

Wills, Trusts & Estates

Forgotten assets can give executors tax, legal problems

By **Susannah Roth**

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(May 27, 2021, 2:12 PM EDT) -- Whether you're downsizing, moving closer to be with family, or moving internationally to spend your "golden years" in Spain, Greece or Austria, one thing is always true: moving is a pain. So much work, so many logistical details, so many legal documents, so many boxes.

In all the hullabaloo, that \$37,000 investment account or that nine-acre property in northern Ontario that you haven't thought about in decades can get left behind. As impossible as it seems, Canadian estate lawyers who serve cross-border Canada-U.S. and international clients see this scenario more often that you would think. It happens.

Assets get forgotten, or people simply don't prioritize closing that investment account when they have so much else to deal with.

What happens next? The executors end up dealing with the fallout: possible capital gains tax and possible applications for probate grants.

And that's not all.

Where an executor resides outside of Canada, the increase in financial institution compliance designed to prevent income tax evasion and money laundering also makes it more and more difficult for a non-resident to open an estate bank account or provide investment instructions for financial assets in Canada. Canadian financial institutions have implemented extensive and often onerous procedures and requirements. These can be burdensome to meet and can increase the time and costs of estate administration, and they are applied even where an Ontario probate certificate has been obtained.

Canadian estate assets that are income-producing or grow in value will create income tax consequences. Canada levies income tax on income arising in Canada (subject to certain exceptions) and capital gains tax on taxable Canadian property (as defined in the *Income Tax Act* (Canada), including real estate) when taxable Canadian property is actually or deemed to be disposed of, such as on death, subject to certain exceptions.

The estate trustee (executor or administrator) will be responsible for filing a terminal tax return for the income tax year up to the deceased's date of death, as well as any additional tax returns necessary if the estate has income or capital gains after the deceased's date of death. Penalties and interest on unpaid tax may also be payable if tax filings and payments are not completed in a timely manner.

Other legal hurdles await when the non-resident executor or family members wish to access or liquidate Ontario assets. At common law, a foreign estate trustee has no authority over the assets of the deceased in Ontario by virtue of a foreign court appointment or the authority given to them under the law of another jurisdiction. This means that in most cases they must obtain a probate grant in Ontario to confirm their authority.

While there have been certain amendments made to legislation on this principle, they usually allow, but do not require, recognition of a foreign grant. It is therefore the choice of the asset holder, such

as a financial institution, to decide if it will accept a foreign grant as proof of authority in such cases or require a local grant.

If the property is real estate, an Ontario grant will be required unless an exception applies. If the property is a bank or investment account, in most situations involving a non-resident estate trustee, financial institutions will require an Ontario grant.

Once it is determined an Ontario grant is necessary, whether the non-resident estate trustee resides in a Commonwealth jurisdiction or not and whether the deceased had a will or not dictates which type of court grant will be necessary in Ontario and whether the estate trustee will be entitled to apply for a court grant at all (for more information, see our *Multijurisdictional Estate Administration Highlights* advisory).

A non-resident estate trustee of an estate where the deceased died without a will in a non-Commonwealth jurisdiction may not be entitled to apply at all. A non-resident estate trustee of an estate without a will who has not received a foreign court grant is ineligible in Ontario at first instance due to the court rules, although an Ontario court may allow his or her appointment in certain circumstances.

Regardless of whether the deceased died with or without a will, an estate trustee who lives in a non-Commonwealth jurisdiction may be required to post a bond. The requirement for a bond can be dispensed with by the Ontario court in some circumstances, and the court may also reduce the amount of a bond. Where a bond is required, a non-resident estate trustee may find it difficult to obtain one given that they are unlikely to have assets in Ontario which can be used as security for the bond.

When cross-border estate matters arise, family and beneficiaries will need expert advice to assist them to successfully navigate the inevitable complications. While it's best to plan ahead to avoid problems, that isn't always possible, but experienced professionals can help guide matters to a successful conclusion.

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