LEGAL BUSINESS REPORT | ALPERT LAW FIRM
THE TAX LAW PROFESSIONALS
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STRATEGIES TO MINIMIZE ESTATE ADMINISTRATION TAX

This issue of the Legal Business Report provides current information to the clients of Alpert Law Firm on strategies to reduce estate administration tax in Ontario. It also provides information on recent amendments to the Ontario *Estate Administration Tax Act*.

Alpert Law Firm is experienced in providing legal services to its clients in tax and estate planning matters, tax dispute resolution, tax litigation, corporate-commercial transactions and estate administration. Howard Alpert has been certified by the Law Society as a Specialist in Estates and Trusts Law.

A. THE ONTARIO *ESTATE ADMINISTRATION TAX ACT*

When a will is probated in Ontario, pursuant to the *Estate Administration Tax Act,* an estate administration tax ("EAT"), or "probate fee", is levied on the value of any assets that are subject to the will. This tax is imposed in addition to any income tax arising pursuant to the *Income Tax Act* and any other applicable taxes. Any assets that flow through a probated will are taxed at $5 per $1,000 on the first $50,000 worth of assets and $15 per $1,000 thereafter. As an example, a probated estate worth $10 million would be liable to remit approximately $150,000 of EAT.

B. CONSIDERATIONS REGARDING PROBATE OF A WILL

An application for a certificate of appointment, or "probate", is the judicial process through which the Ontario Superior Court of Justice confirms the authority of the estate representative. When a will is probated, the Court issues a Certificate of Appointment of an Estate Trustee with a Will ("Estate Certificate"). The certificate confirms the identity of the estate representative and verifies that the testator is deceased. It also substantiates that the will is a lawful and authentic document that complies with all statutory and common law requirements. For example, the will must be the final and complete will of the testator, it must be validly signed and witnessed, the testator must have made the will with the requisite intention and mental capacity, and so on. The will can only be probated if the Court is satisfied that all required conditions have been met.

An estate representative's authority stems from the will itself rather than from the Court, meaning that the estate representative has full legal authority to deal with the assets of the deceased from the moment of death with or without obtaining an Estate Certificate. Therefore, in theory, there is no strict legal obligation to probate a will.

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Despite this, an Estate Certificate may become necessary due to the provisions of particular statutes or because of the requirements of third parties, such as a financial institution or a public corporation, who need the Court's assurance that the estate representative has the authority to deal with the property of the deceased. Probate may also provide the third party with legal protection from liability in the event that a disgruntled beneficiary subsequently claims that an asset was incorrectly distributed to the third party by the estate representative. Assets that usually need to go through probate are shares in a public corporation, funds held in a bank account, real estate, corporate bonds, most types of government bonds, and items held in safety deposit boxes.

Where assurances are unnecessary, certain assets may not require probate before they can be distributed. For example, shares in a closely-held private company may not need to be probated because the director of such a company is likely a friend or relative of the deceased who will not require the formality of an Estate Certificate. Assets in foreign jurisdictions require probate only in the jurisdiction in which they are located. Assets that generally do not require probate include personal property (such as furniture or art), vehicles, jointly-held property with a right of survivorship, shares in a private company, debts owed to the deceased by a privately-held company, cash or bearer certificates, real property that is situated outside Ontario, Canada Pension Plan survivor benefits, and proceeds from either life insurance policies, Registered Retirement Savings Plans, Registered Retirement Income Funds, or Canada Savings Bonds that are directly payable to a named beneficiary.

Within specified limits, Canada Savings Bonds or other Government of Canada bonds may be distributed without probate, provided that the debts of the estate have been paid or will be paid. The current specified bond limits are as follows: (i) where the spouse is the sole beneficiary, $75,000 may be transferred without obtaining probate; (ii) where the children alone or the children together with the spouse are the sole beneficiaries, $50,000 may be transferred without obtaining probate; and (iii) where the parents, siblings or other family members, or common-law spouse, same-sex partner, or friend are the sole beneficiaries, $20,000 may be transferred without obtaining probate. An Estate Certificate is required in order to transfer bonds to persons not listed above, including organizations such as a church or charity.

