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Cross-border Estates

Cross-border estate administration: The U.S.-Ontario mix

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

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(September 24, 2018, 9:30 AM EDT) -- As noted in our previous articles, 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. Our first three articles discussed complications arising for Ontario estates with a U.S. connection. This fourth article will discuss complications arising for U.S. estates with an Ontario connection.

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 the place where a person has a settled intention to make his or her permanent home.

U.S. estate with an Ontario resident beneficiary

Due primarily to the differences between the two tax regimes, in particular taxation on death, there are fewer complications arising for U.S. estates with Ontario connections if there is an outright distribution with no continuing trusts. Typically, an Ontario-resident beneficiary would create no significant complications for a U.S. estate, since the U.S. levies no additional tax on inheritances which are capital distributions payable to non-U.S. persons and Canada treats such inheritances as gifts, which are not taxable in Canada in the hands of a beneficiary when received.

It should be noted that distributions from a U.S. revocable trust are different and special issues can arise given the different rules for taxation of trusts, which are beyond the scope of this article.

U.S. estate of a deceased Canadian citizen

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 estate trustee dealing with the estate of a U.S. resident or citizen who was also a Canadian citizen, would encounter no additional complications due to the deceased's Canadian citizenship, other than it possibly being necessary to inform various federal Canadian and Ontario government authorities, such as Service Canada, Service Ontario and the Canada Revenue Agency, of the individual's death. Canada does not tax based on citizenship or levy an estate tax on its citizens' estates.

Instead, Canada taxes based on actual or deemed tax residence in Canada or on income which is earned in Canada, as well as capital gains tax on certain property located in Canada (referred to as "Taxable Canadian Property") when assets are disposed of or deemed to be disposed of (including on death, subject to exemptions and credits, etc.).

The estate of a non-resident Canadian citizen is typically not required to file Canadian income tax returns unless the deceased owned taxable Canadian property at death or earned income in Canada

in the year of death. Canadian income tax complications arising for U.S. estates are discussed more fully in our fifth article in this series.

Probate requirements for U.S. estates owning Ontario property

In many, if not most, cases, an Ontario asset-holder (such as a financial institution) will require that an Ontario probate certificate be obtained by the U.S.-resident estate trustee in order for him or her to be able to deal with Ontario assets. This will be so regardless of whether he or she has already obtained a probate certificate in the U.S. state where the deceased lived or had the majority of their assets. Also, if the deceased owned land in Ontario, in most cases a probate certificate will be required under the Ontario Land Titles rules in order for the executor to be able to deal with the property, although certain exemptions do exist.

The Ontario rules provide that a non-resident of Ontario who applies for an Ontario probate certificate and who is not resident in another Canadian province of territory or a Commonwealth jurisdiction, which would include a U.S.-resident estate trustee, must post a bond in the amount of twice the value of the Ontario assets before the certificate will be issued by the Ontario court (although if the probate certificate sought is a resealed or ancillary grant, the bond must only be for the value of the Ontario assets which will be under the estate trustee's administration). The bond must be provided by an insurance company licensed in Ontario or by one or more personal sureties of the estate trustee, or both.

This requirement can be waived, or the necessary value of the bond reduced by the court in certain circumstances. It may be difficult or even impossible to obtain a bond if the estate trustee has no substantial assets required for the issuance of the bond and no one who will act as a personal surety.

If the deceased died without a will (intestate), a U.S.-resident estate trustee cannot obtain an Ontario certificate to administer the estate assets in Ontario (either original letters of administration or an ancillary grant) as the Ontario rules restrict who may apply for such a certificate to Ontario residents for original certificates and residents of Canada or Commonwealth jurisdictions for secondary certificates (resealed certificates). A U.S.-resident estate trustee needs to find an Ontario-resident individual or a trust company in Ontario to administer the Ontario estate assets.

U.S. financial institutions and trust companies, if they are not licensed to carry on the business of a trust company in Ontario, may not be able to act as an estate trustee to administer Ontario assets, even though appointed under the deceased's will. However, in at least one Ontario case, the court allowed a U.S. trust company to apply for and receive an Ontario probate certificate where it was necessary to administer Ontario real property owned by the deceased on the basis that the trust company was not attempting to carry on business or hold itself out as an Ontario trust company, but the appointed trustee needed to administer a non-resident's estate where the deceased happened to own land in Ontario.

If no probate certificate has been obtained in a U.S. jurisdiction, an Ontario probate application will be considered the original application. The estate trustee must pay Ontario probate fees (estate administration tax) on the value of all the deceased's worldwide property, other than certain exempt assets such as property held jointly with another person and passing to that person by right of survivorship, assets with beneficiary designations and real property located outside Ontario. At the current rate of approximately 1.5 per cent, this can create a serious and unexpected financial cost for the estate, which may otherwise not require an Ontario probate certificate to be administered, but the total value of which will nonetheless be subject to Ontario probate fees.

Where a probate certificate for a deceased who died with a will is first obtained from a U.S. jurisdiction, the Ontario probate process will be an ancillary process, and Ontario probate fees will only be payable on the value of the deceased's assets located in Ontario. This may still create some double taxation if the U.S. original probate state also levies probate fees on the value of the deceased's property, including some or all of the Ontario assets.

Other complications, causing additional time and expense, may arise if the U.S. jurisdiction's original probate documentation does not co-ordinate well with the Ontario rules. Sometimes even different terminology between the U.S. jurisdiction and Ontario can create confusion.

Further, the U.S. probate process may be complicated by the fact of the necessity to complete the Ontario probate process. For example, in some U.S. states, the necessary U.S. court documentation required by the Ontario probate rules will not be issued after the U.S. probate has been closed. This will mean that the U.S. probate will have to remain open, possibly requiring additional court filings, until it is certain no further documentation is required for the Ontario estate administration.

This is the fourth in a five-part series. Read part one here, part two here, and part three here. Part five will continue to discuss complications arising for U.S. estates with an Ontario connection.

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