# "Probate" Planning In Ontario

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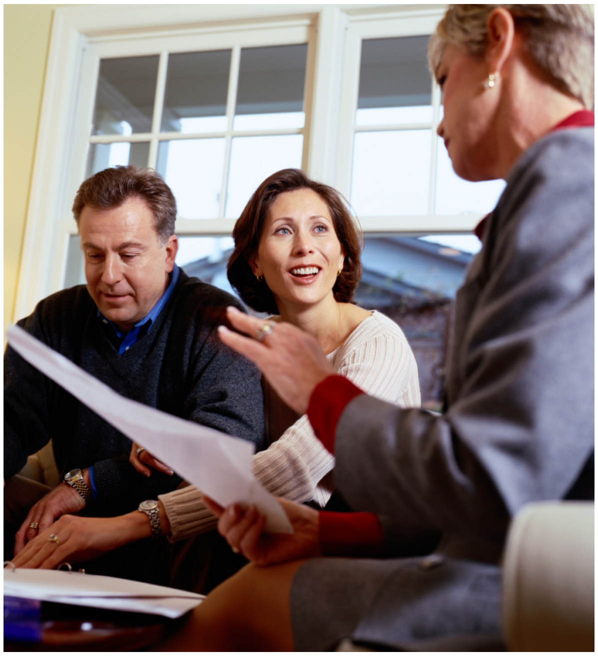

## A GENERAL OVERVIEW OF PROBATE

A valid Will takes effect from death. However, a third party who has possession of or control over the deceased person's property (e.g., a financial institution) will generally insist upon having the Will authenticated by a court before it will deal with the executor because of the protection this authentication process affords third parties. In Ontario, the process to obtain court authentication of a Will is an application for a "Certificate of Appointment of Estate Trustee with a Will", commonly referred to as an application for "probate". Probate also protects an executor who delivers the deceased's property in the event the will turns out not to be valid.

There is no universal probate requirement in Canada; however, in Ontario, the transfer of certain types of assets, such as real estate, from one person to another generally requires probate under specific land legislation. The transfer of other kinds of assets, like personal property (including jewellery, paintings, furniture) and privately held shares does not generally require probate, if all concerned – those transferring and those receiving – are satisfied that they can safely transfer and that they will get good title without having probate.

## CALCULATING "PROBATE FEES OR TAXES"

### What to include

The "probate fee", or "estate administration tax" ("EAT") in Ontario, is calculated based on the value of the assets of the deceased that are governed by a Will that is presented to the Court. This includes cash, personal property (jewellery and artwork), real estate and any other assets governed by or disposed of in the Will.

### Rates of Tax

In Ontario, a probated Will is subject to the EAT, which is calculated on the total value of the deceased's estate wherever situated. The formula for calculating the EAT is:

- $5 for each $1000, or part thereof, of the first $50,000 of the value of the estate, and
- $15 for each $1,000, or part thereof, of the value of the estate exceeding $50,000.

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The chart below provides examples of the amount of EAT payable based on the value of a particular estate:

| VALUE OF ESTATE | EAT PAYABLE |
|---|---|
| $500,000 | $7,000 |
| $1,000,000 | $14,500 |
| $2,000,000 | $29,500 |
| $3,000,000 | $44,500 |
| $4,000,000 | $59,500 |
| $5,000,000 | $74,500 |

## PROBATE PLANNING

Individuals and their advisors often implement one or more of the following methods of "probate planning" in an effort to minimize the EAT charged on the individual's estate.

### Joint Tenancy

Assets held in joint tenancy may, in certain circumstances, be excluded from a calculation of EAT. Joint tenancy is a form of joint ownership where each owner has an undivided interest in property with a "right of survivorship". The deceased's ownership interest is extinguished on death, meaning the assets owned in joint tenancy become the property of the surviving owner(s) as of right. As a joint tenancy ownership interest is extinguished on death in favour of the survivor, it does not form part of the deceased's estate and is therefore not typically subject to probate.

However, funds held by a parent and child in joint tenancy will generally be presumed to be held in a "resulting trust".[1] This means that the child is presumed to hold his or her ownership interest in the property as a trustee, such that the parent remains the sole beneficial owner of the property. If this presumption prevails, the property will still be considered to form a part of the estate of the parent. This presumption can be rebutted based on the facts of a particular case. Legal advice should be sought when transferring an account into joint tenancy with a child.

In addition, assets that are transferred by an individual into joint tenancy with another person solely for probate planning purposes may be considered to form a part of the original owner's estate, especially if it is clear that the original owner never intended to relinquish his or her sole control over the transferred property.

Although the prospect of reducing EAT payable on an estate may be appealing, transferring property into joint tenancy can have for consequences, including adverse income tax purposes. For example, the transfer will generally be considered a disposition of property for income tax purposes, which may cause tax to be payable. Once transferred, the consent of the other joint owner would be needed to transfer or mortgage the property. As well, the property could be exposed to creditor and family law claims of each joint owner.