It is also important to note that an Estate Certificate will be required for the distribution of all assets, regardless of their nature if: (i) third parties refuse to transfer title to the assets, (ii) the assets are situated in Ontario but the estate representative is situated outside of Ontario, or (iii) the estate is involved in litigation as a plaintiff or defendant.

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C. HOW MULTIPLE WILLS MAY BE USED

In general, reduction of EAT is achieved by reducing the value of assets that undergo probate and pass through the estate. The use of multiple wills is one way this can be accomplished.

All assets that can be distributed only after obtaining probate are dealt with under a primary will. Assets that can be distributed without probate are covered in a secondary will. If it is unclear whether or not an asset will require probate, it can be put into a separate will on its own so that it can be probated if necessary without affecting other assets. Upon the testator's death, only the primary will needs to be submitted to the Court and EAT is calculated based only upon the value of the assets included in that will.

The use of multiple wills as a strategy for estate planning in Ontario is possible because of subsection 32(3) of the Ontario *Estates Act* and because of a landmark decision from 1998, *Granovsky Estate v Ontario*, which essentially sanctioned the technique. In that case, the Court ruled that there was no need to pay EAT on property that was contained in a second will and that could be distributed without probate.

D. *GRANOVSKY ESTATE v ONTARIO*, [1998] OJ No 508

This decision of the General Division of the Ontario Court of Justice was subsequently appealed by the Government of Ontario but it abandoned the appeal before being heard by the Ontario Court of Appeal.

The testator passed away on December 24, 1995, leaving behind two wills that explicitly dealt with separate types of assets. The wills were dated with the same date and had clearly been prepared to complement one another.

The first will contained assets with a value of approximately $3.2 million. The Court probated the will and the estate paid EAT on the assets it included. The second will directed the distribution of assets that did not require probate: approximately $25 million worth of shares in a private corporation and capital in the form of debt owed to the testator from that private corporation. The second will was not submitted for probate, resulting in savings of approximately $375,000 in EAT that would have been payable on the shares and capital it contained.

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The Government of Ontario commenced litigation on the basis that EAT should be calculated on the value of all assets at the time of death, regardless of whether probate was sought with respect to those assets. In contrast, the position of the estate was that only those assets that required probate formed the basis on which to calculate EAT. The divergent views stemmed in part from two apparently contradictory provisions within the Ontario *Estates Act*. Section 53 of the Ontario *Estates Act*, which has been repealed, stated that EAT was to be "calculated on the value of the whole estate". Conversely, subsection 32(3) of the Ontario *Estates Act* allowed for a grant of probate on only a portion of the deceased's estate, and stated that in such a case it would be appropriate to set forth for the Court the value of only that part of the estate.

The Court ruled in favour of the estate, determining that there was no requirement to submit the secondary will to probate or to pay EAT on the assets it contained. The Court found that the second will did not require probate because the directors of the companies whose securities were bequeathed under it did not require probate in order to transfer the securities. The language of the Ontario *Estates Act* left open the option of obtaining limited probate and, absent any specific legislative prohibition on limited probate or the use of multiple wills, the Court found the technique valid. In addition, because other estate planning techniques, such as transferring assets to joint tenancy, can prevent assets from being included in calculating EAT, the Court considered it "common sense" that limited probate could have the same effect.

The Court also stated that no legal obligation to obtain probate exists and testators have a right to arrange their affairs by any legal means available in order to pay as little tax as possible. In this particular case, the wills were complex, well-crafted documents wherein the testator had carefully planned the administration of his estate. The wills were both valid, and clearly showed the testator's intention to dispose of different classes of assets separately.

E. ***THOMPSON v WATSON*, [1999] OJ No 1351**

In this Ontario Superior Court of Justice case, a deceased individual left her entire estate in her will to The Hospital for Sick Children Foundation (the "Foundation"). The will was challenged by the deceased's sister on the basis of lack of testamentary capacity to make a will and the deceased's sister sought a resulting declaration that the deceased had died intestate and that she was entitled to the entire estate as the sole next of kin.

