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# Estate Research

Private Client Expert Webinar 19th May 2021  
Presented by O'Sullivan Estate Lawyers LLP

Starts at 11am EST





# Complex, High Value Trust and Estate Administration: Perils and Pitfalls

Wednesday, May 19, 2021  
11 a.m. EST / 4 p.m. GMT



# Thank you for joining us today!

- This session is being recorded for replay
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- Please submit questions via the Chat function
- Questions will be addressed in the Q&A session at the end of the presentation



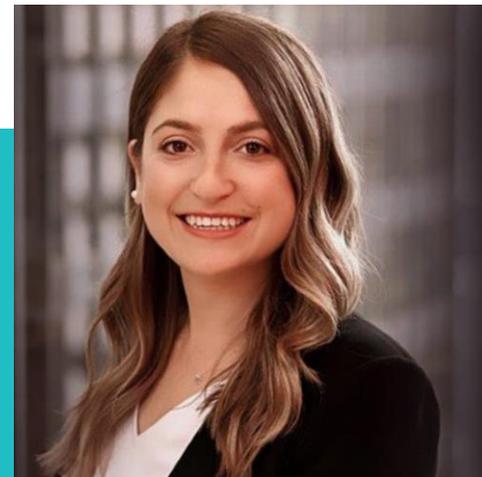
# Presenters



**Susannah Roth**  
Partner



**Stephanie Battista**  
Associate



**Marly Peikes**  
Associate

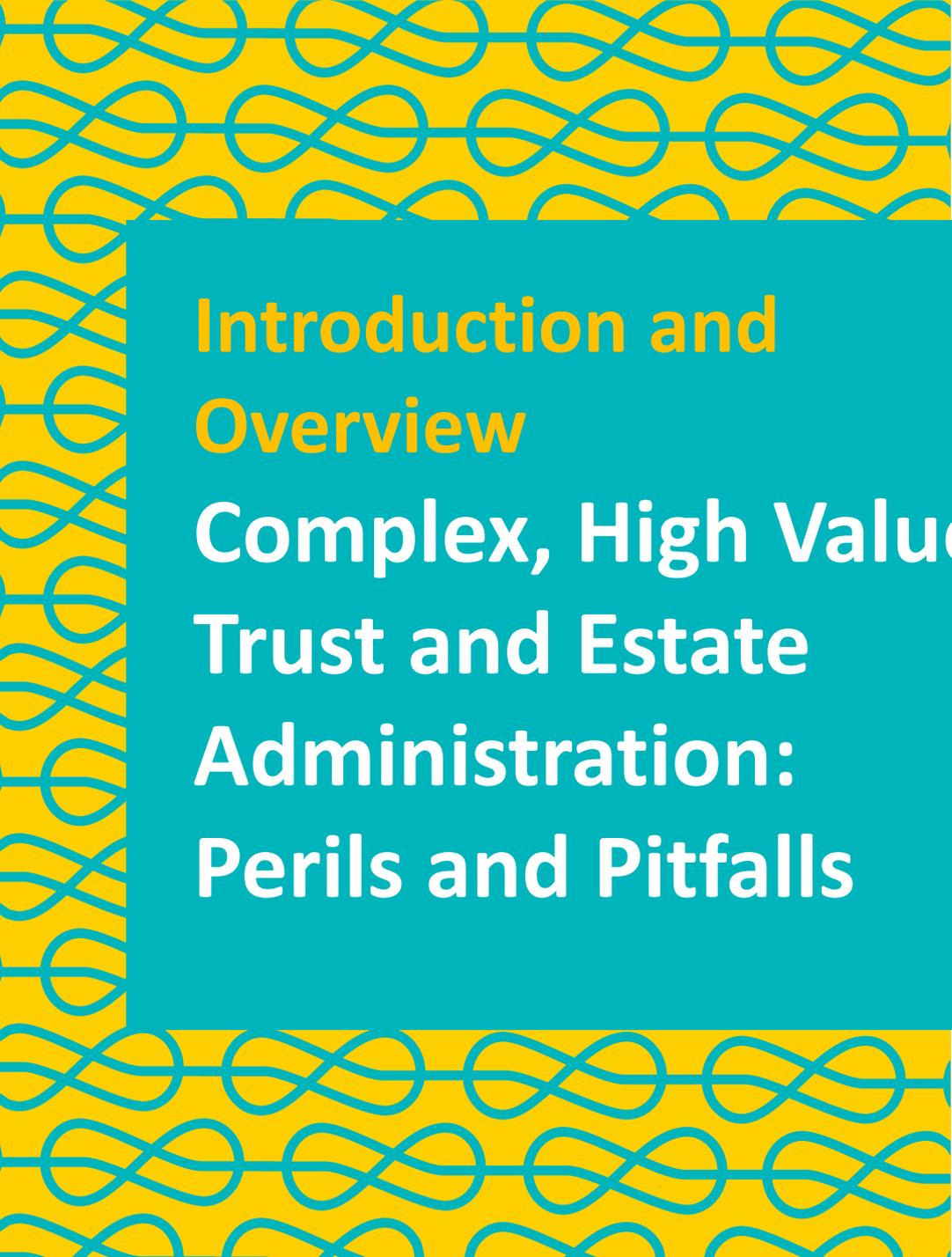
# Introduction

**Andrew Miller,**  
Private Client Manager  
Estate Research



**Presenter:  
Susannah Roth**





## **Introduction and Overview**

# **Complex, High Value Trust and Estate Administration: Perils and Pitfalls**

# Agenda

1. Gathering in foreign assets
2. Liability and tax matters
3. Private corporation interests in an estate or trust

1.

