

Wills, Estates & Trusts

April 2015

Changes to Estate Administration Tax Regime and Duties for Estate Trustees

In our previous newsletter, we outlined key changes to the Ontario estate administration tax (commonly referred to as “probate tax”) regime. At that time, we reported on the legislative changes and were waiting on regulations which would set out the specific reporting requirements of estate trustees under the new system. These regulations, and the related Ministry of Finance forms and guidelines, were introduced on December 22, 2014. It is very important that estate trustees in Ontario take note of these changes as they impose new duties on an estate trustee to accurately report information about the deceased’s assets and update incorrect and incomplete information with the Ministry of Revenue. Failure to perform those duties may lead to payment of hefty fines and even incarceration.

When an executor/estate trustee applies for a Certificate of Appointment to collect and deal with certain property of a deceased (formerly and still commonly known as “probate”), estate administration tax is payable on the total value of the property that belonged to the deceased at the time of death, subtracting the value of any encumbrance of real property. This value must be disclosed when an estate trustee applies to the Superior Court of Justice for a Certificate of Appointment of Estate Trustee, with or without a will, so that the Minister of Revenue may calculate the amount of the estate administration tax payable by the estate.

Duty to Give Information

Section 4.1 of the *Estate Administration Tax Act* (“EATA”) now provides for an estate trustee’s duty to give information to the Minister of Revenue. For any estate certificate application made after January 1, 2013, the estate trustee must give the Minister of Revenue specific information about the deceased and his or her assets for the Minister of Revenue to assess the estate with respect to the tax payable under the EATA. The new information return must be submitted for any probate application made on or after January 1, 2015. Therefore, if you are an estate trustee that has made or is planning to make an application for a Certificate of Appointment

after this time, you now have a duty to file an information return with the Ministry of Finance and report any inaccuracies that come to light thereafter.

Ontario Regulation 310/14 (“O.Reg. 310/14”), which came into effect on January 1, 2015, sets out the specific details that must be disclosed to the Minister of Revenue. An estate trustee must file an initial information return within 90 calendar days of the Certificate of Appointment being issued. In addition to information about the deceased and the application for the Certificate of Appointment, the information return will require:

- A complete list of assets of the deceased for determining the value of the estate, including the following information with respect to each asset:
 - o The actual value of the asset, or if this is unavailable, the estimated value at the time of the deceased’s death;
 - o For real property:
 - The full address;
 - The actual value of any encumbrances;
 - The assessment roll number; and
 - The property identifier.

- o For cash assets (i.e. bank deposits, investment certificates, loan receivables, securities, contracts of insurance without a named beneficiary, derivatives, and partnership or investment interests):
 - The type of asset;
 - The number of units held at the time of death;
 - Other particulars of the asset, such as the particular series of bonds or class of shares;
 - The name and contact information of the deceased's advisor, dealer, financial institution or other person holding the asset on the deceased's behalf; and
 - The account number in relation to the asset assigned by the person or institution holding the asset on the deceased's behalf, if applicable;
- o For assets other than real property and cash, detailed information about the asset, including the type of assets and other particulars;
- o For any information owned by the deceased as tenant-in-common, the asset and the percentage owned by the deceased person at the time of death
- The amount of tax owing or paid by the estate or the amount deposited;
- The name and contact information of every estate trustee of the deceased's estate;
- If the tax or deposit was calculated based on the estimated value of the estate, the date on which the estate trustee gave an undertaking to the court to confirm the value of the estate and a copy of that undertaking;

- If the Superior Court of Justice issued an estate certificate without payment of the required deposit, the estate trustee must provide a copy of the order obtained and any details about the security furnished to the Court;
- For any assets held by an advisor, dealer, financial institution or other person on behalf of the deceased, the return may include the following information: the name and contact information of the advisor, dealer, financial institution or other person who holds these assets, including any account numbers and the total value of all the assets within each account.

Duty to Keep Records and Update and Correct Information

The Minister of Revenue makes clear in its guide to completing the information return that all estate trustees will be expected to retain supporting documents for the assets and values reported in the information return. The notion that estate trustees should have supporting documentation for the assets and values they report is not new, but the assessment powers and 4 year period is new and should encourage all estate trustees to take care in the values they report.

