

Is it time to get aggressive on probate planning?

The term “probate” has been in use in the English common law system since the 1400's and is widely recognized and used in all common law jurisdictions. For some years now, Ontario has changed its terminology by replacing Letters Probate (where there is a Will) and Letters of Administration (where there is no Will) with the generic “Certificate of Appointment of Estate Trustee”. Because of the long history in common law jurisdictions of using the term “probate” to describing a process wherein a Will is proved in Court, many of us still use the term to describe this process.

Probate fee has had a similar treatment. Long described as the fee paid to the Court to prove a Will or to obtain administration of an estate where there was no Will, this expense no longer remotely resembles a fee. The province of Ontario was, in fact, forced by the Supreme Court of Canada in the 1990's to formally replace this fee with a taxing statute. What is often described as the “probate fee” is, in fact, now a tax imposed under Ontario’s Estate Administration Tax (the “EAT”).

The EAT is charged where it is necessary either to prove a Will or to have an Estate Trustee appointed where there is no Will.

Why do we prove a Will?

As a matter of English Common Law, we say that a Will speaks from the moment of death. So the probate process confirms the validity of the Will as opposed to giving it validity. The Executor or Estate Trustee appointed in the Will has, in reality, had their authority from the time of death. Unfortunately, the practical reality is that third parties who must rely on the Will need to be assured that the Will is valid. These third parties include financial institutions, the Land Titles Office, or the transfer agents for publicly traded stocks. These third parties require the Court process to prove the Will so that they are protected should another Will be produced, or should there be any kind of challenge to the validity of the Will.

Why would you want to avoid proving the Will?

The court process both takes time and incurs legal expenses;

The Will becomes a public document;

If you do not have to prove the Will, then you do not have to pay the Estate Administration Tax (EAT).

Changes to the Estate Administration Tax

In the past there has been no practical enforcement in the collection of probate fees (EAT), as the System has relied on the honesty of the Estate Trustee swearing an affidavit attesting to the total value of real estate owned by the deceased and a total value of all other assets owned by the estate. Both figures (without any detailed listing or breakdown) were

simply totalled for purposes of calculating the Tax. Ignoring a small discount for the first \$50,000.00 of assets, the tax is then charged at a rate of 1.5% of the value. It is interesting to note that these rates are triple the rates charged prior to 1992. Compliance work and costs for most estates were not onerous, and the tax rate is still not particularly high. However, with a bit of planning, the tax can also be avoided relatively easily.

The rates of tax have remained the same since 1992, however, changes to the EAT were enacted in 2011 and implementation of new forms and processes were planned for January 1, 2013. This implementation date has now been delayed, however, it seems that there may be some retroactive effect, and Executors should now be prepared to comply with a more rigorous system and possible audits.

Even where estate trustees have been diligent in establishing their probate values, it can generally be assumed that the new forms and risks of audit will significantly add to the time delays and costs of probate. There will be significant valuation issues for many estates. For example, it can be both expensive and time consuming to appraise a private corporation and real estate. It is not hard to imagine a situation where the expense of valuation exceeds amount of EAT payable. In some of these cases, the asset may even transfer without a tax liability under the Income Tax Act. Even where clients have a personal and accurate knowledge of the value of an estate asset, they may now be required to prove that value. Estates that can quickly and easily be administered and distributed will have to address the fact that the province will have four years to reassess the values used in probate and challenge them.

Proposed Changes to the Income Tax

In the past many people found it was more tax effective to establish tax structured testamentary trusts in their Will and pay the probate fee than to explore probate avoidance techniques. The February, 2014 federal budget announced a significant reduction in the benefits of testamentary trusts.

Many people who have, in the past, employed testamentary trusts in their estate plan should now consider probate avoidance strategies in their estate plans. So, in the writer's view, yes, it is time to get aggressive on probate avoidance strategies.