

Tax, Retirement & Estate Planning Services

Investment Insight

Ontario Estate Information Return

Ontario's probate process is governed by the Estate Administration Tax Act, 1998 ("EATA"). This legislation requires an Estate Information Return be filed. Probate fees will be assessed based on the estate's value as reported in the Estate Information Return.

Executors are required to file the Estate Information Return for applications for probate as of January 1, 2015. In the past, estate bypass was very attractive. The information required was less than it is now and the probate fees and other costs associated with the estate only related to the assets forming part of the estate for which the certificate of appointment of estate trustee (or similar certificate) was sought.

Probate fees, referred to as estate administration taxes, are levied under the EATA. These taxes are paid when an "estate representative" (including an executor or administrator of an estate, an estate trustee, etc.) receives a court order certifying that the will of the deceased is valid and that the estate representative has the legal authority to administer the estate.

We have gone from what was largely an honour system to one with considerably enhanced administration and compliance. The duties of many executors, especially those for more complex estates, have become more onerous. Some heirs may have to wait longer to receive their final distribution from an estate than was previously the case.

Probate fees levied under the EATA are \$15 per \$1,000 for assets in excess of \$50,000.

With appropriate planning, and a designated beneficiary, assets can pass outside the estate. Beneficiary designations are available on registered accounts (i.e. RRSP, RRIF, TFSA, etc.) and insurance policies. Insurance policies include segregated fund contracts, life insurance policies, insurance company Guaranteed Interest Contracts (GICs) and annuity policies (including life and term certain policies).

Other strategies exist for avoiding the fees, including, but not limited to the use of alter ego or joint partner trusts and joint tenancy with the right of survivorship (JTWROS), etc. Each situation needs to be reviewed before the appropriate strategy is implemented, as the full implications need to be assessed. For example, a transfer of assets into JTWROS may have income tax implications (possible disposition for tax purposes or application of attribution rules). Other implications, including loss of control, exposing assets to the debts of the other party, etc. need to be considered as well.



Case Study:

John anticipates that at the time of his death, he will have \$1 million in assets. His house will be worth \$450,000. He will have another \$550,000 in investments (currently a Guaranteed Investment Certificate (GIC) held at a bank.) He is considering acquiring an insurance company GIC or conservative segregated fund contract issued by an insurer. Looking at these two scenarios, see the difference in how probate fees are calculated:

	Estate Subject to Probate (\$)	
Anticipated holdings at death		
House	450,000	450,000
GIC held at a bank	550,000	
Term fund (or segregated fund contract) issued by an insurer having a named beneficiary		550,000
	1,000,000	1,000,000
Estate subject to probate	1,000,000	450,000
Probate fees		
\$15 per \$1,000 > \$50,000	14,250	6,000
Total	14,250	6,000
Savings achieved by estate bypass	0	8,250

For Illustration purposes only

Under the EATA regulations, the Minister of Finance will be getting a significant amount of data, including “a complete list of the assets of the deceased person used to determine the value of the estate”. The assets falling into the estate governed by the will that is being probated will be disclosed on Ontario’s Estate Information Return, which is to be filed with the (Ontario) Minister of Finance. The return is due no later than 180 days after an estate certificate is issued to the estate representative.

This filing will be cross-referenced to the application for probate made by the estate representative. As is indicated on the Ministry’s web-site, “estate representatives should be able to substantiate asset valuations”.

For assets falling into the estate (including contracts of insurance without a named beneficiary), a full description of the asset is required, including the name of the deceased person’s advisor, dealer, financial institution or other person holding the assets on behalf of the deceased, as well as account numbers if applicable.

The Guide indicates that there is no need to include “property that the deceased owned as a ‘joint tenant’ with right of survivorship with other parties”. However, in text appearing on the same page of the Guide, we are reminded “to include all property in which the deceased had a beneficial interest, even if the deceased did not hold legal title and legal title was held in another person’s name”. In reading these two phrases together, there may be circumstances in which estate trustees may want to confer with legal counsel when deciding whether certain assets that the deceased had transferred to JTWRROS should be included in the filing. The Ministry of Finance can audit Estate Information Returns four years after the day the estate administration tax became payable.

Estate representatives should retain records pertaining to the estate assets and their values for a minimum of four years after the estate certificate is issued. There are no time limits when there is a failure to comply, fraud or misrepresentation. The provisions provide for fines and imprisonment for certain types of non-compliance.

There is no doubt that once the return is filed, the Minister will be able to make a more informed decision about which estates to audit. Here we need to bear in mind that there is much more at issue than the probate fees. The legislation provides that the Minister of Finance may share the information with other employees of the Crown for many purposes, including “for the use in the administration or enforcement of an Act that imposes a tax or confers a benefit”. Income tax implications such as capital gains calculations come to mind, as do benefit programs such as Ontario’s Ontario Disability Support Program.

On the topic of clearance certificates, we note that the EATA legislation currently does not contain a mechanism whereby the estate representative could obtain a clearance certificate for probate fees. Given the potential for audits, and challenges as to the valuation of assets, we expect that estate representatives may well hesitate to distribute the last of the assets of the estate until the audit period has elapsed.

It is clear that the estate representative’s duties have become considerably more complex over time. And as stated above, given the ability for the information to be exchanged by the various taxation and other authorities, estate representatives will have to be extremely diligent when making an application for probate, and completing the information return for the Minister of Finance.

Advisors should be reviewing estate plans put in place for their clients. Estate bypass using insurance products having named beneficiaries provides significant benefits:

- Avoiding delays associated with settling the estate;
- Savings in probate fees and associated costs relating to administering the estate;
- Enhancing confidentiality, and;
- Potential creditor protection.

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