# Gathering in Foreign Assets



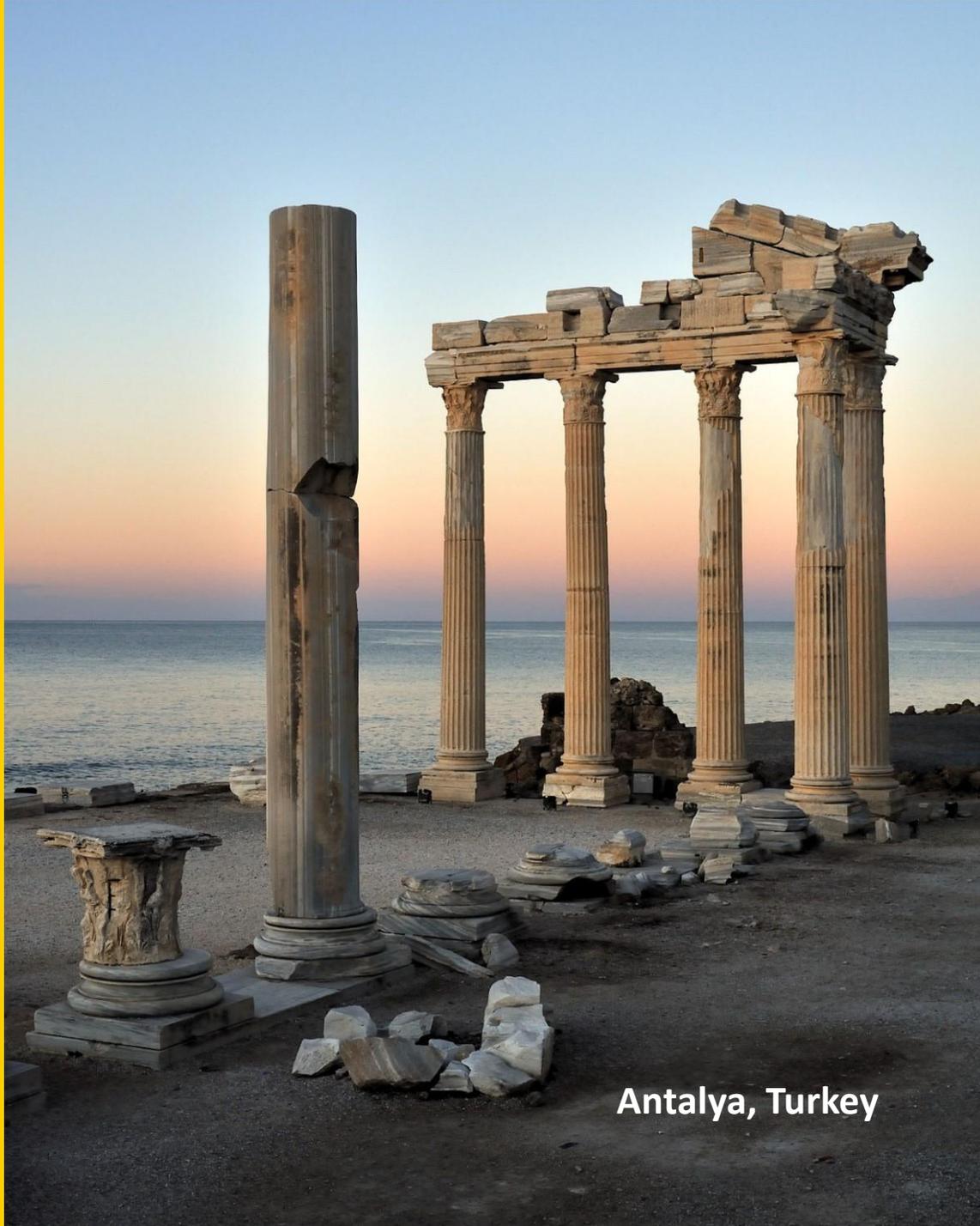
Singapore

# Practical Challenges:

- Locating assets
- Locating all wills and other testamentary documents
- Identification of assets which are governed under each will where there are multiple wills

# Practical Challenges (cont'd)

- Valuing foreign assets and foreign exchange issues
- Dealing with foreign professionals and foreign legal concepts
- Determining debts, liabilities and tax obligations and who has the obligation to pay them: the estate/executors and/or beneficiaries



Antalya, Turkey



Girona, Spain

## Practical Challenges (cont'd)

- Foreign language and documentation
- Translations and “official” copies
- Managing expectations, timelines, delays and costs

# Foreign Laws Impact on Distribution of Foreign Assets

- Forced heirship
- Foreign family law regimes
- Foreign laws for succession on registered accounts, pensions, life insurance
- Foreign probate or other legal processes



Tuscany

# Where Should Original Probate be Obtained?

## *Consider:*

- Where is it required by a third party?
- Necessity to produce original will and requirements for original vs. secondary grant
- Probate fees
- Legal fees and other costs