The Foundation and the deceased's sister agreed to settle their claims on the basis that the estate be divided equally between them. However, the estate consisted of

money that was managed by the Public Guardian and Trustee (the "PGT"). The PGT took the position that where the value of an estate's property is worth more than $20,000, it is required by the Ontario *Public Guardian and Trustee Act* to request probate in order to distribute the estate's assets. The PGT was not prepared to assume liability for an improper distribution of estate property without probate so it refused to distribute the estate according to the settlement agreement. The deceased's sister brought a motion on behalf of herself and the Foundation for an order directing the PGT to transfer the estate property that was in its possession and under its control without the requirement of obtaining probate. This was necessary because in the course of obtaining probate a court would be declaring either the deceased's sister or the Foundation to be entitled to the entire estate, which would defeat the purpose of their settlement agreement in which they agreed to divide the estate.

The Ontario Superior Court of Justice allowed the motion and granted the orders requested. The Court found that the PGT is entitled to require justification and authority for delivering estate property. However, the Court found that proof of the ownership of the estate property is sufficient justification and authority and that such proof had been demonstrated on the facts of the case and would not have been enhanced or re-enforced by obtaining probate. The Court also made note that reference to probate fees by the PGT was irrelevant and distracting because avoidance of probate fees was not the primary objective of the motion.

The Court cited *Granovsky Estate* approvingly with respect to the principle that probate is not required to deal with certain estate property in certain circumstances. The Court concluded that the facts in the present case were an instance in which probate was not required.

F. ***SILVER ESTATE v SILVER*, [2000] OTC 680, 35 ETR (2d) 287**

The Ontario Superior Court of Justice considered whether a will is required to be submitted for probate in order for the court to approve an arrangement varying testamentary trusts. The Court was asked to approve the variations on behalf of the minor, unborn, and unascertained beneficiaries of the testamentary trusts. The counsel for the Children's Lawyer, who represented these beneficiaries, supported the application. Each of the other beneficiaries of the testamentary trusts had consented to the variations, subject to the Court's approval.

The Court was willing to allow the application and approve the variations, if it was not prevented from doing so by the fact that the will that created the testamentary trusts was not, and was not anticipated to be, submitted for probate. The estate was opposed

to submitting the will for probate because it would trigger probate fees. The Court assessed whether it could grant such a judgment without requiring the will to be submitted for probate.

The Court considered that the issue at bar was not truly an "estate matter", since neither the validity of the will or the title of the executor was disputed and at the time of the application the executors held the remaining assets in trust so the assets were no longer assets of the estate. In allowing the application, the Court framed the sole issue as whether the variation would be for the benefit of those beneficiaries who were not able to consent for themselves.

The Court noted that its order would not vary the trusts but that the variation of the trusts takes effect by virtue of the consents of the beneficiaries. Therefore, the Court only had to determine whether to give consent on behalf of those beneficiaries not able to do so themselves, which would not require an analysis of the validity of the will before addressing the merits of the proposed variation. In the alternative, the Court stated that if it was required to determine the validity of the will before addressing the proposed variation, it could do so without requiring the executors to submit the will for probate.

G. ***POLLOCK v MANITOBA*, 2004 MBQB 188**

In this decision of the Court of Queen's Bench of Manitoba, the Court held that when a testator has made a single will, the reduction of EAT is not a special circumstance that would justify a limited grant of probate. The testator had a single will that dealt with both immovable and movable property. Probate was only needed to transfer the immovable assets into the beneficiary's name so the estate asked the Court for a limited grant of probate only with respect to the immovable property so as to minimize the probate fees payable by the estate.

In refusing to grant limited probate, the Court distinguished *Granovsky Estate*, noting that in that case the testator had used two wills. *Silver Estate* was also distinguished by the Court on the basis that it did not deal with whether the court could make a limited grant of probate but whether probate was required for the court to deal with an application to amend a trust established under a will. The Court remarked that *Granovsky Estate* and *Silver Estate* were simply authority for the proposition that an executor is under no duty to apply for probate of a will where probate is not required in order to administer the estate.

