



# Navigating the Cross-Border Highway: A Roadmap for Canada-U.S. Estate Planning and Administration

Thursday, March 23, 2023  
11:00 a.m. EST / 3:00 p.m. UTC



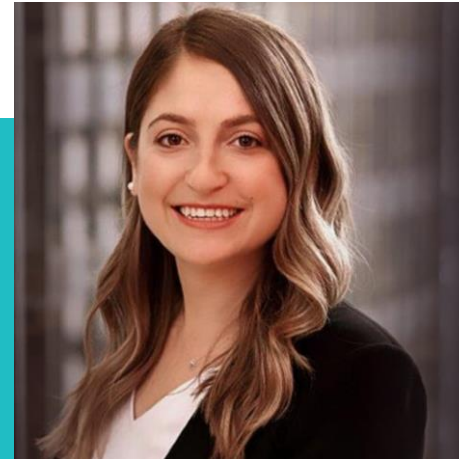
# Presenters



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# A Proud Milestone

25  
YEARS

O'SULLIVAN  
— ∞ —  
ESTATE LAWYERS

# Agenda

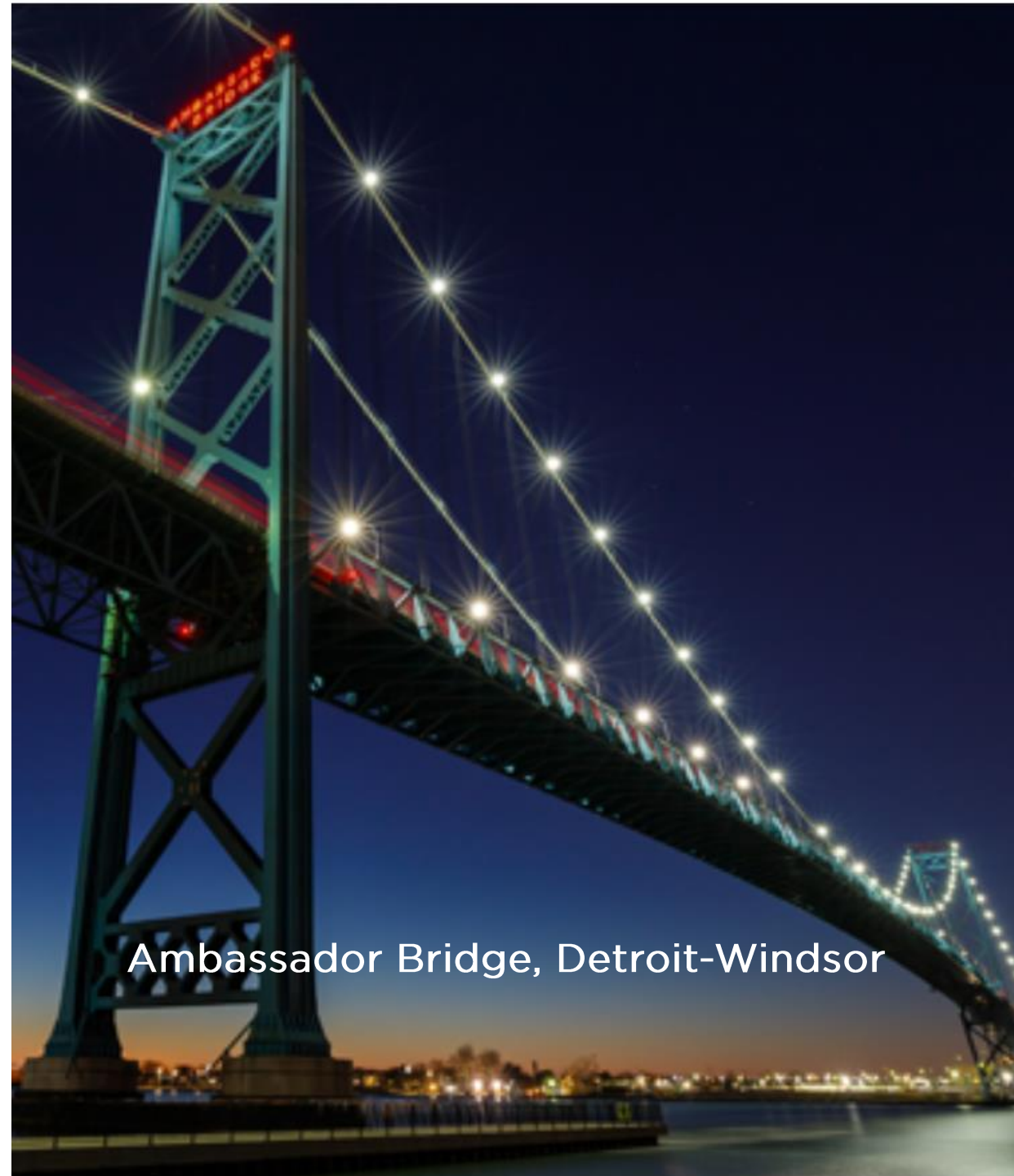
1. Canadian and U.S. Taxation on Death: Two Different Tax Regimes and Treaty Provisions
2. Will Planning: Canadians with U.S. Connections
3. Will Planning: Americans with Canadian Connections
4. Appointing Executors and Trustees
5. Cross-Border Power of Attorney Issues
6. Special Issues: Revocable Trusts
7. Canadian Estates with a U.S. Connection
8. U.S. Estates with a Canadian Connection



