalised world, where trade and the flow of goods and services span numerous jurisdictions, there is inevitably a significant increase in the number of internationally mobile individuals. Advanced technology, increased opportunities for work and travel abroad and the expansion of global markets all come into play.

This throws the spotlight on the legal status of people moving between different countries and raises the question of which legal system should apply to them in relation to their personal affairs.

Under English law (particularly in the private client arena) a key concept is 'domicile'. It is relevant not just to tax, but also matrimonial issues and succession.

What is domicile?

There is no statutory definition of 'domicile' but it is generally thought to refer to a person's permanent home, or 'roots'.

It is a concept which has developed from many years of case law and, as with many common law concepts, there can be plenty of 'grey areas' when assessing someone's domicile status.

There are three different types of domicile:

1. Domicile of Origin, which is acquired at birth
2. Domicile of Dependency, which can be acquired under the age of 16 and can displace a domicile of origin and
3. Domicile of Choice, which again can displace a domicile of origin if an individual moves to a new country and intends to settle there permanently and indefinitely.

Even if you are not domiciled in the UK under the common law rules, you can be treated as domiciled here ('deemed domiciled') for tax purposes under the UK tax code.

The crunch point for individuals who have links to the UK and other jurisdictions, is likely to concern their domicile of choice, whether that is the acquisition of a domicile of choice outside the UK (thereby displacing an English domicile of origin) or the possible reinstatement of an English domicile of origin on the return to the UK after a period abroad.

Domicile should also be a watch-point for non-domiciliaries (with a foreign domicile of origin) living in the UK on a temporary basis.

Did you know?

- Many of the cases which still govern the concept of domicile today span back to the 19th century before the invention of the telephone, the light bulb and the radio.
- Domicile is different to residence and nationality, although both of these factors can be relevant to a person's domicile status.
- A domicile of origin can never be lost, although it can be displaced by other types of domicile.
- An individual can be domiciled in a country in which he or she has never actually lived.
- A person can only ever be domiciled in one jurisdiction at any one time.
- Domicile under English law has a different meaning to domicile in other countries. This can lead to some conflict of law issues although it can also offer some planning opportunities, especially where there are double tax treaties in place.
- The English law test for acquiring a domicile of choice is subjective, because it depends on a person's intention (i.e. whether they intend to settle in a jurisdiction on a permanent and indefinite basis) although this necessarily has to be evidenced on a factual basis. Relevant factors include a person's residence status, the location of their assets, their business and employment links, social and family connections and nationality. The list goes on.
- HM Revenue & Customs (HMRC) has expressly confirmed that it is continuing to enquire into domicile notwithstanding the expansion of the deemed domicile rules in 2017. HMRC enquiries can be lengthy and onerous in terms of the information requested, although the requests are not always valid in the circumstances and need to be carefully assessed.

Do I need advice?

We would recommend you seek advice on your domicile position if you have links to the UK and one or more other jurisdictions. Particular areas of importance to international private clients include:

- Tax status – e.g. can a person claim the remittance basis of taxation in relation to foreign income and capital gains, what are the implications for trusts set up by them, will their estates be subject to inheritance tax etc; and
- Estate planning and succession – determining which law will govern how assets pass on death and how this should be documented.

Please get in touch with Katie Hawksley or your usual Birketts contact if you require more information.

Buying a holiday home abroad? Some pointers on tax and succession

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As we approach the holiday season, thoughts turn to trips abroad. For some, this might mean a holiday home bought in a favourite spot, as a base to return to again and again. In some cases, this might also be viewed as a potential retirement home.

So what do you need to think about if you are considering buying a holiday home abroad, or indeed if you already own one? Although it may seem remote, there are a few things that it is useful to think about as part of your estate planning.

How will you own the property?

Forms of and restrictions on ownership of property in different jurisdictions will vary. As a starting point it will be important to understand what sort of property interest you own. If you co-own (for example with a spouse), there will often be different forms of co-ownership available, and you should be sure to take advice on the best option for you and what this means in practice, e.g. can you leave this interest under your will, or will it pass automatically to the surviving co-owner?