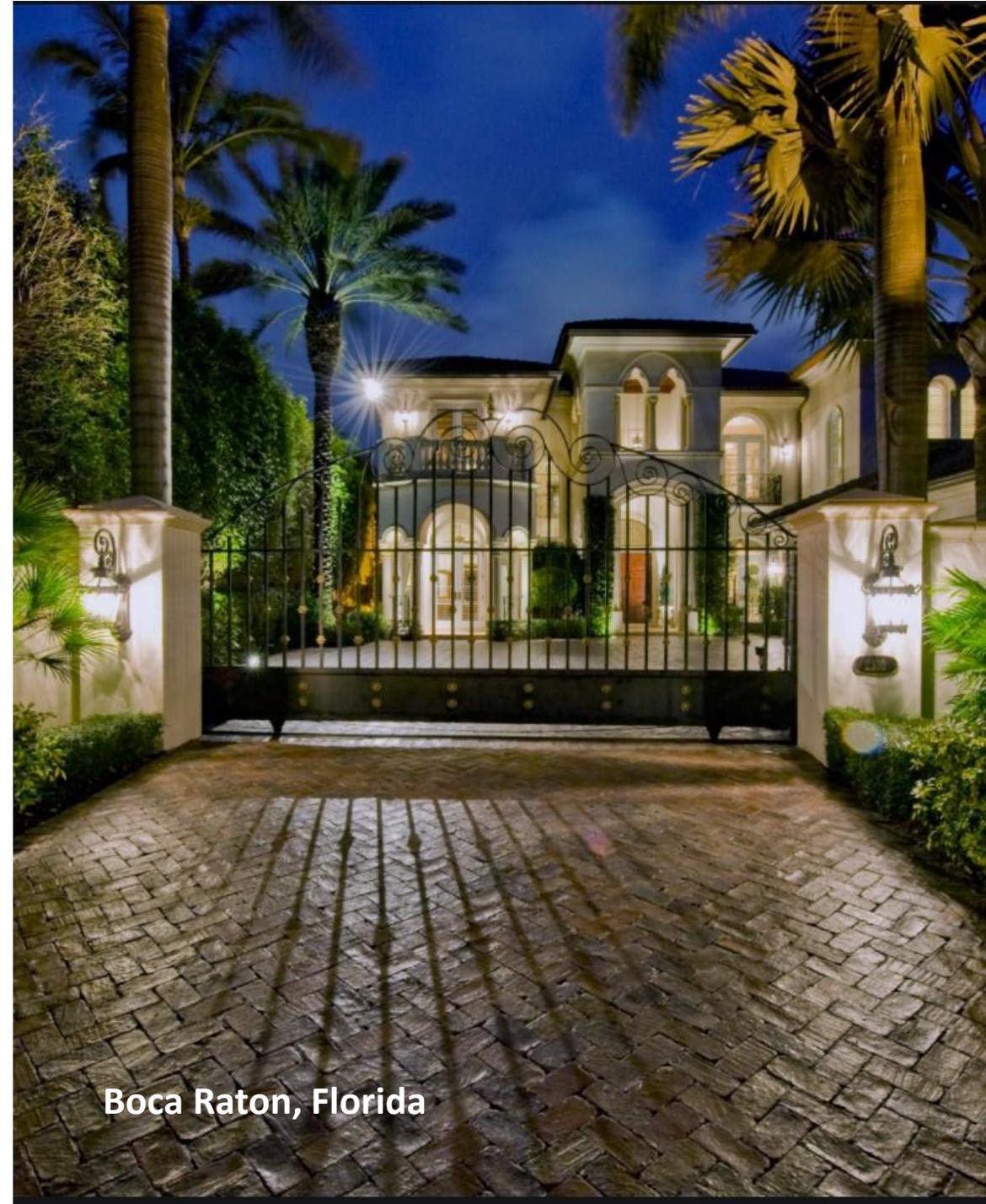
Monte Carlo



# Where Should Original Probate be Obtained?

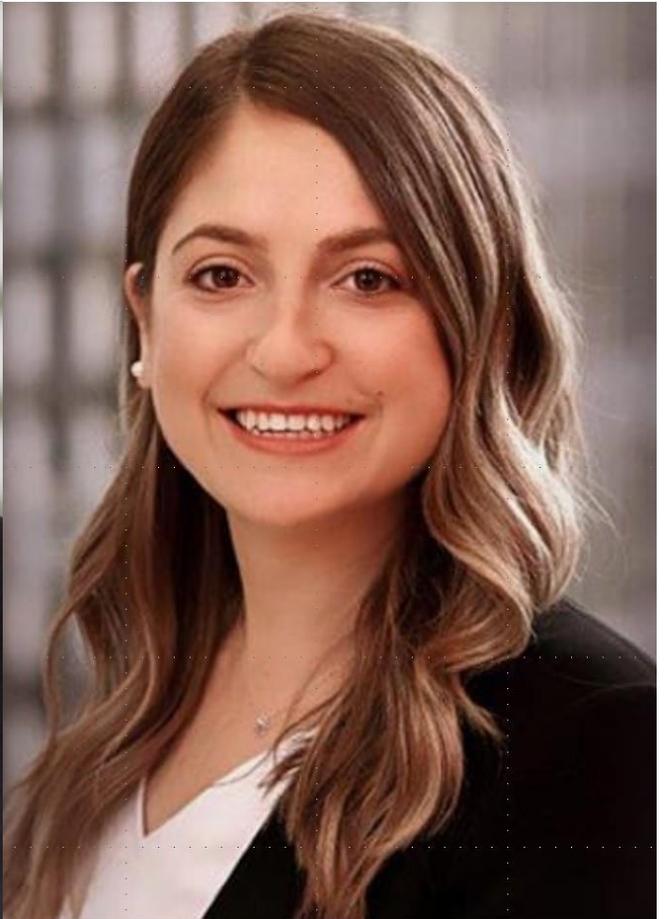
## *Consider (cont'd):*

- Bonding
- Qualifications for executor to be appointed
- Court process and level of oversight
- Protection for executor



**Boca Raton, Florida**

**Presenters:  
Stephanie  
Battista and  
Marly Peikes**



# CASE STUDY 1

## “Probate Shopping”

- Max was Canadian citizen, former Ontario resident, moved to London, U.K. to work in international private equity, where he died
- Max had investment accounts in Guernsey with international financial institution, and accounts in Toronto managed by affiliate of the same institution

# CASE STUDY 1

## “Probate Shopping” (cont’d)

- His widow, Emily, is sole executor of his estate, has now returned to live in Toronto, wants to know where probate of Max’s will should be applied for

# CASE STUDY 1

## Analysis

- Ontario probate fees (Estate Administration Tax) high
- Guernsey probate fees much lower
- Guernsey counsel advises will can be probated in Guernsey, and Emily can apply as no restrictions on her ability to act

# CASE STUDY 1

## Analysis (cont'd)

- Toronto affiliate of financial institution advises it will rely on either Ontario grant or Guernsey grant and no need to “reseat” the Guernsey grant in Ontario
- To Emily’s delight, there is a savings of probate fees, as well as legal fees by not resealing in Ontario

# What if Ontario Probate had been Necessary?

- There would still be a savings of Ontario probate fees on the Guernsey assets
- Guernsey original probate would likely have been the favoured option unless the Guernsey assets were of minimal value



2.

## Liability and Tax Matters

# Basic Liability of Executors and Trustees:

## Tax filings:

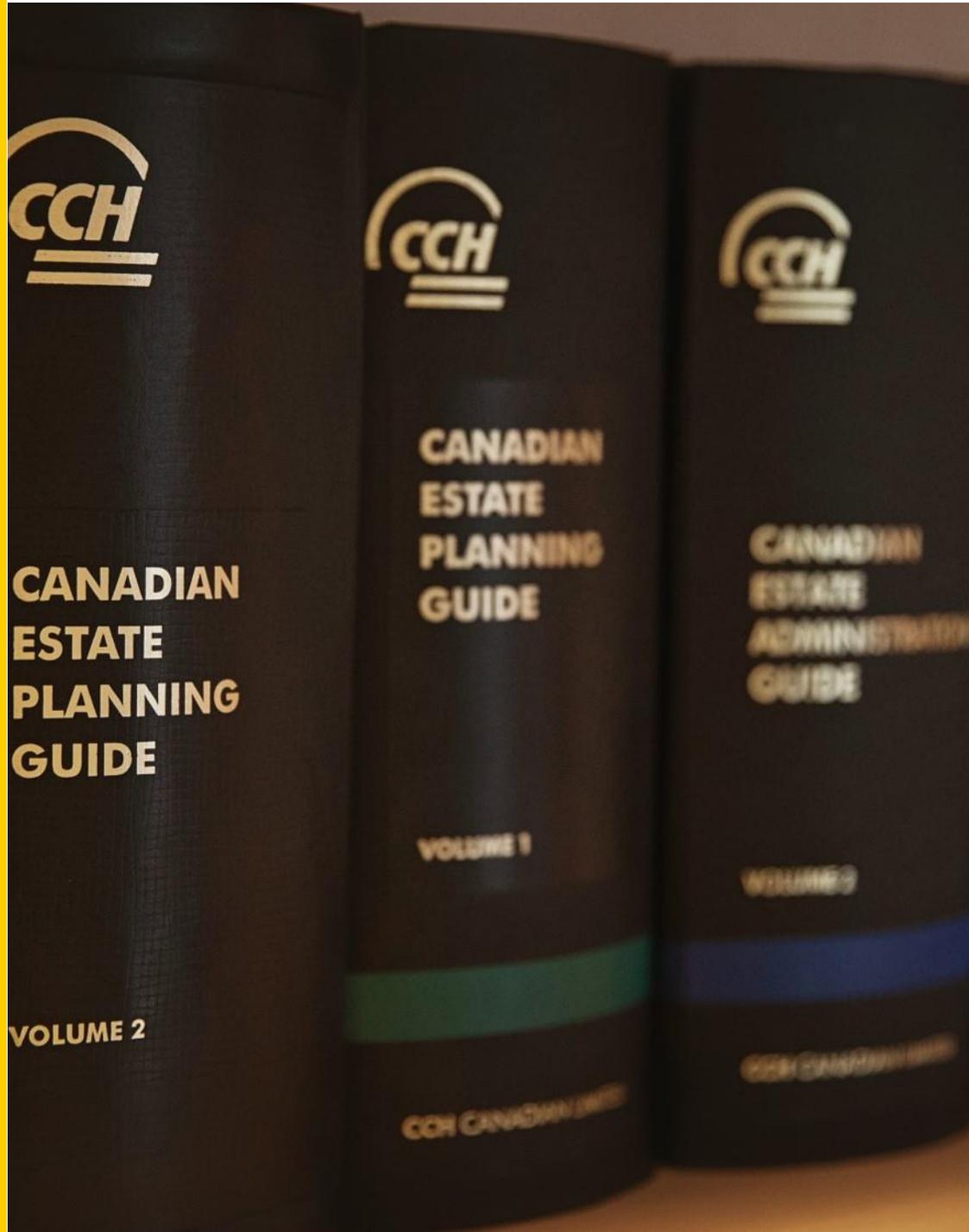
- Terminal tax return
- Previous year(s) tax return(s)
- Trust tax return(s)
- Corporate/other tax returns