# **1. Canadian and U.S. Taxation on Death: Two Different Tax Regimes and Treaty Provisions**

# Canadian Taxation on Death:

- Capital gains tax on death since January 1, 1972
- No estate tax or inheritance tax
- 50% inclusion rate



Ambassador Bridge, Detroit-Windsor

Border Crossing, Blaine Washington



# For Canadian Tax Residents:

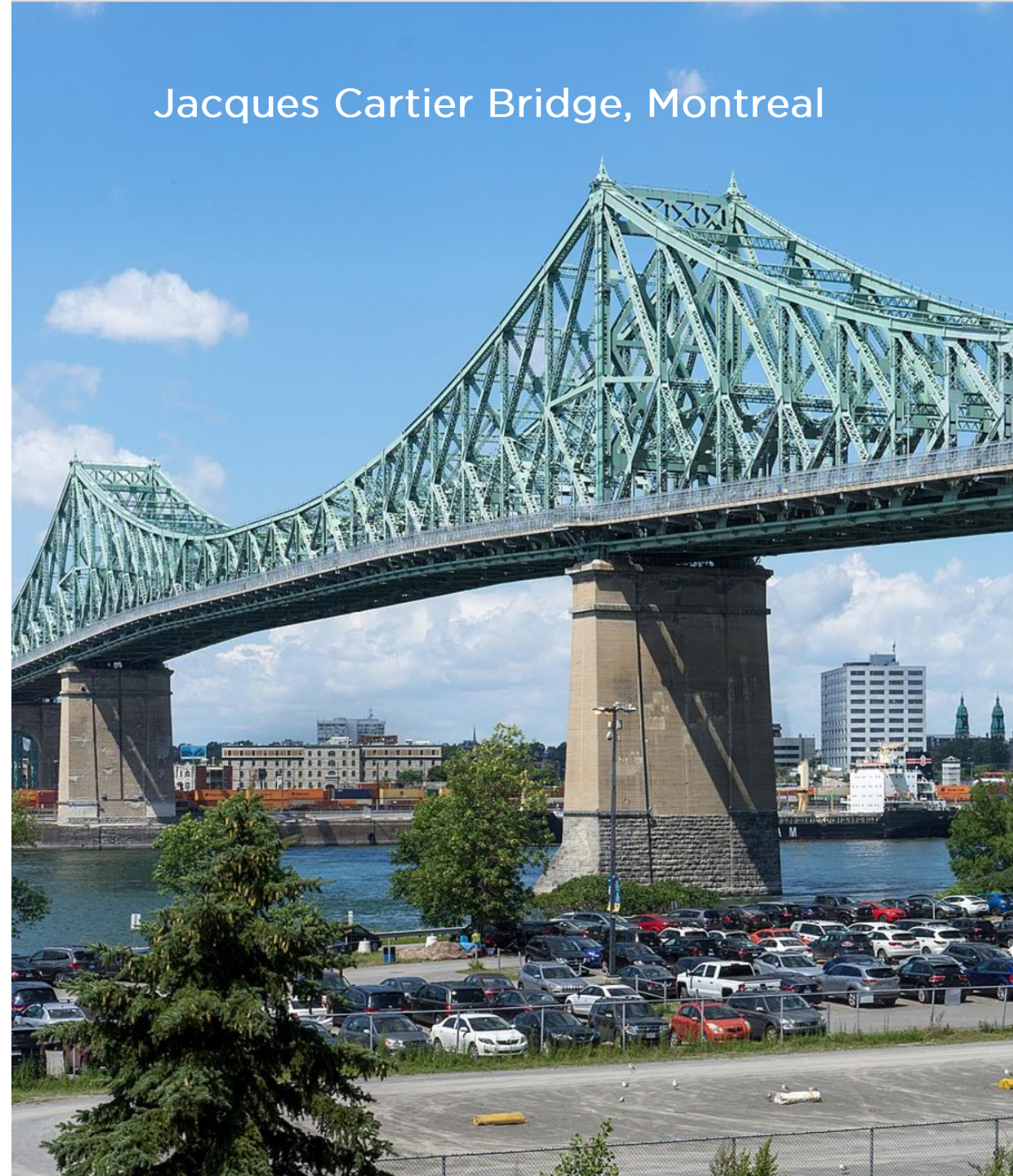
- Deemed disposition on death on worldwide assets
- Spousal rollover
- Principal residence exemption