Although *Pollock* is a Manitoba decision, the relevant provisions of the act considered in the case are similar to those in Ontario. Therefore, even though the case

has yet to be cited by an Ontario court its holding is likely applicable in the context of estate administration in Ontario.

H. *RE KERZNER ESTATE* (2008), 42 ETR (3d) 311, 169 ACWS (3d) 224

This decision of the Ontario Superior Court of Justice addressed the issue of the ability of a court to determine that a will that is submitted for probate remains in force and has not been revoked even though there are other wills that have not been filed with the court. In a situation where a testator has prepared more than one will, only one of which is submitted to the court, the Court held that the estate representative may file an affidavit swearing that the probated will is in force as has not been revoked by the other will(s). Therefore, it is not necessary to submit the additional wills, which, if required, would defeat the purpose of using multiple wills as a means to minimize the value of the estate on which EAT would be payable.

I. *BROSAMLER ESTATE v THE QUEEN*, 2012 TCC 204

In this decision the Tax Court of Canada held that probate fees and legal fees paid to obtain probate could be added to the adjusted cost base of property when determining the capital losses realized upon its disposition. The appeal from a deceased taxpayer's income tax reassessment was brought by the executrix of his estate. The deceased taxpayer was a German citizen who owned three rental properties in Vancouver, British Columbia. Due to the large inheritance tax payable on the taxpayer's estate under German law, the executrix determined that she had to generate approximately $3 million and consequently would have to sell at least two of the Vancouver rental properties.

The deceased taxpayer's estate needed to have the German grant of probate resealed in British Columbia in order to sell the Vancouver rental properties. The estate had the probate resealed in British Columbia and sold all three of the Vancouver rental properties. The executrix added a portion of the British Columbia probate fees and the legal fees incurred to have the probate resealed to the adjusted cost base of the Vancouver rental properties when determining the capital loss incurred for income tax purposes. The estate was reassessed by the Canada Revenue Agency, which disallowed the inclusion of these fees in the adjusted cost bases.

The Tax Court held that it the estate was allowed to include a portion of the British Columbia probate fees and the associated legal fees in the adjusted cost bases of the disposed Vancouver rental properties. The Tax Court held that the estate could

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include a portion of the fees that was equal to the proportion of each property's value relative to the value of the entire estate on which British Columbia probate fees were assessed.

J. USING MULTIPLE WILLS IN MULTIPLE JURISDICTIONS

Multiple wills can also be used to assuage difficulties associated with owning property in foreign jurisdictions. In a time of growing globalization it is becoming increasingly common for Canadian taxpayers to own assets in other provinces or other countries. If this is the case, it is vital to consider whether the laws of a foreign region will affect a proposed distribution of property upon death.

Where a person owns assets in several jurisdictions, there is the possibility that a tax might be levied in each jurisdiction on the same asset. In addition, different jurisdictions likely have differing laws regarding how assets are dealt with upon death.

There may be conflicts of law regarding validity of a will, formal requirements for a will, distribution of movable property, support that must be provided to dependants, and what constitutes "residence" or "domicile" for the purposes of determining the correct jurisdiction to administer an estate. Settling these matters may be costly in terms of time and money for the estate of the deceased.

One method commonly proposed to address ownership of foreign property upon death is to divide assets into several groups which are governed by different wills. Each will covers only the assets in one particular jurisdiction and is prepared in accordance with the laws governing that jurisdiction. Aside from potentially reducing EAT, another advantage of using multiple wills for multiple jurisdictions can be simplicity. Each will can be put through the proper court process independent of the others, and any delays or complications that arise in the administration of one should not affect the others.

A combination of legal propositions, make it theoretically possible for a testator to choose, by clearly indicating in the will, the jurisdiction and governing law for his/her will. At common law, a will is to be interpreted in accordance with the testator's intentions, as far as they can be determined. With regards to jurisdiction, there is a rebuttable presumption that the testator's intentions are for the will to be governed by the laws of the jurisdiction where the testator is domiciled at the time the will is executed. However, this presumption can be rebutted by evidence that the testator intended the laws of another jurisdiction to apply.