Along with the duty to file an initial information return, an estate trustee now has an additional duty required to update information in an amended information return if he or she becomes aware within four years of the issuance of Certificate of Appointment that the information in the initial information return was inaccurate or incomplete. Again, the duty to report new or incorrect information relevant to the calculation of probate fees is not new, but the period and form of the reporting is. The refiling of the amended return must include the updated information and the reason for updating the return. This must be done no more than 30

calendar days after the estate trustee becomes aware of the inaccuracy in the initial return. The only time an estate trustee need not file an amended return is where he or she discovers the incorrect or incomplete information beyond four years after the tax is due.

If an estate trustee comes across a statement disclosing discovered property of an estate, he or she has the duty to give the Minister of Revenue a revised return containing the particulars of the after-discovered property within 30 calendar days of the discovery. Similarly, where an estate trustee finds out that there is any incorrect or incomplete information in previous filed returns, he or she must notify the Minister in writing within 30 calendar days after the discovery.

Penalties for Contravention of Section 4.1

The EATA imposes onerous penalties for an estate trustee who contravenes section 4.1 of the statute. If guilty, an estate trustee may have to pay a fine of at least \$1,000 to up to twice the amount of the tax payable by the estate if the amount is greater than \$1,000, may be imprisoned for a term of up to two years, or both.

Impact of the New Rules on the Probate Process

While the new amendments do not substantially change the application process for a Certificate of Appointment of Estate Trustee, with or without a Will, it is extremely important that an estate trustee fully understands and acts upon the new duties imposed by the EATA and O.Reg. 310/14. Understanding these obligations, keeping detailed records and properly providing updated information on the deceased's assets is important to avoid liability. If you are an estate trustee in the process of applying for a Certificate of Appointment after January 1, 2015, you should review the particulars of these new duties and ensure that you comply with them

for at least four years from the date the Certificate of Appointment is issued.

Impact of the New Rules on Estate Planning

Three common estate planning tools should be considered in light of the new reporting requirements described above, namely joint ownership, multiple wills and the use of alter ego and joint partner trusts.

Joint ownership is a common tool used by individuals to minimize probate fees and avoid the probate process altogether in certain circumstances. This is usually accomplished by adding children or others to accounts and real property as joint owners, thereby allowing title to the accounts and real property to pass to the surviving owner without the need for a Certificate of Appointment. Regrettably, many individuals utilize this type of planning without considering other consequences such as income tax liability and exposure to creditors and family law claims. Even more regrettable is that the planning is not effective to remove the asset from the probate fee calculation if the intention of the deceased is that the surviving child treat the asset as part of the estate and share it with the other beneficiaries. The new reporting requirements reinforce this by distinguishing property held jointly with right of survivorship which does pass to the survivor, and property that the deceased and the estate has a beneficial interest in. In our opinion, estate trustees who also own property jointly with the deceased will be required to report those jointly held assets as part of the value of the estate if they intend to deal with the property as part of the estate.

On the other hand, the new reporting rules reinforce the use of multiple wills as a valid tool to minimize probate fees. It does this by confirming that where a Certificate of Appointment is limited to assets administered under a particular Will, only the assets administered by that Will should be reported. Thankfully, the use of joint

ownership and multiple wills can be combined to provide clients with a relatively straightforward and seemingly secure way to minimize probate fees.

For clients that are over the age of 65 years and are interested in minimizing the probate tax and potentially avoiding the entire process altogether, the use of Alter Ego Trusts and Joint Partner Trusts may be a good option. These types of trusts can maintain a significant

degree of flexibility and control for the client while giving them some assurance that they are leaving as little work for their family as possible. The particulars of these trusts are beyond the scope of this newsletter, but our team is available if you have any questions.

If you require assistance with any of the above, the members of our Wills, Estates and Trusts Group would be pleased to assist you.

Cecile Ko is a member of the firm's Wills, Estates & Trusts Practice.



Pallett Valo LLP Wills, Estates & Trusts Practice

Our goal is to help our clients arrange their personal and business affairs in the most efficient and advantageous manner possible.

We work closely with our clients and their other professional advisors to develop a customized estate plan. We use vehicles like tax-planned trusts and wills to accomplish our client's personal objectives while minimizing adverse tax consequences, including the reduction of probate taxes. We are experienced in the complex issues relating to business succession planning and ongoing wealth transfer. In this way, our clients are better prepared to deal with aging, illness, incapacity and death.

Upon incapacity or death, we represent and advise Estate Trustees, beneficiaries, heirs, surviving spouses and other family members. We have unique expertise advising families with disabled beneficiaries. When disputes arise in the administration of an Estate, we provide experienced counsel to assist in their resolution, whether by litigation or other dispute resolution mechanisms.

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