# For Non-Tax Residents:

- “Taxable Canadian Property” is deemed disposed of on death and subject to capital gains tax

Jacques Cartier Bridge, Montreal



# Taxable Canadian Property Includes:

- Canadian real property and certain corporations where more than 50% of the value of the shares is derived from Canadian real property
- Interest in a Canadian trust where more than 50% of its FMV derived from Canadian real property
- Canada/U.S. tax treaty: allows a rollover to a spouse or spouse trust for U.S. tax residents





Eads Bridge, St. Louis, MO

# U.S. Taxation on Death:

- Estate tax on worldwide assets for U.S. citizens and permanent residents
- Estate tax on U.S. situs assets for non-resident non-citizens of U.S.
- Several states have their own estate tax



# Exemptions for U.S. Citizens and Permanent Residents:

- Current lifetime exemption for 2023 is \$12.92 M (USD)
- On January 1, 2026, reduces to \$5 M (USD) indexed for inflation from 2011 unless legislative change
- Marital credit for assets to a U.S. citizen surviving spouse
- Portability



# Non-U.S. Residents and Citizens:

- Estate tax applies to U.S. situs property including U.S. real estate, U.S. securities and U.S. tangible personal property
- Exemption under the Internal Revenue Code: \$60,000 (USD)

# Canada-U.S. Tax Treaty:

- Can provide much larger exemption against U.S. estate tax
- Small estate exemption: no tax exposure if total worldwide estate is under \$12.92 M (USD) for 2023
- Canadian residents allowed exemption equal to U.S. situs assets pro-rated to worldwide assets multiplied by the current exemption

# Canada-U.S. Tax Treaty (cont'd):

- Spousal credit for transfers by a U.S. person to Canadian resident spouse or to a trust which qualifies for the marital deduction which approximately doubles the exemption
- Spousal roll-over to defer Canadian capital gains tax on death if Taxable Canadian Property is transferred by a U.S. person to a spouse, or to a spouse trust (with Competent Authority approval)

## **2. Will Planning: Canadians with U.S. Connections**





Boca Raton

## **Scenario 1:** **Where One Spouse** **is a U.S. Person**

- “Bypass Trusts” to benefit a U.S. person spouse under non-U.S. person’s Will
- Planning for utilization of Spousal Credit under the Canada-U.S. Tax Treaty under U.S. person’s Will to benefit non-U.S. spouse



# **“Bypass Trust” to Benefit a U.S. Person Spouse Under Non-U.S. Person’s Will:**

Non-U.S. person  
spouse’s Will  
(Canadian province  
or territory)



“Bypass Trust”  
for surviving U.S.  
person spouse  
for U.S. estate  
tax minimization