Therefore, each will should clearly identify which jurisdiction's laws apply to it as well as which assets it includes and excludes. However, this area of law is not clearly settled, particularly in regard to testamentary trusts and their administration. The possibility of using this technique should be assessed on an individual basis and the wills drawn with care and precision to avoid any complications.

For property that is considered "immovable" such as real estate, the governing law is typically the law where the land is situated. Therefore, if the only asset outside Ontario is real estate, a second will may not be needed since foreign real estate is excluded when assessing Ontario EAT in any case. However, drafting a will ensures that the asset will be distributed according to the testator's wishes and not according to the rules of intestacy.

The preparation of multiple wills in multiple jurisdictions can be a useful tool to reduce EAT and simplify the administration of an estate. It can also be a complex matter involving conflicts of law in addition to customary estate planning considerations. Consequently, it should only be undertaken after careful research and analysis by legal professionals from each respective jurisdiction.

K. OTHER CONSIDERATIONS REGARDING THE USE OF MULTIPLE WILLS

Minimizing EAT may not be the only reason for using more than one will. As discussed above, having assets in several jurisdictions could also inform this decision. Additionally, or alternatively, individuals may wish to consider the following possible advantages and disadvantages of using multiple wills.

For some taxpayers, maintaining privacy in regard to the financial situation of their estate is a concern. Once a will is probated, its contents are no longer confidential; it becomes a matter of public record. This means that any member of the public who chooses to view the record could see the details of the gifts, both in respect of the recipients and the amounts. Deciding to forego probate on some assets helps to retain a degree of confidentiality regarding the estate.

Protecting the estate from the claims of creditors or family law claimants may be another consideration. Assets that either pass directly to a testator's named beneficiary (such as a Registered Retirement Savings Plan designated to a named beneficiary) or that are distributed without probate are not included in the net value of the estate. These assets may not only escape EAT but also claims against the estate.

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Another concern may be ensuring immediate liquidity of assets for one's beneficiaries. Probate can be a formalistic and time-consuming process. In some cases, beneficiaries might require access to the assets in a timely manner, which is more easily accomplished when probate is not necessary.

One additional factor for reflection could be reducing the estate representative's fees. Often the estate representative is a family member who acts without taking a fee. However, sometimes a neutral, more experienced estate representative may be needed, for example if the estate is particularly complex or if the family dynamics are complicated. Generally, the fees are a percentage of the assets received and distributed by the estate. Reducing the value of probated assets may reduce the amount of fees received by the estate representative.

However, a potential drawback of not probating a will relates to legal responsibility. Probate protects the person acting as estate representative from liability. Generally, an estate representative will not be held personally liable for losses suffered by the estate as long as the estate representative acts with the care and diligence that a reasonable and prudent person would exercise in conducting his or her own affairs. However, not probating a will can make it easier for a third party to challenge a will or for a dependant to bring a support claim. A testator may not want to expose the estate representative to that risk.

Other difficulties surrounding the use of multiple wills involve the care with which they must be drafted. For example, the testator and drafter must take care when signing sequential wills that the later will(s) do not unintentionally revoke the earlier. In addition, it is critical that the parties involved ensure that nothing in the secondary will requires probate. This may involve soliciting the third parties involved with those assets to canvass what documentation they would require in lieu of probate documents to transfer the assets. If the documentation requirements are too onerous, simply probating the assets may be preferable. In addition, there must not be any overlap of the assets dealt with under each will. The definitions of assets included under each will has become increasingly important with the potential for audits of the value given to assets included under a probated will, during the course of which auditors from the Ministry of Finance will most likely request copies of any non-probated wills. In the case of smaller estates, the financial advantages of using multiple wills may not justify the time and effort involved in planning and drafting the documents. However, the effects of the recent amendments to the Ontario *Estate Administration Tax Act* must be taken into account.