# Basic Liability of Executors and Trustees (cont'd)

## Tax payments:

- Overdue amounts already outstanding at date of death
- Payment before probate certificate obtained
- Penalties and interest incurred





## Basic Liability of Executors and Trustees (cont'd)

### Tax clearance certificate(s):

- What protection does a tax clearance certificate provide and for whom?
- When might an executor/trustee not wish to obtain one?

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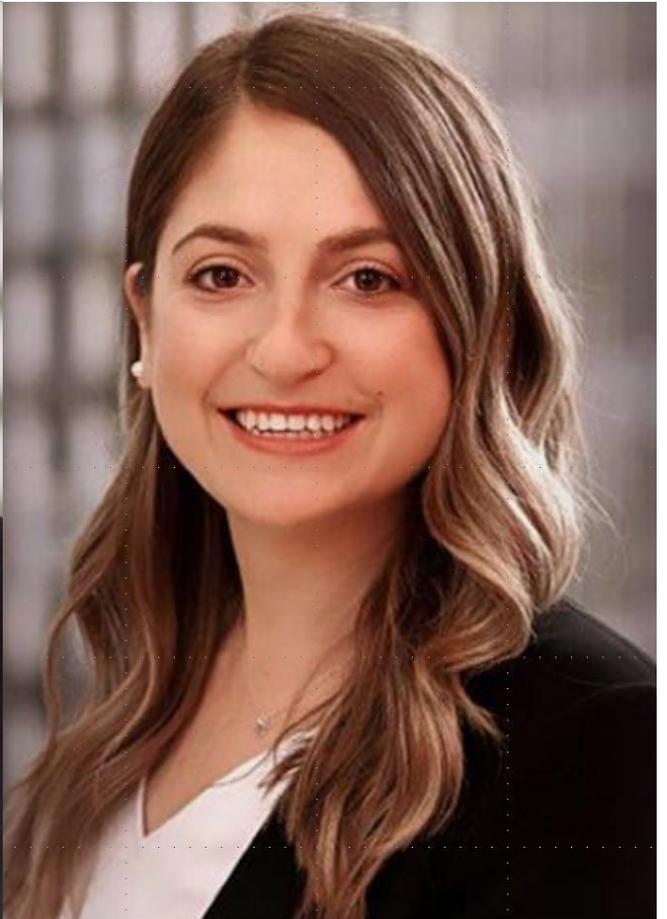
## Trust and Estate Essentials

Achieving Success in  
Family Succession

# GRE Status for Estates

- Importance of qualification for post-mortem tax planning or charitable donation credits
- Designation must be made on first estate tax filing and cannot be late-filed

**Presenters:  
Stephanie  
Battista and  
Marly Peikes**



# CASE STUDY 2

## Tax Clearance Certificates and *Muth Estate*

- Executor hired an accountant to estimate the tax owing on the final tax return
- Accountant advised holdback of \$25,000 would be sufficient
- Executor retained holdback based on this advice and distributed remainder of estate to herself and other beneficiaries before she had filed the tax returns for the estate and without having obtained a clearance certificate

# CASE STUDY 2

## Tax Clearance Certificates and *Muth Estate* (cont'd)

- Executor then hired a second accountant who advised tax liability was nearly \$60,000
- Executor requested beneficiaries pay back part of distribution but several of them refused, executor then brought a court application to compel beneficiaries to indemnify her

# CASE STUDY 2

## Tax Clearance Certificates and *Muth Estate*(cont'd)

- Court rejected application, judge determined failure to obtain clearance certificate before making distributions to be breach of trust, no requirement to indemnify for breach of trust
- Judge determined executor's actions constituted breach of trust based on ITA, section 159
- Requires that executor obtain clearance certificate before making distributions from estate to beneficiaries

# CASE STUDY 2

## Lessons Learned

- Case highlights potential personal liability of executor or trustee for income tax liabilities of estate/trust where estate/trust funds paid out before all tax liabilities determined and paid
- Can be difficult to obtain repayment from beneficiaries
- Court applications for indemnification not ideal

# Ontario Estate Trustees' Responsibility and Liability Regarding Foreign Tax Filings and Payment

- Tax can be levied on the estate, deceased, or beneficiary
- Base for tax: citizenship, residence, domicile, location of assets
- Need to consider tax liabilities arising on assets in a foreign jurisdiction



Toronto

# Ontario Estate Trustees' Responsibility and Liability Regarding Foreign Tax Filings and Payment (cont'd)

- Standard debts and death taxes clause makes all death taxes payable by the estate:

**“My trustees shall pay out of and charge to the capital of my general estate as if the same were debts of mine incurred by me during my lifetime all succession, accession, estate and inheritance duties or taxes and all taxes owing on any of my capital gains whether imposed by or pursuant to the law of this or any jurisdiction whatever (hereinafter referred to as “death taxes”) that may be payable by reason of my death ...”**