# Planning for Utilization of Spousal Credit Under the Canada-U.S. Tax Treaty:

U.S. person's  
spouse's Will  
(Canadian Province  
or Territory)



Outright to  
spouse/  
qualified  
Spouse Trust

# Scenario 1: Where One Spouse is a U.S. Person (cont'd)

- Qualified Domestic Trust under U.S. person spouse's Will
- Credit Shelter Trust under U.S. person's Will
- Life insurance
- Holding assets between spouses

Long Wharf, Boston

## Scenario 2:

# Where Intended Beneficiaries Including Children, Grandchildren are U.S. Persons

Parent's Will  
(Canadian Province  
or Territory)



“Bypass Trust” for  
U.S. person’s  
children,  
grandchildren and  
other beneficiaries  
for U.S. Estate Tax  
minimization



# Scenario 3:

## Where Both Spouses are U.S. Persons

- Unlimited marital deduction
- Credit shelter trust
- Portability of exclusion amount
- Life insurance
- Charitable donation planning



Seattle

### **3. Will Planning: Americans with Canadian Connections**



# Will Planning: Americans with Canadian Connections

- Consider separate situs Will in a Canadian province to minimize probate fees, including on worldwide personal property if an original grant of probate (1.5% in Ontario – a hidden wealth tax)

# Will Planning: Americans with Canadian Connections (cont'd)

- Take advantage of spouse credit under the Treaty to double exemption on transfer from a U.S. person to a Canadian spouse or spouse trust which qualifies for the marital deduction

# Will Planning: Americans with Canadian Connections (cont'd)

- Structure Will to obtain spousal roll-over on transfer of Canadian Taxable Property to defer Canadian capital gains tax by transfer to spouse or spouse trust or consider holding property joint with right of survivorship for real estate

# **Will Planning: Americans with Canadian Connections (cont'd)**

- Consider use of a QDOT to defer U.S. estate tax on transfers to Canadian spouse

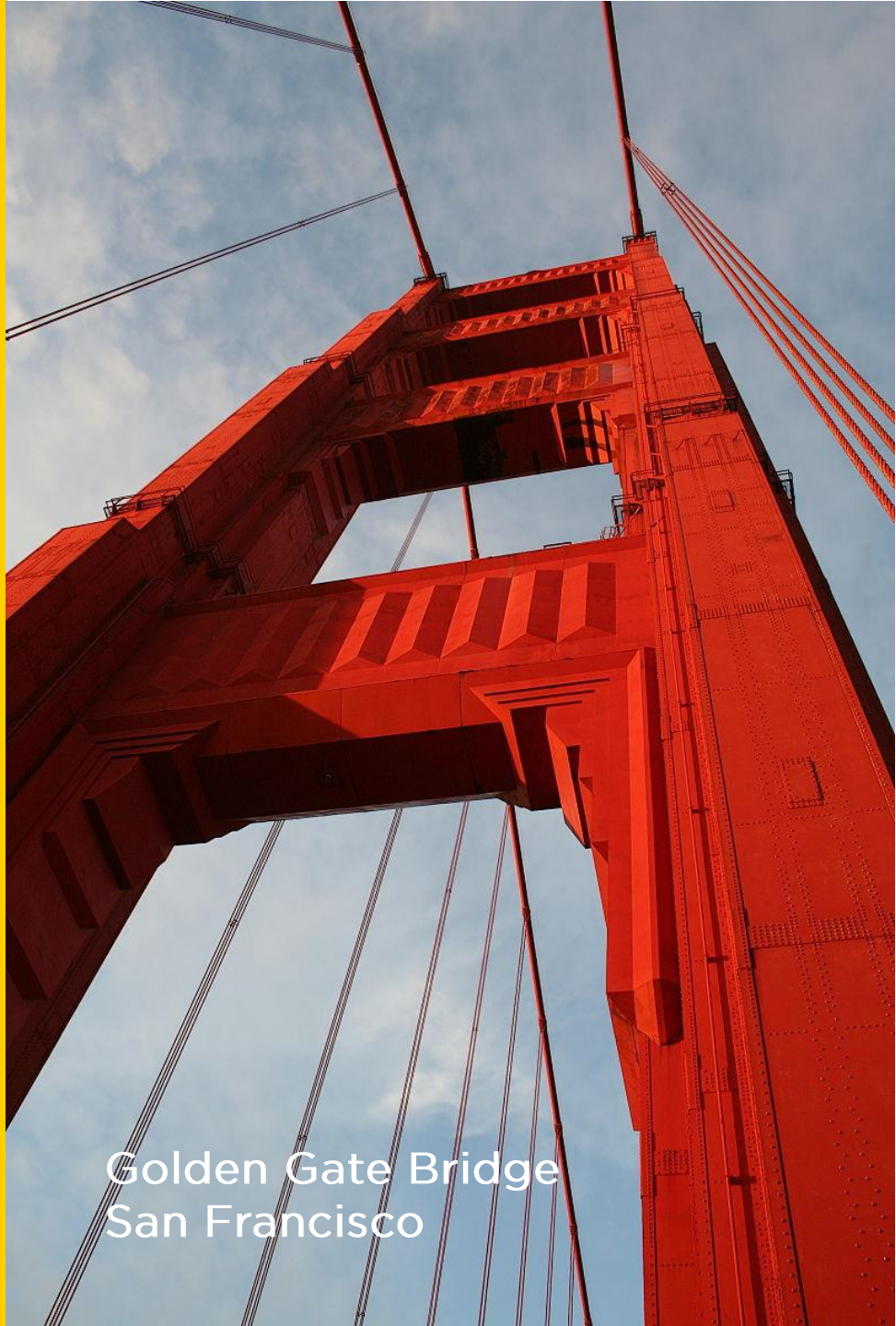
# **4. Appointing Executors and Trustees**