In addition to multiple wills, there are several other strategies that can be used to reduce taxes payable upon death including the use of trusts, such as alter-ego or joint partner trusts, or the creation of joint tenancies, which are addressed in other issues of

the Legal Business Report. Due to different taxation rates for different types of trusts it may be most desirable for a testator to put different types of assets into different types of trusts. This matter is dealt with in more detail in the issue of the Legal Business Report on alter ego trusts. A testator is well-advised to speak to a qualified estate planning lawyer regarding the advantages and disadvantages of each strategy in respect of the testator's particular assets and circumstances before deciding how to proceed.

L. RECENT AMENDMENTS TO THE *ESTATE ADMINISTRATION TAX ACT*

(i) BACKGROUND

Prior to the Ontario government's decision to triple the rate of EAT in 1992, the average annual increase in revenues from such taxes between 1972 and 1992 was 9.7%. If individuals had not reacted to the significant rate hike in 1992, the revenue from EAT would have been approximately $520 million in 2011. However, the actual revenue that the Ontario government received from EAT in 2011 was approximately $111 million. The Ontario government believes that the significant shortfall is attributable to a proliferation of false affidavits, which were required to be sworn by estate representatives, in respect of the value of estates. However, there are a variety of other reasons that could explain the shortfall, such as multiple wills, alter-ego or joint partner trusts, *inter vivos* gifts from parent to child, and the creation of joint tenancies between parent and child. In an effort to correct this perceived evasion of EAT, the Ontario government has made amendments to the *Estate Administration Tax Act* and introduced a new regulation under that act.

(ii) NEW FILING REQUIREMENT

On December 22, 2014, the Ontario government filed a new regulation, Regulation 310/14, under the *Estate Administration Tax Act* which requires an estate representative to file certain information about a deceased person and his/her estate. The new regulation applies to applications for an Estate Certificate filed on or after January 1, 2015 and requires an estate representative to file an Estate Information Return ("Information Return") with the Ontario Ministry of Finance within 90 calendar days of receiving an Estate Certificate. An Information Return must be filed even if no EAT is payable, including estates that are exempt from EAT because their value is less than $1,000. An Information Return is deemed to have been given to the Minister on the day it is received by the Minister.

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The Information Return must include a complete list of the assets of the deceased person used to determine the value of the estate. The new regulations have not made any changes to the way an estate is valued; an estate is still valued with reference to the fair market value (the "FMV"), at the time of the testator's death, of the assets included in the probated will only. However, now the Ministry of Finance has the ability to verify and audit the reported value of the estate so that there is accountability and liability for the valuations included in the Information Return.

When a testator uses multiple wills, they should consider whether language is vague such that it is uncertain which assets are included and excluded in each will. Any uncertainty could be problematic upon reassessment by the Ministry of Finance. Careful drafting has become increasingly important in the face of potential audits. Assets that pass outside of the estate and are not to be included in the Information Return, include assets jointly owned with a right of survivorship; Registered Pension Plans, Registered Retirement Savings Plans, Registered Retirement Income Funds, and Tax Free Savings Accounts with a beneficiary designation or beneficiary declaration; and Canada Pension Plan death benefits.

Assets in which the deceased person had a beneficial interest at his/her time of death must be included in the Information Return. For example, if during her lifetime, a now deceased mother had transferred a bank account into joint tenancy with an adult child, subject to a right of survivorship, purely for convenience, and not as a gift. There is a presumption that the adult child holds the bank account on resulting trust for the mother's estate and on the facts that the mother did not intend the transfer to be a gift, the presumption of resulting trust would not be rebutted on a balance of probabilities. Therefore, the mother's estate would have a beneficial interest in the bank account, the value of which would need to be reported in the Information Return.

Generally, the value of the worldwide assets of the deceased that are referred to in the probated will must be reported in the Information Return in order to determine the value of the estate. An exception is real property; only real property located in Ontario needs to be included in the Information Return. Additionally, only the assets located in Ontario need to be included in the Information Return when the estate representative is issued: (1) a Confirmation of Resealing of Appointment of Estate Trustee, (2) a Certificate of Ancillary Appointment of Estate Trustee with a Will, or (3) a Certificate of Appointment of a Foreign Estate Trustee's Nominee as Estate Trustee without a Will.