# Multiple Taxation on Death and Impact of Tax Treaties

- Canada only has two treaties that allow a Canadian to credit estate or inheritance taxes against capital gains tax on death: U.S. and France
- U.S. estate tax paid by estate of a deceased Canadian tax resident under the Fifth Protocol to the Canada/U.S. Income Tax Treaty can be credited against Canadian capital gains tax paid on the same assets
- Canada-France Tax Treaty allows a deduction for French inheritance tax paid in France against Canadian capital gains tax on death

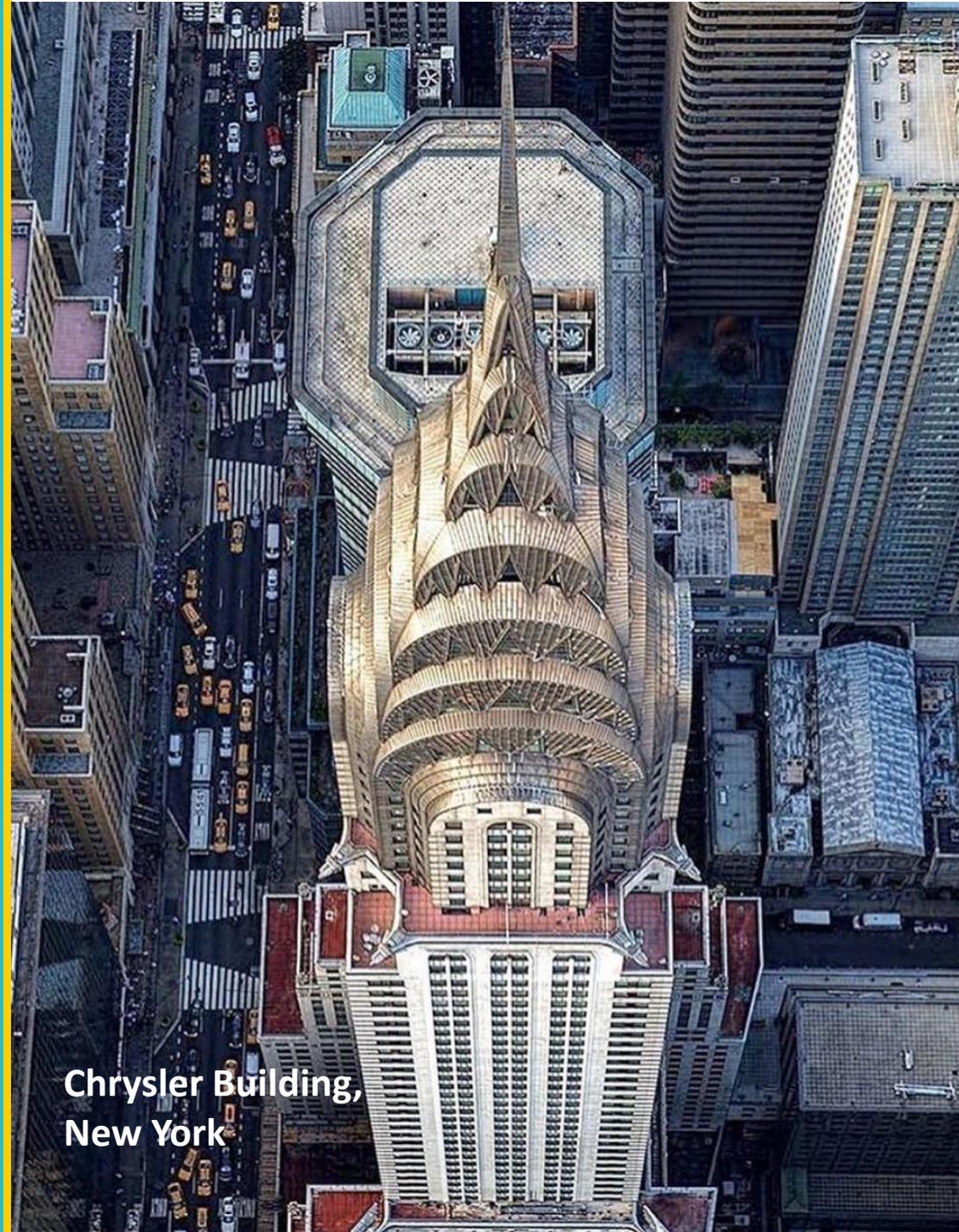


Shangri-La Hotel, Paris

# U.S. Estate Tax Obligations

- Filing deadline – 9 months from date of death
- Extensions of deadline and impact on payment obligations
- U.S. situs assets and potential pitfalls

Chrysler Building,  
New York



# Foreign Resident Beneficiaries and Tax Matters

Taxation: withholding tax and loss of “rollover”

- Withholding tax on income payments
- Basic rate and reduction by treaty
- No rollovers to non-resident beneficiaries if not taxable Canadian property