### Beneficiary Designations

Proceeds from a life insurance policy or registered plan[2] that are validly designated to a named beneficiary may also be excluded from a calculation of EAT. Upon the death of the holder or annuitant, the proceeds are payable by the financial institution directly to the beneficiary. Consequently, these proceeds may pass outside the deceased's estate and are not, therefore, subject to probate.

[1] Pecore v. Pecore, 2007 S.C.C. 17.

[2] A "registered plan" for these purposes means registered retirement savings plans (RRSPs), registered retirement income funds (RRIFs), tax free savings accounts (TFSAs), and registered pension plans (RPPs). RPPs and locked-in RRSPs and RRIFs may have limitations on beneficiary designation.

## Multiple Wills

EAT applies to all of the assets governed in a particular Will submitted for probate, whether or not any party involved in transmitting them actually requires the probate. In order to reduce the number of assets included in an EAT calculation, legal practitioners have devised the technique of creating "multiple Wills", one which is submitted to probate because it contains all assets where another party, like a financial institution, may require probate, and another Will that contains all assets where probate is not required by anyone involved in the asset transmittal process.

While there has been some concern that the anticipated regulations to the Ontario Estate *Administration Tax Act, 1998* may eliminate the ability to avoid the EAT through the use of multiple Wills, no such regulations have been released as of the date of this article, so we cannot comment on that point.

## Trusts

Trusts may also be useful probate planning tools. For example, an individual who is 65 or older can establish an "alter ego" trust to reduce EAT. An alter ego trust is established when an individual (the "settlor") transfers assets into the trust and becomes the sole beneficiary of the income and capital of the trust during his or her lifetime. The transfer of these assets occurs on a tax-neutral "rollover" basis, meaning that the transfer will not constitute a disposition for tax-purposes. Upon the settlor's death, the capital of the trust is generally distributed according to the terms of the trust. The assets in an alter ego trust are held by the trustee and, consequently, the value of those assets are not included in the value of property owned by the settlor at death, thus precluding the application of EAT to the value of those assets.

Spousal and common-law partner trusts (also referred to as "joint partner trusts") operate in a fashion similar to alter ego trusts, but permit both the settlor and the settlor's spouse to be beneficiaries of the income and capital of the trust during their lifetimes. Upon the second spouse's death, the assets will pass according to the trust from the trustee to the remainder beneficiaries of the trust outside of the deceased's estate.

Although alter ego trusts and joint partner trusts can effectively reduce or eliminate EAT, the implementation of these trusts requires careful consideration of the income tax consequences of this type of probate planning.

## Gifts Prior to Death

Gifting assets prior to death is an easy and effective way to reduce or eliminate EAT. However, depending on the transaction and the identity of the recipient, unintended tax consequences may arise, both at the time the gift is made (i.e., capital gains realised on the disposition of the asset) and afterward (i.e., attribution of income arising from the gift to the donor). And of course, once given away, the assets no longer belong to the donor.

## No Probate Planning

In some cases, no probate planning is sometimes the best planning.

A plan under which a Will is not probated (i.e., the use of multiple Wills, discussed above) carries some risk. Probate affords protection to third parties who rely on the terms of the Will. A Will that is not probated may be invalidated by a court in the future and an individual who has distributed the assets governed by the Will may be personally liable to the extent of those distributions. Probating a Will may also start the clock on important legal limitation periods, which can provide additional protections to the executor, the beneficiaries and third parties.

As well, the implementation of a probate planning strategy may ultimately cost the testator as much as or more than the EAT that would have otherwise been charged on his or her estate, in which case it may be simpler to avoid the implementation of a probate planning strategy altogether. Remember, the tax is paid after the testator dies so it doesn't actually benefit the testator during his or her lifetime.

## Final Comments

Probate planning can result in the reduction of EAT payable upon death of a testator. However, certain strategies used to avoid EAT can result in other substantial consequences. The practicality of implementing one or more probate planning strategies in a particular case should be explored with a tax and estate planning lawyer in order to ensure the estate plan is properly designed, which will minimize the likelihood of unintended results.

In addition, where a probate planning strategy depends, to some extent, upon third party involvement, input should be sought by the third party with respect to the plan prior to implementation. For example, before transferring a bank account into joint tenancy, or planning for signing authority of a corporation that holds an investment account to pass under an unprobated will, the financial institution administering the account should be consulted as to whether there might be any issues.

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*This article was prepared by the Private Client Services practice group of Miller Thomson LLP, a full-service law firm. Miller Thomson LLP’s Private Client Services practice group provides a complete range of estate planning and personal tax services for clients with domestic, cross-border or off-shore requirements. This practice group has extensive experience in all aspects of estate planning from the conception and implementation of the estate plan to the eventual administration of the estate.*

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