On the Information Return, the estate representative must disclose the FMV of each asset at the time of the testator's death and, depending on the type of asset, provide certain details in respect of each asset. It may be necessary to have an asset

valued by a professional valuator or a professional with expertise in the asset (e.g. for valuing securities that are not widely-traded).

The Information Return breaks down assets into five general categories: (1) real estate in Ontario, (2) bank accounts, (3) investments, (4) vehicles and vessels, and (5) other property. Generally, for each asset in each of these categories, the estate representative must disclose: (1) the FMV at the time of death; (2) the percentage ownership attributable to the deceased person; and (3) the value of the deceased person's percentage ownership (item 1 multiplied by item 2). Any additional disclosure requirements specific to each type of asset are discussed below. Encumbrances against any asset other than real estate cannot be deducted from the FMV of the assets.

If the FMV of the assets is not available at the time the estate representative applies for an Estate Certificate, the estate representative can provide an estimated value of the estate provided that it gives an undertaking to the Court to, within 6 months after giving the undertaking: (1) file a sworn statement as to the actual total FMV of the estate and (2) pay any additional EAT payable beyond the amount deposited with the court based on the estimated value. When the estate representative files the estate's Information Return it must include the date the undertaking was given and a copy of the undertaking. Within 30 calendar days of fulfilling the undertaking, the estate representative must file an amended Information Return with the Ministry of Finance.

Section D of the Information Return pertains to real estate in Ontario. For all real estate in Ontario, including real estate in which the deceased person had a beneficial interest, the estate representative must disclose: (1) the assessment roll number assigned to the property by the Municipal Property Assessment Corporation; (2) the Property Identifier Number assigned to the property in the Land Registry System; (3) the amount owing on any encumbrances registered against the deceased person's interest in the property at the time of death (e.g. mortgages, collateral mortgages, liens); and (4) the net value of the deceased person's interest in the property (value of deceased person's percentage ownership minus item 3).

Section E of the Information Return addresses bank accounts. The cash portion of a brokerage account should be included under Section F: Investments. For each bank account, from all financial institutions anywhere in the world, the estate representative must disclose the branch address of the financial institution where the bank account is owned.

Section F of the Information Return relates to investments, including Canada Savings Bonds, guaranteed investment certificates, securities, and partnership

interests. Mortgages given to and loans receivable by the deceased person and insurance contracts without a named beneficiary should be included under Section H: Other Property. For each investment owned by the deceased person, the estate representative must disclose: (1) the name of the issuer; (2) the number of units owned; and (3) details about the type of investment. If the investments are held by a broker, agent, adviser, dealer, financial institution, or any other person, the estate representative only needs to provide: (1) the name, telephone number, and address of the person holding the investments for the deceased person; (2) the account number(s); and (3) the total FMV of the investments within each account.

A registered education savings plan ("RESP") is owned by the subscriber(s) of the plan and not the beneficiary(beneficiaries). If the RESP is owned by one subscriber who dies without designating or declaring a successor subscriber, the RESP will form part of the deceased subscriber's estate.

A registered disability savings plan ("RDSP") forms part of the beneficiary's estate. Upon the beneficiary's death, all grants and loans received in the 10 years preceding his/her death must be returned to the federal government. The remaining proceeds of the RDSP will pass to the beneficiary's estate and must be included in its total value when completing the Information Return and calculating EAT.

Section G of the Information Return corresponds to vehicles and vessels, including motorcycles, boats, all-terrain vehicles, bicycles, and snowmobiles. With respect to each vehicle and vessel, the estate representative must disclose: (1) the Vehicle Identification Number or Hull Identification Number and (2) the make, model and year.

Section H of the Information Return is a catch-all for all other property that was not listed in previous sections. For example, business interests, copyrights, patents, trademarks, household contents, art, jewelry, cash not reported elsewhere on the Information Return, mortgages given to the deceased person, loans receivable by the deceased person, and insurance contracts without a named beneficiary. A description must be given for each item. Similar types of property may be grouped together and valued as a group but items of significant value should be identified separately.

