



CROSS BORDER ESTATE PLANNING

— Wills and Powers of Attorney

Whether in the sunny south or in ski country, many Canadians have invested in holiday homes outside of Canada. Property ownership often means vehicles, furniture and bank accounts are also located in the jurisdiction of the holiday home. These foreign assets become an important part of an estate plan and necessitate the review of wills and powers of attorney.

WILLS

While in most cases one will can dispose of all assets regardless of where they are located, it is a common planning technique to enter a will in each jurisdiction where property is owned.

Multiple wills have several advantages:

- **Choice of executor:** A will in each jurisdiction allows a testator to choose separate executors, both of whom have jurisdictional expertise. Additionally, several jurisdictions (such as Ontario) have requirements that a foreign executor must post a bond as security before he or she may apply for probate. Appointing local executors eliminates this expense.
- **Avoiding lengthy probate process:** Where there are separate wills, probate applications can proceed independently in each jurisdiction, which can save a significant amount of time. When one will is used, the executor will be required to “reseal” or obtain a secondary grant of probate after probate is obtained in the primary jurisdiction.
- **Formal requirements to enter a will:** The requirements for making a will may differ in each jurisdiction. Many jurisdictions (such as Ontario) have statutory provisions which recognize foreign wills so long as they complied with the laws where they were entered. However, this is not universally true; in other words, a foreign will may be required to deal with foreign property.
- **Requirements for transferring property:** The rules for transferring real estate may also differ. For instance, in some civil law jurisdictions, rules of forced heirship may override the provisions of a will. When a will is drafted in the jurisdiction where the land is held, there may be clauses available to address these rules.
- **Planning opportunities:** A jurisdiction may have some unique planning tools designed to save costs. For instance, many states — such as Hawaii or Arizona — have adopted the provisions of the Uniform Real Property Transfers on Death Act, which allows real property to be transferred outside of a will by entering a revocable deed during the owner’s life, thus avoiding probate. Without meeting with a solicitor who understands the laws of each jurisdiction, such planning opportunities might be missed. We strongly suggest that you file your return by this due date.
- **Reducing expenses:** Having only one will may prove to be more expensive, and drafting a will that has the clauses required for both jurisdictions can be complex. Secondly, a solicitor qualified in the foreign jurisdiction should review the will, which is often an additional expense.
- **Accounting for tax implications:** There may be significant tax implications not dealt with where the testator only has a single will. For example, special planning may be required where the testator is a U.S. citizen and wishes to leave U.S. property to a grandchild to avoid the generation skipping transfer tax, a special tax levied when property bypasses a generation.

POWERS OF ATTORNEY

Both a power of attorney for personal care (a document allowing another to make personal care decisions on behalf of the grantor) and a financial care power of attorney (a document allowing another to manage the finances of another) can be complicated by foreign ownership.

Several of the considerations discussed above apply to powers of attorney, however, in addition to the following:

- **Choice of attorney:** Unlike a will, there are no bonding requirements associated with a power of attorney. However, as a power of attorney acts on a day-to-day basis, it may be prudent to name an attorney located in the jurisdiction where assets are located.
- **Validity of power of attorney:** Most provinces recognize foreign powers of attorney. Therefore, in Canada, most American powers of attorney are recognized; however, this does not mean the reverse is true. In the U.S., each state has different rules. For instance, Florida's legislation recognizes foreign powers of attorney, but only where the original was executed in an American jurisdiction. Therefore, Canadian powers of attorney will likely not be recognized.

- **Limitations on power of attorney:** Even where recognized, there may be unique rules to consider. For instance, some states limit what an attorney can do unless specific terms or conditions are set out in the document. Connecticut, for instance, states an attorney cannot transfer property unless the power of attorney is witnessed and notarized in accordance with the state's laws. However, the power of attorney might be recognized for other purposes.

CONCLUSION

Snowbirds, or other Canadians who travel regularly or own property in foreign jurisdictions, need to consider their estate plans carefully. It is often a good idea to have estate planning documents completed both at home and in their holiday destination. It is also important to consult tax and estate planning specialists in both jurisdictions to avoid problems and expenses in the future.

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