It is also useful to understand the local tax regime, i.e. what happens if you sell, let the property, or on death? Are there local wealth or property taxes, and when are these applicable? If you are in doubt, your adviser in the relevant jurisdiction should be able to assist.

Is your will planning up to date?

It is important to reflect on the jurisdictions where your assets are located when preparing a will. It is not well understood that, when you prepare an English will, this will generally cover your worldwide assets, unless you instruct your solicitor that it should be otherwise. This means that, if you already have a will in place, then you potentially already have a testamentary document which covers your overseas property. However, that does not mean that it is necessarily appropriate. Even if your property ownership is such that the property will pass automatically to a co-owner on death, it is still important to consider what happens after that.

Careful drafting is required where you (...) have two concurrent wills, to ensure they dovetail properly.

Historically, our UK-based clients have tended to have an English will for their worldwide assets, but with 'carving out' of the jurisdiction where an overseas property is located. They would then have a second will governing that property. This can still be a good approach, although careful drafting is required where you are to have two concurrent wills, to ensure that they dovetail properly. However, if carefully prepared by advisers in the two jurisdictions who work together, then this can be a good solution.

Another option is just to have one will governing worldwide assets. This is now more straight-forward than previously, due to the introduction of the EU Succession Regulation in 2015 (and it will still be possible to rely on this provision even after Brexit). The Regulation allows an 'election' into your national law (e.g. English law in the case of a British citizen), so that that national law governs succession to your European property. This can be particularly attractive in order to override an overseas system of 'forced heirship', whereby in certain jurisdictions you are obliged to leave a portion of your estate to certain classes of heirs.

The most appropriate approach to take will inevitably depend on personal circumstances, and we can discuss this with you in order to determine the best way forward. However, we would always recommend that will planning is undertaken, as otherwise your overseas property may be subject to the intestacy rules of the relevant jurisdiction.

What about Inheritance Tax?

Assuming that the owner lived in the UK and had the UK as their main home at the end of their life, then a non-UK property will be included in their estate for Inheritance Tax. That is another reason why suitable will planning is important, as the local intestacy rules may not give rise to a position which is Inheritance Tax efficient, e.g. if a portion passes to a child then your estate may lose out on some spouse exemption.

There may be local estate taxes to consider, although it is likely that these will be available to offset against UK Inheritance Tax, so that double charging does not occur.

Letting out the property? Or maybe it's time to sell?

If you intend to let out your holiday home when not using it, then this will generate income in the relevant country. In most instances, that income will be declarable and taxable primarily in the jurisdiction where it arises, i.e. the location of the property. That will be the case even where you have the rental income paid into a UK account, and regardless of the nationality of your guests.

You are therefore likely to need an accountant in the relevant jurisdiction to assist you with taking all necessary steps in relation to this income. Assuming that you are a UK taxpayer, you would then declare to HM Revenue & Customs that you had paid that tax in the overseas jurisdiction, so that account can be taken of it. Your UK accountant should be able to assist with this.

There may also be local tax on capital gains when you dispose of the property, and again it is likely that suitable advice will be needed in both jurisdictions.

Thinking of retiring abroad?

The position is little more complex where a person has decided to live in their overseas property long term, perhaps on retirement.

During their lifetime, this may mean that they become tax resident in that other country, and they may or may not cease to be tax resident in the UK (noting that it is possible to be tax resident in more than one country at a given time). Suitable advice should be taken so that the implications of this are fully understood, ideally before the move is made.

There is also the matter of domicile, explored in more detail in Katie Hawksley's article in this issue. If a person moves abroad, and intends to remain there permanently, then this has the potential to impact domicile, which in turn can change the Inheritance Tax and succession rules applicable to that person's assets. If such a permanent move is made, and there is no intention to return to the UK in any circumstances, for example on the death of a spouse or in the event of ill-health, then it will be important to understand the tax and succession implications of this. Again, advice is likely to be needed in both jurisdictions.

