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Wills, Trusts & Estates

More property in foreign jurisdictions complicates estate planning

By **Susannah Roth**

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(February 12, 2018, 9:03 AM EST) -- In an increasingly global and mobile society, where people move between jurisdictions with relative ease, the number of people who acquire property in foreign jurisdictions, inherit foreign property from a relative, or own a foreign property and then move to Canada, is multiplying. While these developments may speak to the increasing prosperity and cosmopolitan nature of Canadian society, foreign property can create problems for families if proper planning is not put in place prior to the owner's death.

One problem can be the foreign probate process itself. Probate is necessary in Ontario where the holder of a particular asset or assets (such as a financial institution for a bank account) or the public registry which is in charge of title to the asset (such as the land titles system in Ontario for most real property) requires a court certificate in order to allow the executor to deal with the asset. Where the deceased owned property in multiple jurisdictions, often an executor will not only need a probate certificate (a certificate of appointment of estate trustee in Ontario) in the deceased's home jurisdiction, but also any other jurisdiction where the deceased held property.

This multiplication of probate certificates can multiply the time and expense normal to an Ontario probate application, because in many jurisdictions the probate process is either cumbersome or lengthy, or both. For example, in some U.S. states, such as Florida, the court retains a supervisory role over an estate when a will is submitted for probate there. This means that, unlike in Ontario, where the court will only become further involved in the estate after a probate certificate is granted in certain specific and limited circumstances, a judge often oversees the executor's ongoing administration of the estate and must approve the administration at its end. Even where this is not necessary, in many jurisdictions, such as several Caribbean countries, the probate process can routinely take up to two years.

Another problem can be incompatible legal processes. If assets are held in civil law jurisdictions, which includes most of Europe, the probate rules may not easily work with those in Ontario, creating more expense and complications. Most Commonwealth jurisdictions and states in the United States are common law jurisdictions based on English common law.

Many other jurisdictions, including most European countries, and notably Quebec, are civil law jurisdictions, originally based on Roman law. Due to the major differences between the two systems' origins, their processes can be extremely different. This lack of harmonization between the two systems' processes has been rationalized to some extent in Canada between Quebec and other provinces by procedural rules designed to deal with such issues. For example, the Ontario *Estates Act* allows a notarial copy of a Quebec notarial will to be admitted to probate, instead of the usual requirement to submit the deceased's original will, which avoids additional, otherwise unnecessary, legal steps in Quebec.

However, other civil law jurisdictions can present challenges. For example, in Austria, if an Austrian resident dies without having named an executor to administer their estate, the magistrate (or local judge) of the deceased's local canton (the Austrian equivalent of a county) acts as the administrator

of the estate.

This system functions well where the deceased's assets are all in Austria (and indeed might be considered in other jurisdictions), but can prove problematic if the deceased owned assets in a common law jurisdiction such as Ontario. Local magistrates will not exercise jurisdiction over, or take any steps to administer, the Ontario assets, but the Ontario *Rules of Civil Procedure* require that the original administrator of the estate execute court documents to allow an administrator to be appointed to administer the Ontario assets, potentially creating an impasse.

Fortunately, there are a variety of methods for planning to avoid the worst of, if not all of, these problems. Setting up trusts, including a revocable trust, to hold assets by trustees instead of directly, executing separate wills for each jurisdiction, joint ownership of assets and other planning methods can, if appropriate in the circumstances and properly implemented, assist in making the administration of extra-jurisdictional assets much easier.

Because of the potential pitfalls, such as income or transfer tax implications, proper and complete advice is necessary. However, where advance planning has not been undertaken, patience and the assistance of experienced professionals can help families to navigate the legal quagmire that can arise in our increasingly mobile society.

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