Long Wharf, Boston

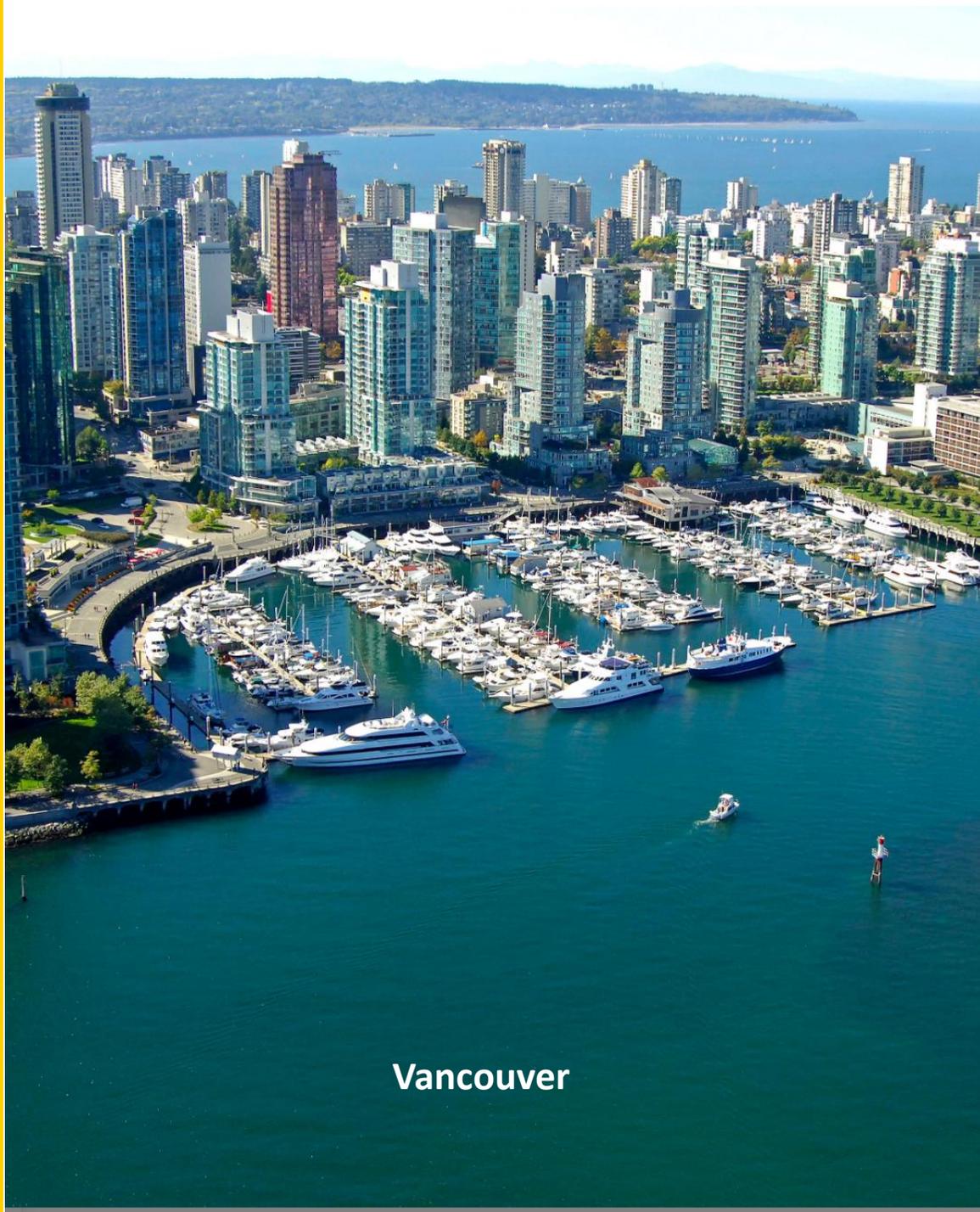
# Foreign Resident Beneficiaries and Tax Matters (cont'd)

s.116 certificate requirements

- Taxable Canadian property
- Disposition of interest – includes capital distribution to a beneficiary
- Pre- or post- transaction filing requirement



The Muskokas,  
Ontario Cottage Country



Vancouver

# Foreign Resident Beneficiaries and Tax Matters (cont'd)

Problematic issues of foreign beneficiary with interest in a Canadian corporation

- CCPC status
- Foreign tax law applications e.g. U.S. mismatch of credits and potential double taxation

**3.**

## **Private Corporation Interests in an Estate or Trust**

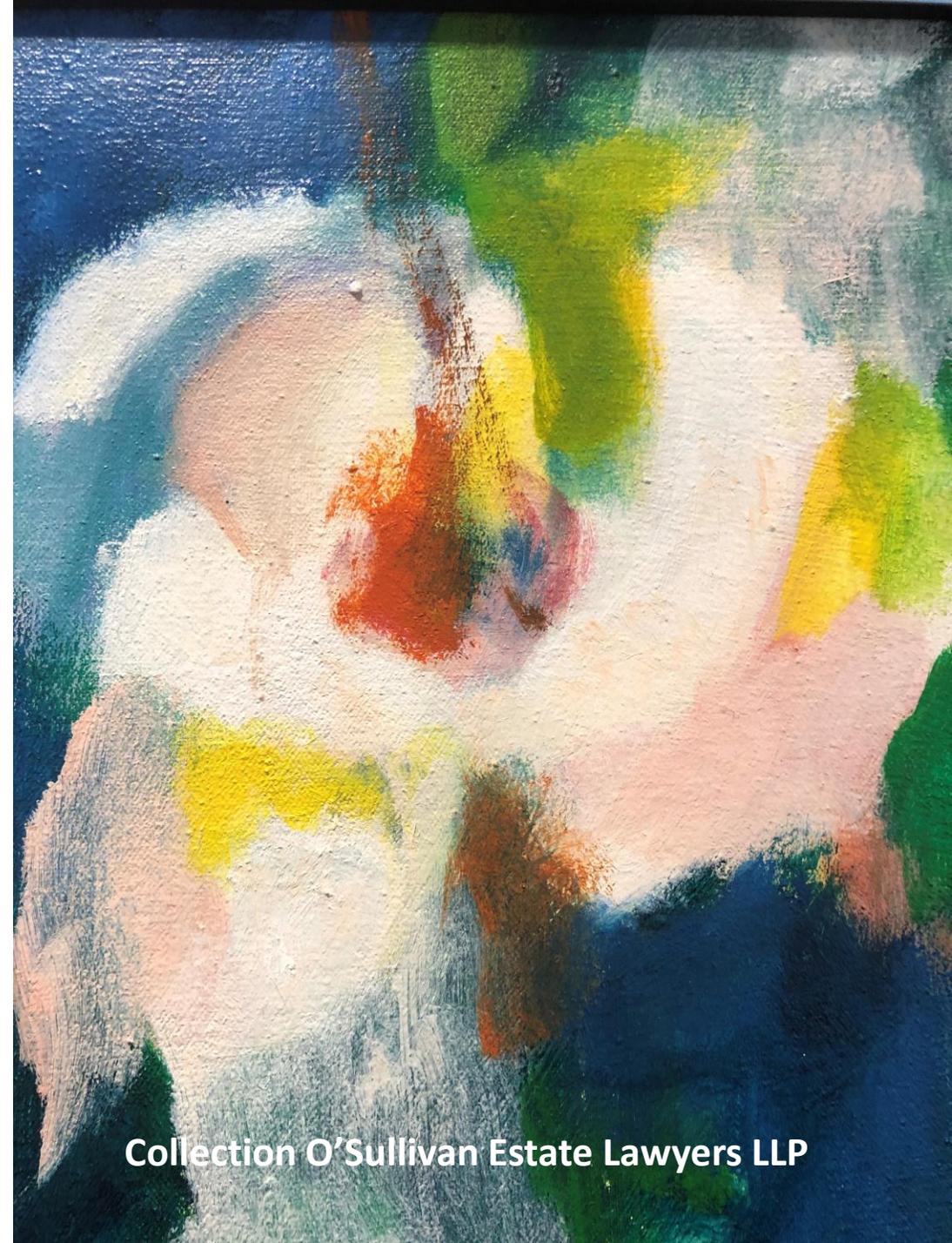
# Practical Issues for Executors

- Income tax filings
- Updating corporate documents including possible historical issues
- Transfer of shares to ongoing trusts



# Governance Issues for Executors

- Necessity for executors to be directors/officers of corporation
- Liability if relying on third-party directors/officers