How can we help?

We are frequently asked to assist with estate planning for those with assets and other links abroad, often across multiple jurisdictions. Where planning has not been ideal during a person's lifetime, we are also experienced in resolving cross-border matters for the family, where there are also UK links. We work with a range of advisers across other jurisdictions, and can provide recommendations if necessary; equally, we are happy to work with clients' existing overseas advisers.

Moving a child abroad following a divorce

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In today's global society it is not unusual for families to move between countries or permanently relocate. Parents may be offered work abroad or move closer to extended family.

Following a separation, if one parent wants to move abroad with the children without objection, there is no need to obtain a court order as long as there is a plan in place to maintain contact with the parent staying behind. Luckily, with modern technology affording so many ways of communicating, contact is easier than ever.

However, if one parent wishes to move abroad and the other objects, this could necessitate family court involvement. Whilst the court may not see any reason to oppose the move, it can make orders to enforce certain conditions or to prohibit the move altogether.

What is the legal position?

It is a criminal offence to remove a child from the country without the appropriate consents in place. This means that consent must be obtained from every person with parental responsibility.

"Orders can be made prohibiting the move (...) or allowing it to go ahead with certain conditions attached.

What is parental responsibility?

Parental responsibility is a legal status encompassing all rights, duties and responsibilities in respect of a child. Mothers automatically have parental responsibility, as do fathers if they are named on the birth certificate. This means that if a parent or grandparents plan to take children out of the country even for a short holiday, the necessary consent must still be obtained.

The exception to this rule applies to parents who already have a court order in place confirming contact arrangements, who can take their children out of the country for a maximum of four weeks without consent.

If you are the parent that wants to move

When an international relocation is contemplated the parent wishing to move can apply for a specific issue order under section 8 Children Act 1989.

It is crucial for the parent wishing to move to have a detailed plan in place before making a court application. As the court will want to establish that they are not moving in order to restrict contact with the other parent, if it does not believe the application is genuine, it will be denied.

Full details will need to be provided regarding the child's schooling and living arrangements. The parent must also provide financial details including their employment status, as well as clear steps for maintaining contact with the parent staying behind.

If you are the parent that wants to prevent the move

As above, the parent opposing the move can apply to court for a prohibited steps order under the section 8 Children Act 1989.

If the parent opposing the relocation has alternative plans to put forward, they will need to produce evidence showing that the relocation is not in the child's best interests and is likely to have a negative effect upon them.

How does the court decide?

The welfare of the child is the court's paramount concern and it uses a list of legal factors, known as the welfare checklist, to help consider the full impact of any decision upon the child.

First steps for either parent

Before either parent can apply to the court to authorise or prevent a move, they must have an initial meeting with a family mediator known as a Mediation Information and Assessment Meeting (MIAM) to which the other parent will also be invited. If the mediator deems the case suitable, both parents will attend on-going joint mediation sessions. If mediation proves unsuccessful, either parent can apply to the court.

If the parents are not married, does this impact their freedom to move abroad?

An unmarried parent has just as much right to apply to court to move a child or oppose a move. The same applies to same-sex parents.

However, it is worth noting that if a parent doesn't have parental responsibility the other parent would not be committing a criminal offence if they tried to proceed with a move without consent. Legal advice should be obtained to work out how best to resolve this.

What about grandparents' rights?

Sadly, grandparents are increasingly finding themselves with limited contact with their grandchildren following a divorce.

Ideally, grandparents should speak with the parents to try to establish consistent contact, perhaps by agreeing regular Skype or Facetime calls. Arrangements could also be made for grandchildren who have moved abroad to visit their grandparents during a school holiday trip to visit the other parent.

Except in rare circumstances, grandparents do not have an automatic entitlement to contact with their grandchildren and therefore must obtain permission from the court before applying.

