

## Wills, Trusts & Estates

# Cross-border estate administration: It's complicated

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



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(August 15, 2018, 10:54 AM EDT) -- When an individual dies, many issues can arise in the administration of their estate. This is true no matter the nature of their assets, their net worth, or their personal situation. When a deceased person had cross-border connections to the United States and Ontario or any province or territory in Canada, many other issues can arise which can complicate the administration of their estate. In this series of articles, we will 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.

Issues arising in cross-border Canada-U.S. estate administration are most helpfully discussed in two parts: Ontario estates (the deceased died or had the bulk of their assets in Ontario) which have some U.S. connection, and U.S. estates (the deceased died or had the bulk of their assets in a U.S. state) which have some Ontario connection. Note that while we focus on Ontario, many of the issues discussed are equally applicable to other Canadian provinces and territories. The differences in the tax regimes of the two countries, and the probate processes between each jurisdiction, make each situation unique.

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. We discuss below the complexities that can arise for the Ontario estate of a U.S. Person.

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. U.S. Persons are subject to U.S. estate, gift and generation-skipping tax. As a result, it is important to determine whether the deceased was a U.S. Person in order to ensure all U.S. tax compliance is carried out on a timely basis.

In addition to U.S. estate tax levied at the federal level, some states also levy estate or inheritance taxes on death. These states are: Connecticut, Hawaii, Illinois, Iowa, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Nebraska, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington, as well as the District of Columbia.

It is possible to be a U.S. citizen without being aware of this status. For example, in certain cases under applicable U.S. rules a person may be a U.S. citizen if he or she was born in Canada to a U.S. citizen parent, even if he or she never resided in the U.S. There are also other types of "accidental" U.S. citizens, including children born in the U.S. while their parents were visiting on vacation. A person may also be a U.S. Person if he or she moved to the U.S. to work and has a domicile there because he or she intends to permanently reside in the U.S., and may also have acquired a green card.

U.S. tax residents are subject to the U.S. income tax regime and must file an annual tax return. U.S. citizens must do so regardless of their country of residence. A discussion of U.S. gift and transfer

taxes can be found in our advisory "Will and Estate Planning Consideration for Canadians with U.S. Connections".

U.S. estate tax is calculated at graduated rates based on the gross value of certain assets owned by an individual at death. Currently, the maximum rate of U.S. estate tax is 40 per cent. For a U.S. Person, the tax is based on the value of his or her worldwide estate, subject to applicable exclusions, credits and deductions. U.S. estate tax may be payable on the death of an individual where the value of his or her worldwide estate exceeds the U.S. estate tax exclusion amount (currently US\$11.2 million in 2018, indexed for inflation, as a result of tax changes enacted in 2017, although it is important to remember that gifts during lifetime may reduce the available exemption on death, depending on the amount and to whom the gift is made).

Under U.S. tax rules, a person's worldwide estate for U.S. estate tax purposes includes certain assets that may not be considered part of his or her estate under Ontario law, such as proceeds of life insurance policies owned by a deceased person on his or her own life even if there is a named beneficiary other than his or her estate, the total value of property held in joint tenancy with right of survivorship upon the death of the first joint tenant (subject to certain exceptions and deductions), and property held in certain types of trusts.

Our next article will discuss the complications which can arise for an Ontario estate with one or more beneficiaries who are U.S. Persons.

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