

Wills, Trusts & Estates

Cross-border estate administration: The two-country connection

By **Susannah Roth and Margaret O'Sullivan**



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(September 11, 2018, 9:20 AM EDT) -- When a deceased person has cross-border connections to the United States (U.S.) and Ontario or any province or territory in Canada, many issues can arise which can complicate the administration of their estate. In this series of articles, we discuss common issues that can arise when estates have connections on both sides of the border.

We use the term "estate trustee," the term used for the legal representative of an estate under the Ontario *Rules of Civil Procedure*. The term executor (where the deceased died with a will) or administrator (where the deceased died without a will) are the traditional terms used for this role.

An Ontario estate with U.S. connections can face complications due to the presence of any of the following: the deceased was a U.S. Person (defined below); one or more beneficiaries are U.S. Persons; or the deceased owned U.S. situs assets. Our last article discussed the complexities that can arise for an Ontario estate with beneficiaries who are U.S. Persons. We discuss below the complexities that can arise for an Ontario estate of a person who owned U.S. situs assets at his or her death.

A U.S. Person for the purposes of this series of articles is a U.S. citizen, including a dual citizen of the U.S. and another country, or a person who is domiciled in the U.S. Domicile is considered to be the place where a person has a settled intention to make his or her permanent home.

Where a deceased person owned assets in the U.S., complications can arise due to tax considerations, practical difficulties in administering assets in another jurisdiction and obtaining probate in the U.S. state in question, if necessary.

U.S. estate tax considerations

For a non-U.S. Person, U.S. estate tax may be payable if he or she owns U.S. situs property on death. For Canadian residents, an exemption for U.S. estate tax is calculated either based on the value of his or her U.S. situs property as a proportion of his or her worldwide assets pursuant to the Canada-U.S. Income Tax Treaty multiplied by the exemption amount (US\$11.2 million in 2018) or there is a general exemption amount for assets valued at US\$60,000 or less.

There are also rules under the treaty to avoid double taxation of the same assets on death in both countries, although they are not always effective to eliminate double tax in all cases, which credit U.S. estate tax paid against Canadian capital gains tax, and vice versa.

U.S. situs property for federal estate tax purposes includes:

- Shares of U.S. publicly traded corporations and units of U.S. mutual funds and money market funds, even if held in Canadian registered plans or in certain other vehicles;
- Deposits in a brokerage account in the U.S.;
- U.S. retirement plans and annuities;

- Shares of a U.S. private company;
- Certain debts with a U.S. connection; and,
- U.S. real property and tangible personal property located in the U.S.

U.S. situs property generally does not include certain assets which appear to have a U.S. location or connection, such as:

- Canadian mutual funds invested in U.S. securities;
- Non-U.S.-issued securities listed in U.S. funds;
- U.S. bank deposits; and,
- U.S. Treasury Bills or Certificates of Deposit.

If the value of a non-U.S. Person's U.S. situs property at death is greater than US\$60,000, his or her estate trustee may be required to file a U.S. estate tax return. Furthermore, U.S. estate tax may be payable where the value of his or her worldwide estate for U.S. estate tax purposes exceeds the U.S. estate tax exemption amount (as noted above, US\$11.2 million in 2018).

Ontario estate trustees should not make the mistake of thinking that there will be no cross-border tax consequences if no reporting is made. "How will the tax authorities in the other jurisdiction ever find out?" is a common question. The current global agenda for governments includes aggressive measures to ensure greater transparency and information exchange to stop leakage of tax revenues due to non-reporting across borders. For example, between Canada and the U.S., under the *Foreign Account Tax Compliance Act (FATCA)* and our intergovernmental agreement with the U.S., Canadian tax authorities are now providing information on the Canadian accounts of U.S. Persons to U.S. tax authorities. Failure to accurately report taxable income or gains or file required tax returns can result in personal liability for an estate trustee, including substantial penalties, particularly if deliberate tax evasion is involved.

Further, even if U.S. estate tax is not payable by the estate, in order to transfer certain U.S. situs property after death it may be necessary for the estate trustee to obtain U.S. estate tax clearance (for example, for the sale of Florida real estate). In addition, to obtain tax credits which may partially offset double taxation of Canadian income tax and U.S. estate tax on death allowable under the Canada-U.S. Tax Treaty as described above, the estate trustee may need to file a U.S. estate tax return.

It should be noted that U.S. estate tax returns are typically due nine months from date of death, which may be considerably earlier than when the Canadian terminal tax return is due, although it may be possible to obtain an extension for the filing deadline if applied for before the nine-month period expires.

U.S. state probate requirements

In order to be able to deal with U.S. situs property, the estate trustee may need to obtain a probate certificate from the local court in the state where the property is located. In Ontario, the necessity for a probate certificate will depend upon whether any asset holder (e.g. a financial institution) requires it to allow the estate trustee to access, liquidate and distribute the asset in question. This may be the situation in the state in which the U.S. situs property is located, or the state in question may require probate for all estates over a certain value where the deceased held property located in the state.

In either case, the estate trustee will need to complete the local probate requirements to be able to administer the assets of the deceased in that jurisdiction.

Unfortunately, the local probate rules can create complications for an Ontario-resident estate trustee. Some U.S. states allow a non-resident estate trustee to obtain a probate certificate and some do not, and some allow it only if there are multiple estate trustees and at least one of them is resident in the state. For example, in Florida, only estate trustees who are close family members are allowed to act as estate trustees if they are non-residents of Florida. Professionals or trust companies not resident in or licensed in Florida cannot act.

There may be a requirement to file a bond for non-resident estate trustees, which may create problems if the estate trustee does not qualify for a bond in that jurisdiction (for example, they do not own any assets there). If the estate trustee does not qualify under the rules to apply for probate, or cannot obtain a bond, he or she or the beneficiaries may need to appoint a resident to act in the U.S. state in question and administer the U.S. assets, adding to the expense of the estate administration.

U.S. state court supervision of an estate

The process in many U.S. states is time consuming and requires the assistance of local counsel. For example, in many U.S. states, including Florida and Arizona, the court exercises a supervisory function, reviewing the estate trustee's administration of the estate. The estate trustee may require the court's approval for certain actions, and a "closing" of the estate process, which may involve the filing of an accounting to be reviewed by a local judge. General court supervision of the estate administration does not exist in Ontario, where typically the court will only be involved in an estate matter after a probate certificate is issued if a dispute arises.

Also, local rules may provide certain rights in or to the assets located in that jurisdiction to a spouse or dependent which differ from Ontario law, complicating the estate administration regarding the U.S. situs property.

This is the third of a five-part series. Read part one here and part two here. The next article will discuss complications arising for U.S. estates with an Ontario connection.

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