# Tax and Legal Issues:

- Residence of the estate or trusts under the Will
- Bonding requirements
- Planning to manage having a U.S. executor(s) or trustee(s)







Golden Gate Bridge  
San Francisco

## Other Issues:

- U.S. securities regulation and problems if investment advisor not registered to advise a U.S. resident who is an executor or trustee
- FBAR requirements

# **5.**

## **Cross-Border Power of Attorney Issues**

# Cross-Border Power of Attorney Issues:

- U.S. attorneys for property
  - Securities regulation issues
- FBAR requirements
- Planning to manage having a U.S. attorney for property







Miami

# **The Advantages of Having Separate Situs Powers of Attorney for Property and for Personal Care:**

- Expediency
- Recognition



# Drafting Issues for Separate Situs Powers of Attorney:

- Revocation
- Multiple attorneys
- Compensation
- Execution
- Advance healthcare directives



Charleston, South Carolina

# POLL QUESTION 1



## **6. Special Issues: Revocable Trusts**

# Special Issues: Revocable Trusts

- Legal issues: possible invalidity of pour-over from a Canadian jurisdiction Will to an amendable or revocable trust
- U.S. person: transfer of Canadian Taxable Property is a deemed disposition triggering capital gains tax and also for a Canadian tax resident who transfers U.S. real estate to a revocable trust



# Special Issues: Revocable Trusts (cont'd)

- 21-year rule applies if the revocable trust becomes Canadian resident
- Reporting requirements if Canadian resident
- Mis-match on death: additional tax exposure if a U.S. person and U.S. estate paid tax on assets in the trust – can't be credited against Canadian capital gains tax of deceased if trust is a Canadian resident

# CASE STUDY 1

## Facts

- Bruno and Stella live in Toronto and have three children
- Caleb lives in California; Donny and Emilia live in Toronto
- Their net worth is approximately CDN \$25M
- They recently sold a vacation property in Florida, but continue to travel there every winter to escape the Canadian cold
- They are in the process of updating their wills

# CASE STUDY 1

## Analysis: The Executors

- Their preference is to name all three of their children as their executors, or will they have to leave Caleb out?
- Consider appointing all three children:
  - Tax residency of estate
  - FBAR requirements
  - Bond waiver
  - Include power to appoint additional trustees
  - Renouncing is always an option

# CASE STUDY 1

## Analysis: U.S. Estate Tax

- Special planning to minimize Caleb's U.S. estate tax exposure – consider by-pass trust
- Current exemption = USD \$12.92M USD



# CASE STUDY 1

## Analysis: Florida POA

- Durable General Power of Attorney – consider assets in Florida
- Advance Directive for Health Care – consider whether Bruno and Stella spend a considerable amount of time in Florida

