

Cross-Border Estate Planning Considerations for the United States and Canada

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Planning for your own incapacity and ultimate demise is difficult enough, but when you layer cross-border elements, the complexity can quickly become overwhelming. Below are some points to consider and practical tips when creating an estate plan, if you or your loved ones are from Canada and/or own assets in Canada. We hope that the list will make the task easier.

Points to Consider:

Who You Are

The starting point is clarifying your citizenship(s), domicile and residency. These factors determine what law applies to define your property rights. They also dictate how your property is taxed. For married couples, this is particularly important because you could forgo tax saving opportunities if you ignore the consequences of satisfying some or all of the criteria. Note that there can be different definitions of these terms. For instance, what “residency” means in Canada can be different from what it means in the U.S. Furthermore, different states in the U.S. can have their own rules to determine residency and how residency affects the tax consequences.

Where Your Assets Are

Where your assets are located can also have an impact on not only how those assets pass upon your death, but how they are taxed. Generally, the disposition of real property is governed by the laws of the place in which the real property is located. This means that if you own real property in both the United States and Canada, your heirs may end up with probate in both countries upon your death. Personal property may also be subject to similar rules. With proper planning, the hassles can be minimized.

Who and Where Your Beneficiaries Are

Citizenship, domicile, and residency of your beneficiaries will have an impact on your plan. Tax consequences of holding or disposing of inherited assets by beneficiaries can be simplified with careful planning.

Who and Where Your Fiduciaries Are

Your “fiduciaries” are the executor, trustee, power of attorney agents that you name in your estate planning documents. Their citizenship, domicile, and residency in relation to where your assets are located can generate unexpected legal and tax issues.

Different Legal and Tax Systems

Even though there are many similarities between Canada and the United States, the legal and tax systems are quite different. For instance, the federal government of the United States, as well as some states, imposes an estate tax on a decedent’s assets. Canada, in contrast, does not have an estate tax, but treats a person’s death as creating a deemed sale of all of his or her assets for Canadian income tax purposes. There are exceptions, deductions, exemptions, and other ways to lessen the tax impact in the respective countries, but it requires careful planning that takes into account both systems.

Income Tax Treaty

In addition to the default tax rules in the United States and in Canada, there is a tax treaty between the two countries that confers special privileges and relief to eligible decedents. Your planning and desires can be enhanced by understanding and utilizing the benefits provided by the tax treaty. Beware of state and local tax issues, however, as the tax treaty generally does not apply to provide relief.

Tips

Get Advice on Both Sides of the Border

Because the legal and tax systems are different, it is crucial to obtain professional advice from both U.S. and Canadian advisors. Your advisors should work closely together to formulate the plan that implements your goals while being efficient from a legal and tax perspective. Although the U.S. advisor will look to the Canadian advisor for Canadian issues, and vice versa, it is helpful if they each have basic familiarity with the other’s system so that the process can proceed efficiently.

Plan Ahead

As with all estate planning, the best time to plan is well in advance of the need to implement the testamentary documents. This is particularly true for people with cross-border issues because of the additional need to coordinate among the advisors from both countries. Coordinating among advisors takes time, investigation and energy, particularly when multiple jurisdictions are involved. In addition to formulating the plan, it may be necessary to begin

implementing the plan during your lifetime. So, allow for plenty of lead time.

Appreciate Potential Consequences

How assets are acquired, held or transferred during life will impact testamentary situations. When acquiring investments or property, consideration of how the assets will be held may be the first step in minimizing testamentary issues.

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