# Accounting to Beneficiaries

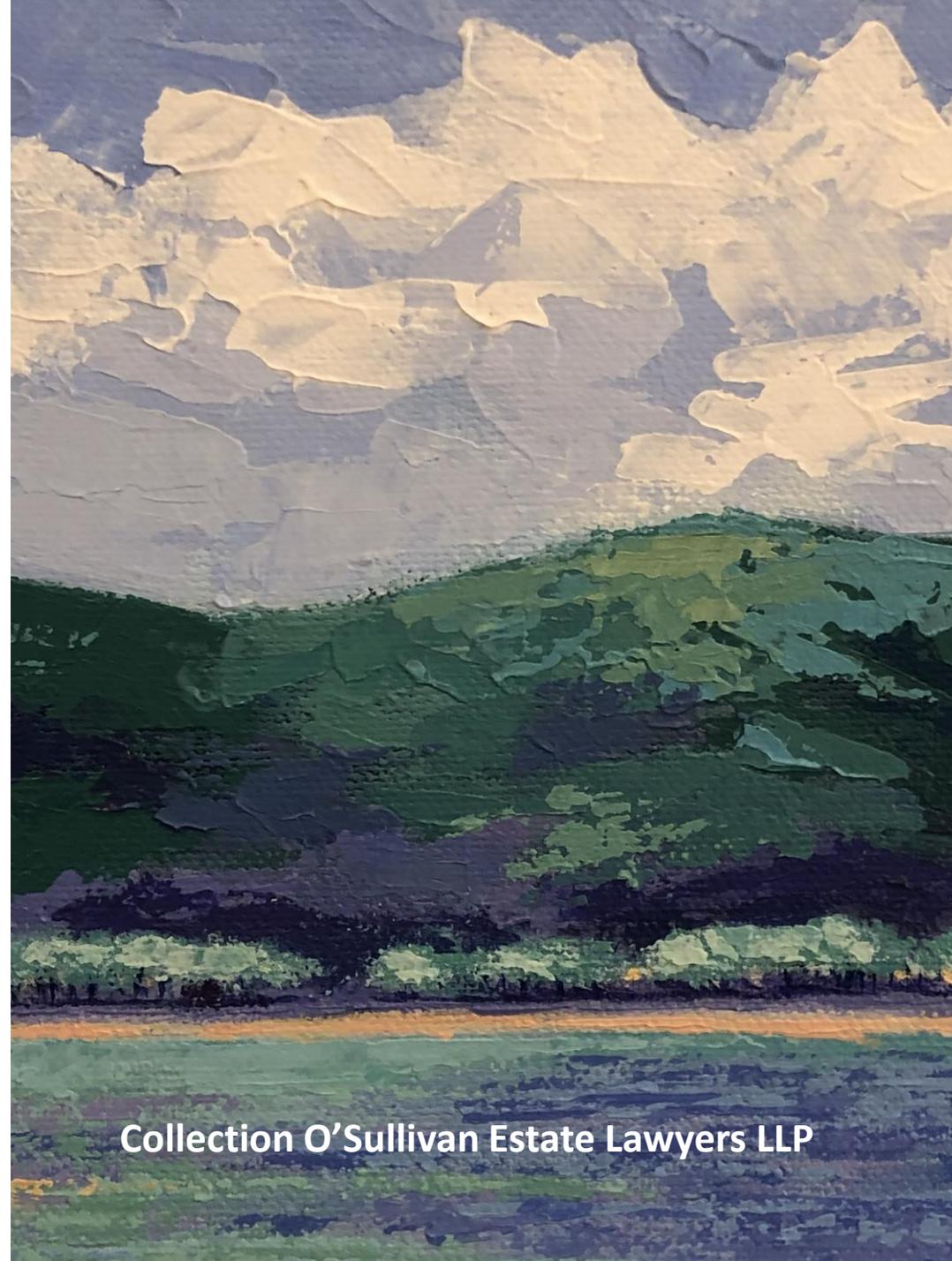
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- Fundamental duty of executors
- Proactive accounting
- Business decisions and confidentiality



