

## Changes to the probate process in Ontario

Ontario's probate fees are governed by the Estate Administration Tax Act, 1998 ("EATA"). The 2011 Ontario Budget contained several measures to improve the administration of Ontario's tax system. Advisors and others involved in the estate planning area may not necessarily have taken note of these changes.

Probate fees are currently administered by Ontario's Ministry of the Attorney General. With the new legislation, the administration of this tax will shift to the Minister of Revenue. Provisions of Ontario's Retail Sales Tax Act will govern the procedures for assessments and reassessments, objections and appeals, administration and enforcement.

An application for probate will generally be "open" (that is, subject to possible audit and reassessment) for four years from the date it is made. For example, an application filed on January 1, 2013 could be audited and reassessed any time until January 1, 2017. (There are no time limits when there is a failure to comply, fraud or misrepresentation.) New provisions provide for fines and imprisonment for certain types of non-compliance.

Practitioners in this area are awaiting the release of the regulations dealing with what is referred to as "prescribed information" about the deceased. Some suggest that there will be an increased need for valuations, etc. If this is the case, the probate process will not only become more costly, there will be time delays.

Under the EATA, the probate fees are \$5 per \$1,000 for the first \$50,000 of assets falling into the estate, and \$15 per \$1,000 for assets in excess of \$50,000. These fees can be avoided by naming beneficiaries in insurance policies.

With appropriate planning, and a designated beneficiary, assets will pass outside the estate. Insurance policies include segregated fund contracts, life insurance policies, critical illness insurance policies, and annuity policies (including term fund, life and term certain policies).

### Case Study:

John anticipates that at the time of 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 a Term Fund issued by an insurer. Looking at these two scenarios, see the difference in how probate fees are calculated:

	Estate subject to probate (\$)	
<b>Anticipated holdings at death</b>		
House	450,000	450,000
GIC held at bank	550,000	
Term Fund issued by an insurer having a named beneficiary		550,000
	<b>1,000,000</b>	<b>1,000,000</b>
<b>Estate subject to probate</b>	<b>1,000,000</b>	<b>450,000</b>
<b>Probate fees:</b>		
First \$50,000 (\$5 per \$1,000)	250	250
Remainder (\$15 per \$1,000)	14,250	6,000
<b>Total</b>	<b>14,500</b>	<b>6,250</b>
<b>Savings achieved by estate bypass</b>		<b>8,250</b>

Not only does the use of a named beneficiary result in probate fee savings, designating a beneficiary also means they will usually receive the bequest at a much earlier date. If the asset forms part of the estate, like a GIC at the bank, it's possible that executors may delay disbursing the estate proceeds. They may not be able to ascertain that no additional amounts are owing in probate fees, especially given the allowable four year time frame for audits.

Other strategies exist for avoiding the fees, including the use of alter ego or joint partner trusts, joint ownership with right of survivorship (JOWROS), etc. Each situation needs to be reviewed before the appropriate strategy is implemented, as the full implications need to be determined. For example, a transfer of assets into JOWROS may have income tax implications (possible deemed disposition for tax purposes, possible application of income attribution rules, etc). Other implications, including loss of control, exposing assets to debts of the other party, etc, need to be considered as well.

It is clear that the administration of estates will become considerably more complex for many individuals. Heirs may also see delays in payouts from estates. For this reason, it is important that financial advisors in the province of Ontario review existing estate plans, and, equally important, that those who have done no planning in this area do so at the earliest opportunity.

The following is taken from the Budget documents: "The government will propose amendments to the Estate Administration Tax Act, 1998, to enhance compliance by integrating the administration of this tax with audit and verification functions at the Ministry of Revenue, starting January 1, 2013."

Ontario's Bill 173 received Royal Assent on May 12, 2011. Applications filed on or after January 1, 2013 will be subject to the provisions of the new legislation, unless Ontario's Minister of Finance defers the application to a later date.

While the legislation has received Royal Assent, we still await the release of certain regulations. Of considerable interest to many estate planning practitioners is that the estate representative will be required to provide to the Minister of Revenue "such information about the deceased person as may be prescribed by the Minister of Finance."

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