

Snowbirds should be cautious when buying that dream vacation property

As the leaves fall and snow threatens, the idea of having a little hide away on a warm and sunny beach is a fantasy in which most of us indulge from time to time.

The number of foreclosures in the U.S. real estate market means that vacation homes can be found at bargain prices never seen before. With all these properties on the market, it's many a snowbird's dream come true. And with the Canadian dollar riding high and the U.S. economy at a record low, the timing seems at first glance to be ideal.

But if you're a Canadian thinking of buying real estate in the U.S. there are some issues you should consider before making a decision.

One important consideration is the exposure to U.S. estate taxes. Even if you are not a U.S. citizen, significant estate taxes under U.S. law may be imposed on your estate if you own U.S. real property on your death. These would be in addition to any capital gains taxes payable in Canada.

Depending on the circumstances, Canada may give a partial credit for U.S. estate taxes. But be aware that the U.S. estate taxes are calculated on the gross value of the estate even if the property goes down in value.

At present, U.S. citizens are entitled to an exemption on the first \$3.5 million of their estate.* There is also a spousal exemption if the property is left to a spouse. However, the Canada-U.S. tax

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When it comes to common law rights, it may not be what you consider common sense

A man and a woman share a house together for 13 years as a common law couple. When the woman passes away, the man just wants to go home and grieve in private. Imagine his shock when, instead, he is given 60 days to vacate the premises and a demand for past-due rent.

The scenario sounds fabricated and none too likely. But a recent case in Alberta ran pretty much along those lines. When the common law spouse is not listed in the will, there is no guarantee that he or she will be allowed to remain in the home, no matter how established the relationship.

In the case of this recent judgment, Katherine Stach and James Kiernan lived together for 13 years, sharing a house that had been paid off by Katherine and her former husband.

Katherine did not add James to her will, or make any formal provision that he could continue to live in the house after her death. In fact, her will left her estate (which was comprised solely of the house) to her three children.

After her death, her children claimed that James was simply a renter and a "drinking buddy" and had no rights to continue to live

Continued on reverse

Whoops! \$25,000? I meant \$2,500!

Another recently reported court case underscores the benefit of using a lawyer to prepare your will even when the lawyer makes a mistake!

In her will a woman intended to leave the sum of \$2,500 to a beneficiary.

Unfortunately, when the will was prepared, the lawyer made a typo that went unnoticed both by the lawyer and the woman who signed it.

The will actually stated the bequest was \$25,000.

Since the will was prepared by a lawyer, he was able to give evidence as to her intent and clear up the confusion. The court made an order rectifying the mistake.

If she had prepared her will herself and the same mistake occurred, the error may never have been rectified.

Without the lawyer's evidence, there would have been no way to objectively prove what her true wishes were.

Snowbirds... (continued)

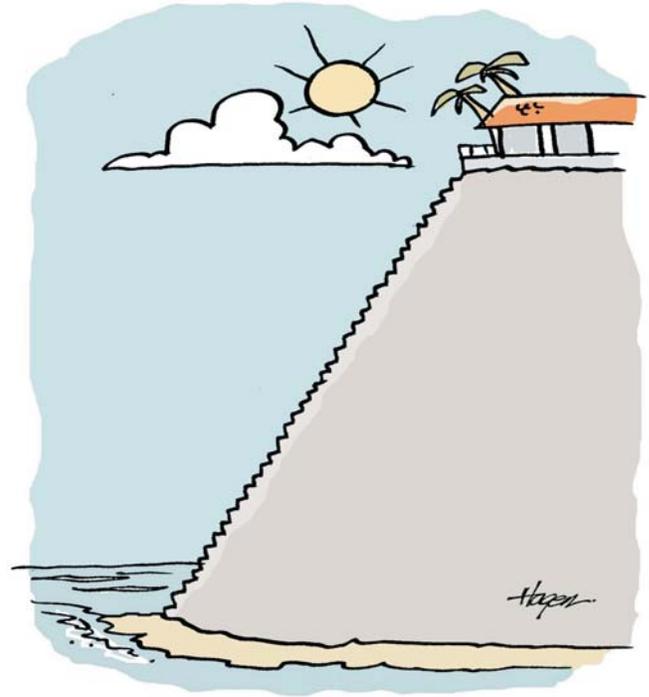
treaty entitles Canadians to only a percentage of the U.S. exemption, based on the value of their U.S. property relative to the total value of their worldwide estate.

So, if you owned U.S. property worth 10% of your total estate, you would be entitled to a credit of \$350,000. If you have a large estate in excess of \$3.5 million and there is no surviving spouse, the rates of U.S. estate tax can be as high as 45%.

You can minimize your exposure to U.S. estate tax significantly with proper will planning and by using different techniques to hold title to the property.

So go ahead and splurge on your perfect U.S. vacation spot. But, before you make an offer, make sure that you consult a lawyer and an accountant here in Canada, both of whom are familiar with cross-border issues.

*The U.S. estate tax does not apply to persons who die in 2010. But that rule is for 2010 only. At present, the 2011 exemption is slated to be substantially reduced, but at the time this newsletter went to print, the amount of the exemption had yet to be fixed.



**THE LISTING SAID IT'S ONLY ONE
BLOCK FROM THE BEACH!**

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Common law rights... (continued)

in the house. James claimed that he and Katherine were a couple and he should be able to stay where he was.

Before deciding the case, the court needed to determine the nature of the relationship. Were Katherine and James a couple, in legal terms were they common law spouses? Or were they landlord and tenant as the children claimed?

The evidence for both arguments needed to be substantiated by further evidence including the testimony of friends and photos of the couple. Whether they shared a bedroom, dated other people while living together, were affectionate in public or attended family events together were all examined.

The court also reviewed in detail whether they owned any property in both their names, shared expenses, split chores or held joint accounts.

In the end, the court ruled that James (aged 66 at the time of the judgment) could remain in the house for the rest of his life with some restrictions. On James's death or his vacating the house, the house will be sold and the proceeds distributed as per Katherine's will.

There are many tragic points of this case, including the intrusion into the privacy of all parties, the anxiety and the irreversible damage to relationships. But the most poignant of all is the fact that a \$60,000 interest-only mortgage had to be taken out on a

previously mortgage-free home in order to pay for expenses and the legal fees resulting from this litigation. The costs will be shared by James (30%) and Katherine's children (70%).

All of these costs and stress could have been avoided had Katherine updated her will to state her intent for her property and her partner.

So don't make the mistake of assuming that your common law spouse will be allowed to remain in your home after your death.

In fact, in Ontario the same situation can apply to a married spouse. If they are not on title, they are only allowed to remain in the matrimonial home for sixty days following the death of the titled spouse.

Whether you are a common law or a married couple, careful estate planning is a must. Take the time to ensure your wishes are fully and clearly documented as part of your will.

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