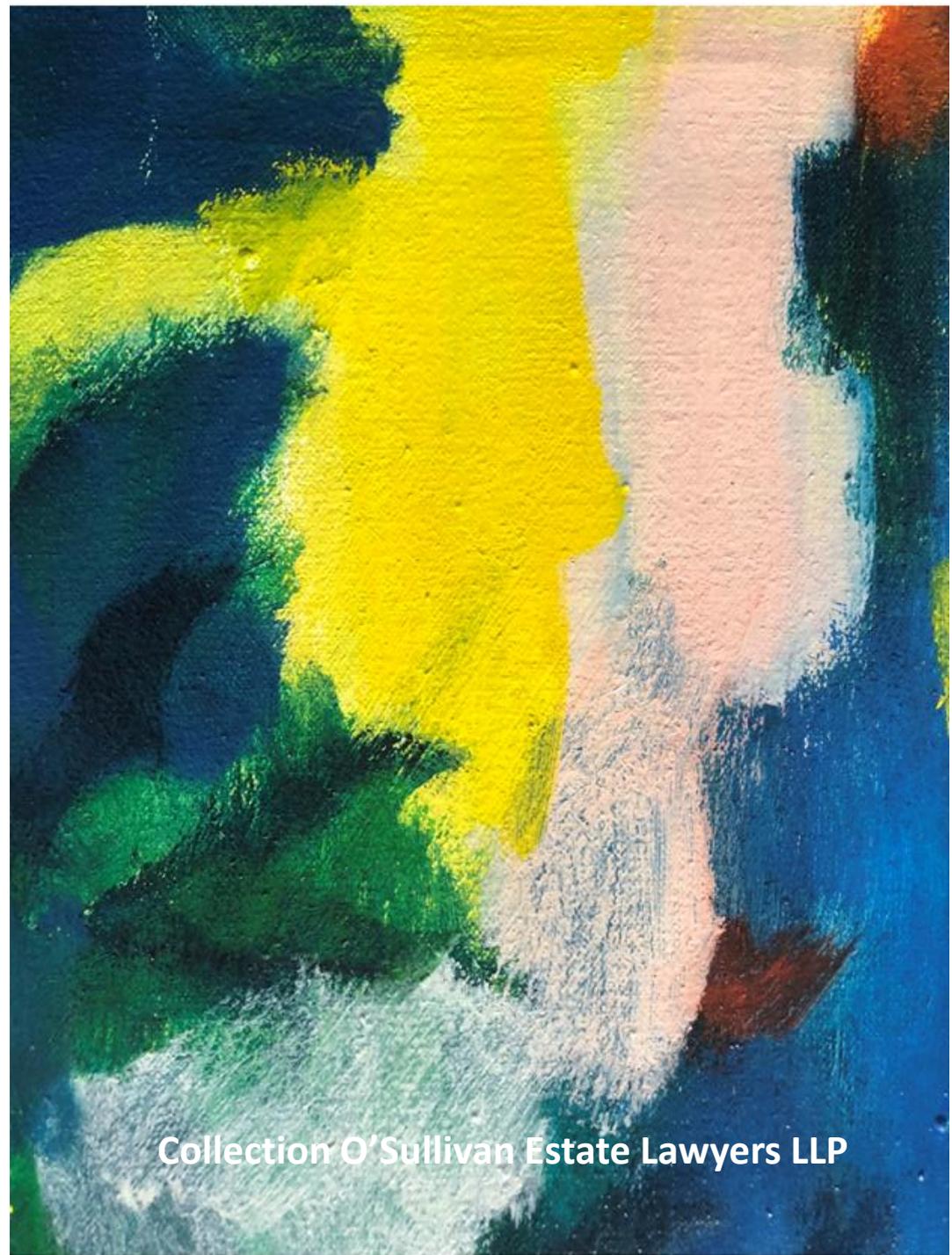
# Conflicts of Interest

- Best interests of corporation versus best interests of estate
- Executor's duty to act in best interests of beneficiaries even while exercising role of director
- Even hand rule and balancing interests of beneficiaries



# Corporate Interests and Estate Investments

- Duty to convert and duty to diversify
- Power to retain assets
- Power to make loans to business
- Corporate distributions – what is income and what is capital





# Resources:

1. *Muth Estate*, [2019 ABQB 922](#) (CanLII)
2. [Estate Administration Basics](#)
3. [Cross-Border Canada-U.S. Estate Administration Highlights](#)
4. [Multijurisdictional Estate Administration Highlights](#)
5. [Estate and Trust Taxation: Important Considerations](#)



## 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.

If you would like to subscribe to our Blog, and our firm Advisories, please register at <https://www.osullivanlaw.com/blog/>.



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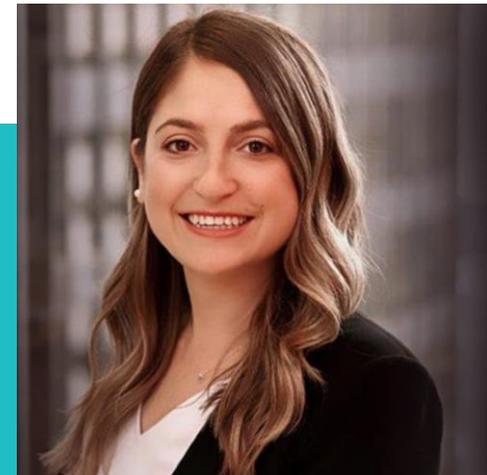
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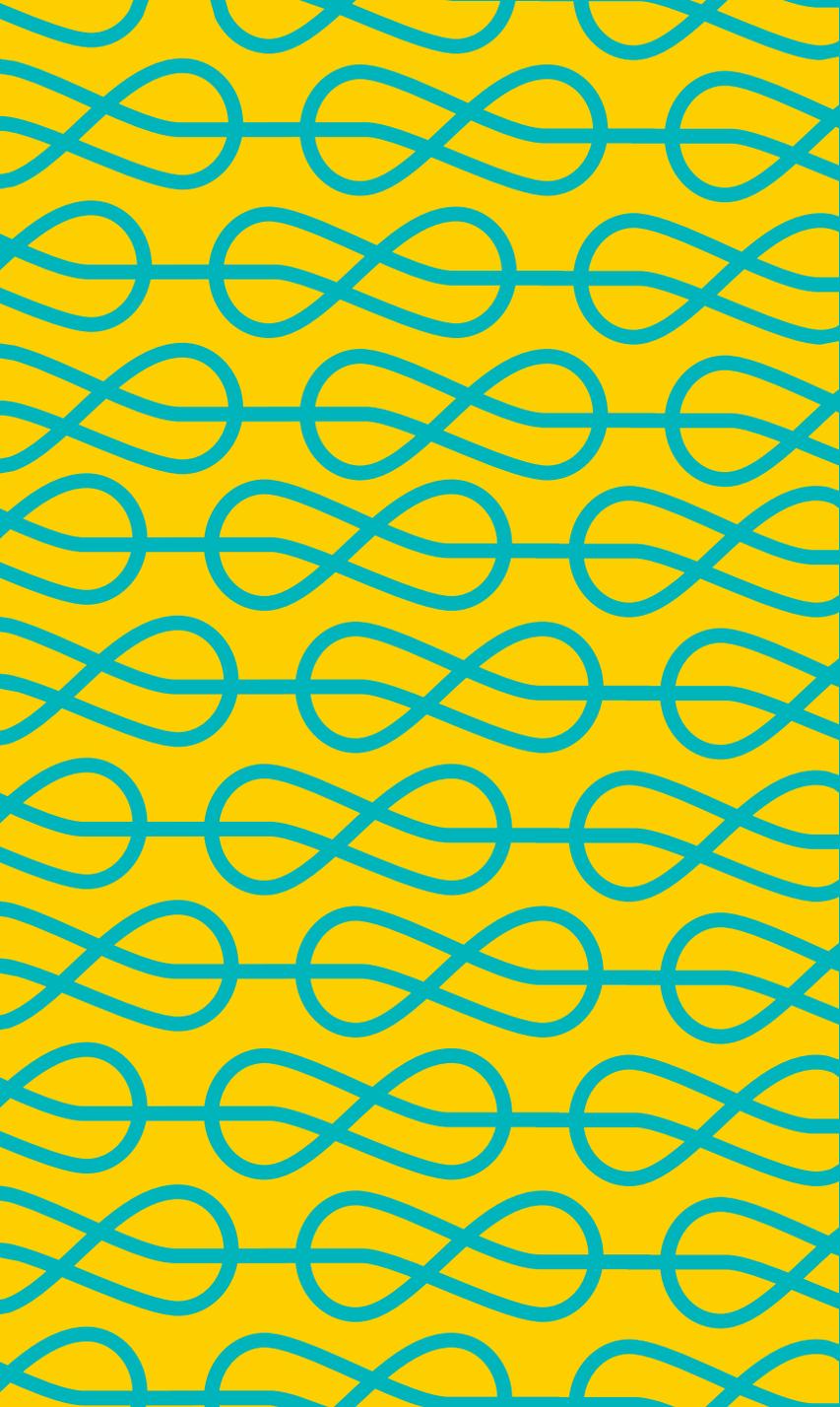
# Questions?

**To ask our speakers a question,**  
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**Thank You!**

**Andrew Miller,**  
Private Client Manager  
**Estate Research**





Thank you!

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