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Wills, Trusts & Estates

Snowbirds and the tangled web of cross-border estates

By **Darren Coleman**

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(February 7, 2018, 11:19 AM EST) -- A Toronto executive was responsible for administering the estate of his uncle who had retired to Florida. The uncle died and held investment accounts worth millions with two U.S. brokerage firms. The nephew, recognized by the state of Florida as executor for the estate, worked with his uncle's lawyer to file for probate in Florida under the formal administration process. Then he and his lawyer received a surprise — those U.S. investment firms wouldn't take instructions from him.

Regulations in both countries generally prohibit a financial institution or financial adviser from taking instructions from someone who resides outside their jurisdiction. That means, with limited exceptions, a Canadian investment firm won't open an account for an American resident, nor will a U.S. firm open one for a Canadian resident. This is news to many financial advisers, not to mention lawyers, on both sides of the border.

In such a situation those U.S. investment firms won't provide the nephew with current account information or a statement of investment positions. They won't provide reports or schedules to assist with tax filings and won't let him do transactions on the account to move funds to an estate account and begin disbursements to beneficiaries.

That nephew spent thousands of dollars on legal fees and travel and time on telephone calls and visits with those financial institutions. His lawyer couldn't understand why two national brokerage firms wouldn't take instructions from a properly appointed personal representative of a Florida estate.

Testators often appoint family members and friends as administrators of their final affairs. And testators — and their legal advisers — are often not aware of compliance rules for financial institutions, especially in cross-border situations.

The Toronto nephew made no error in paperwork, but lived in Canada. That was the problem. His situation would have been the same if his and his uncle's positions were reversed. An executor resident in the U.S. is in a similar dilemma when trying to work with Canadian financial institutions. This always causes distress for the parties in question, and for their lawyers.

As a financial adviser who specializes in cross-border, I see this all the time. Usually, the people and their lawyers are shocked and handcuffed by their inability to do anything. Executors of a cross-border estate can see the money, but can't access it. But two options are available.

The nephew could appoint in his place a U.S. resident who can give instructions to the American financial firms and begin administering the balances as per the wishes of his late uncle. But this wasn't ideal because of the cost, and his lawyer didn't want to take on the liability of managing a multi-million dollar investment portfolio.

However, the nephew could hire an investment adviser who is licensed to act in both the U.S. and Canada, have that adviser open an estate account in Florida, transfer all the assets to the new account and administer the estate. That is the route he took.

All this was done, the new accounts opened and the balances transferred within 14 days. The nephew could pay creditors, file tax returns and make timely disbursements to beneficiaries.

We often encounter challenges involving cross-border estates where the settlor, trustee and beneficiaries are in different countries. Unless the unique compliance rules for financial institutions are considered during the planning process, and solutions identified in advance, executors and trustees of cross-border estates will find much of their work hindered, if not halted.

Things are further compounded by new changes to U.S. estate tax calculations. The exemption has now risen from US$5.6 million of worldwide assets to US$11 million (US$22 million if combined with a surviving spouse who is not a U.S. resident). This means many Canadian snowbirds may think they no longer bear the risk of being captured in the tax net of the IRS, and may not seek expert legal and tax advice when structuring their affairs.

While the risk of incurring the estate tax has been minimized, Canadians with over $60,000 in U.S. assets may still be required to file a U.S. estate tax return to claim the benefits of the U.S.-Canada tax treaty, even if no tax is due. In many cases, transfer agents and U.S. financial institutions won't agree to transfer U.S. investments until the estate provides proof of clearance from the IRS. So, if a snowbird has money in a U.S.-domiciled bank account, or U.S. real estate to sell, their Canadian-based executors may find themselves in a situation just like that of the aforementioned nephew.

The bottom line? Every Canadian who has money, or family, on both sides of the border is at risk of having their estate planning tangled up in compliance issues involving financial institutions. But doing due diligence in advance can save a whole lot of grief.

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