# **7. Canadian Estates with a U.S. Connection**

# Canadian Estate with U.S. Resident Beneficiaries:

- Estate distributions to U.S. beneficiaries
- Need for a Clearance Certificate for disposition of Taxable Canadian Property

# Canadian Estate with U.S. Resident Beneficiaries (cont'd):

- Withholding Tax and rates
- In kind distributions and negative repercussions
- Testamentary trusts and need for planning, including for a trust with U.S. trustees under a Canadian Will to avoid it being deemed Canadian resident



# Canadian Estate with U.S. Situs Assets:

- U.S. Estate Tax considerations
- Exemptions
- Credits: U.S. estate tax paid against Canadian capital gains tax, and vice versa
- U.S. situs property vs. non-U.S. situs property
- Reporting issues and FACTA



# U.S. State Probate Requirements:

- Possible need for probate
- Residency requirements
- Bonding
- Court supervision

# POLL QUESTION 2



## **8. U.S. Estates with a Canadian Connection**

# U.S. Estate with a Canadian Resident Beneficiary:

- Outright distribution versus continuing trust
- Capital treatment from an estate
- Problematic where distribution from a U.S. revocable trust and possible income treatment which can be avoided with proper planning



# **U.S. Estate of a Deceased Canadian Citizen who is also a U.S. Resident or Citizen:**

- No tax implications for Canadian citizenship
- Determine whether any Taxable Canadian Property or earned income and resulting Canadian tax consequences and tax reporting

# Canadian Probate Requirements:

- Need for probate
- Residency issues
- Bonding

# Canadian Probate Requirements (cont'd):

- Intestacy issues and need to appoint a local representative
- U.S. trust company executor appointments and eligibility to act

# Canadian Probate Requirements (cont'd):

- Original application for probate versus ancillary probate
- Possible double payment of fees
- Time and expense and procedural “headaches”

A photograph of a modern office interior. In the foreground, there is a light-colored wooden conference table with several beige leather office chairs with chrome frames. The chairs are arranged around the table. In the background, there is a large abstract painting with warm orange and red tones. A glass partition is visible on the right side of the image.

# Canadian Income Tax Issues:

- What is subject to tax
- Tax compliance and time frame
- Special issues and problems



# Practical Cross-Border Estate Administration Issues:

- Dealing with financial institutions on the other side of the border
- Opening estate accounts
- Liquidating assets
- Providing investment instructions if a U.S. resident on a Canadian account

# CASE STUDY 2

## “Annie’s Forgotten Asset”

- Annie was a Canadian citizen and had a savings account and an investment account in Ontario
- Annie moved to New York and married Zach
- Annie and Zach combined assets – Annie added Zach to title of her investment account and Zach added Annie to title of his assets, which were all located in New York
- Annie unexpectedly died without a Will a few years later
- Zach later found a bank statement for the Ontario savings account, but the Ontario bank would not release the funds to him without a probate certificate

# CASE STUDY 2

## Case Analysis

- Zach unable to act as U.S. resident
- Intestacy laws may be unfavourable
- Ontario probate fees are high
- Extra costs including fees, time, and emotions

# CASE STUDY 2

## How could this have been avoided?

- Ancillary grant of a New York Will is possible
- Owning asset jointly
- Separate situs Will in Ontario



# Resources:

1. [Will and estate planning considerations for Canadians with U.S. connections](#)
2. [Cross-Border Canada-U.S. estate administration highlights](#)
3. [Multijurisdictional and separate situs powers of attorney for the mobile client](#)





# Our Blog and Advisories:

O'Sullivan Estate Lawyers has a blog (twice per month) in which we cover current domestic, cross-border and multijurisdictional trust and estate issues. We strive to be clear, concise and also provocative. Our goal for each post is to provide a few “pearls of wisdom” – easy to comprehend, relevant, and when strung together, an important and valuable collection.

# POLL QUESTION 3



# Our Book

Available on Amazon.ca

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2nd Edition

## Trust and Estate Essentials

Achieving Success in  
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# Questions

Type your question into the Chat Box on your screen.





25  
YEARS

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# Thank you!

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