If permission is granted, grandparents can make a court application for a contact order. In this event, it is worth taking specialist family law advice so that the merits of applying can be carefully considered.

Becoming British

There was a 12% increase in applications for British citizenship last year. In our experience this trend is continuing in 2019. So why apply for British citizenship and how easy is it to obtain?

Why?

For some people their goal has always been to get a British passport. A precious commodity, it not only allows the holder to live in the UK, but also opens the door to visa free travel to numerous countries. Others who have been happy holding settled status or 'indefinite leave to remain' (ILR) in the UK, are now suddenly nervous that the rug may be pulled from under their feet. ILR may be lost if you leave the UK for over two years, or commit a serious criminal offence. British nationality is much harder to revoke. In many cases nationality is a question of identity. You only have the right to vote in general elections or a referendum if you hold British or Irish nationality or are a qualifying Commonwealth citizen.

How?

Since 1 January 1983, being born in the UK is not enough to make you British. You must show that one of your parents was settled in the UK at the time of your birth. Children born in the UK to migrants who later achieve settled status may apply for registration as British nationals at a cost of £1,012. Many parents are willing to accept settled status for themselves, but see getting a British passport for their child as a priority.

Adults who wish to naturalise as British citizens have to fulfil a range of requirements. Applicants must be of good character, demonstrate a certain level of English and pass the 'Life in the UK' test – an exam which one in three candidates fail. They must also meet a residence requirement.

This means you must have lived legally in the UK for at least five years and have held ILR for at least a year. In practice most applicants will have lived here for at least six years but slightly different rules (with a reduced period) apply if you are married to a British national. Evidence of residency must be provided and you must demonstrate your intention to continue living in the UK. You must also provide a detailed list of absences from the UK – a challenging request for many which often involves checking diaries and email accounts for records of flights, ferries and Eurostar journeys. You cannot have spent more than 450 days outside the UK during the last five years, or more than 90 days in the last 12 months. Thankfully only days spent wholly outside the UK are counted, so the day you leave and the day you return from each trip are excluded. You must have been in the UK exactly five years before the day when you submit your application, so accurate information regarding absences is crucial.

Once the application is submitted and the £1,330 fee paid, you are required to enrol your biometrics. Following the UK Government's decision to outsource this service to a private company, Sopra Steria, this usually means further cost. Even a successful application does not make you British. You must attend a citizenship ceremony and make an oath of allegiance and a pledge to respect the rights, freedoms and laws of the UK, before being awarded your certificate of British citizenship. This will finally allow you to apply for a British passport.

If you have any queries regarding UK visas, settlement or British nationality, then please contact a member of our specialist Immigration Team.

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What is a Notary Public?

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A Notary Public is an officer of the law who holds an internationally recognised public office.

The main duty of a Notary is to prepare, attest, authenticate and certify deeds and other documents intended for use anywhere in the world. These documents can be both for individuals or companies.

In England and Wales, Notaries are most often concerned with the verification of documents and information that is intended to be used in other countries for clients who have business or property overseas or who are involved in litigation in foreign courts.

What does a Notary do?

Documents handled by a Notary are known as 'notarial acts' and Notaries must verify for each client their identity, legal capacity and understanding of the document as well as their authority if signing on behalf of another party, such as a limited company.

Notarial acts include:

- preparing and witnessing powers of attorney for use outside the UK, and
- authenticating company and business documents and transactions.

Are Notaries also solicitors?

In many cases Notaries are also solicitors, but this is not always the case. Notaries in fact form an independent branch of the legal profession.

Individuals who also practice as Notaries must keep the practice of any other professional or business separate from their function as a Notary, meaning that solicitors who act as Notaries do not usually give advice concerning the meaning or effect of a document. This advice should be given by an independent solicitor in the relevant jurisdiction.

Louise Long is a qualified and practising Notary Public based in our Ipswich office and regularly assists clients dealing with overseas interests, such as properties abroad.

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