Loans receivable that are forgiven in a will may also need to be included in the value of the estate and disclosed on the Information Return. Such an interpretation would be based on the 1992 decision of *Re Brown Estate* (97 DLR (4th) 163, 47 ETR 246) which interpreted the phrase "all the real and personal property of the deceased at the time of death" to mean "the property that this deceased owned just before he died". In this case, the Saskatchewan Court of Queen's Bench also highlighted the clear

distinction that forgiveness of a debt in a will is an instruction to the deceased's estate representatives regarding how to deal with an estate asset and not a disclaimer that the asset does not form part of the estate. Since the definition of "value of the estate" in subsection 1(1) of the Ontario *Estate Administration Tax Act* includes "all the property that belonged to the deceased person at the time of his or her death", this would likely be interpreted in the same way as the similar wording in Saskatchewan. Consequently, a testator should be aware of this when forgiving debts in a will and should consider whether it would be better to do so in a private will.

Section I of the Information Return outlines the calculation of EAT. Once the total amount of EAT payable is calculated, the amount of the deposit paid in conjunction with the filing of an Application for an Estate Certificate is deducted to determine the net amount of EAT owing or the refund owed to the estate.

Each estate representative must include his/her information in Section C of the Information Return and must certify the Information Return after reading the verification statement in Part J, thereby attesting that the information provided is "true, correct and complete".

If, within four years of the issuance of an Estate Certificate, an estate representative becomes aware that any information on the Information Return is incorrect or incomplete, the estate representative must deliver an amended Information Return to the Ministry of Finance, including an explanation as to why the Information Return is being amended, within 30 calendar days of the estate representative becoming aware that the information is incomplete or inaccurate. There is no requirement for an estate representative to file an amended Information Return after this four-year period has passed since the Estate Certificate was issued. The four-year period is not extended when a revised or succeeding Estate Certificate is issued.

When additional estate property is discovered after the Information Return has been filed, the estate representative must file a statement with the Court disclosing the subsequently-discovered property within 6 months of the discovery. Additionally, the estate representative must deliver an amended Information Return to the Ministry of Finance within 30 calendar days of delivering the disclosure statement to the court.

Upon applying to the Superior Court of Justice for an Estate Certificate, the estate must pay a deposit of the EAT that will become payable, or estimated EAT as the case may be, to the Court. If, after an estate representative has filed an Information Return, the estate receives a full or partial refund of the deposit of EAT it paid to the court, an amended Information Return must be delivered to the Ministry of Finance within 30 calendar days of receiving the refund.

(iii) AUDIT CONSIDERATIONS

The Ontario Ministry of Finance has audit and verification functions, which confer upon it the power to assess or reassess an estate in respect of its liability for EAT. The assessment, or reassessment, must be made: (1) within four years from the date that the EAT became payable or (2) at any time that the Ministry of Finance considers reasonable, upon establishing that: (a) the estate representative failed to file the required information or (b) an individual made a misrepresentation through neglect, carelessness or willful default, or committed fraud in supplying or omitting information regarding the estate.

A deposit equal to the EAT, or estimated EAT as the case may be, must be paid at the time the application for an Estate Certificate is filed with the Court. The EAT becomes payable on the date the Estate Certificate is issued by the Court. When the Estate Certificate is issued, the deposit is applied toward the EAT that is payable. The four-year limitation period begins upon issuance of the Estate Certificate and is not extended following the issuance of a revised Estate Certificate.

Estate representatives must keep all records and books of account in support of all entries on the Information Return(s) at their principal place of business or residence for a minimum of four years after the date the EAT became payable. Estate representatives should be able to substantiate all asset valuations included on the Information Return(s). With respect to estate assets of a modest value, such as household assets that are reported together as one line item, estate representatives could consider whether it would be most efficient for them to make a video recording of the house's interior to support the valuation.

When combined with the audit powers available to the Ministry of Finance under the Ontario *Retail Sales Tax Act*, the Ministry will have the power to require that the estate representative and certain third parties, such as accountants involved in the valuation of the estate's assets, provide assistance with, and answer all questions pertaining to, an audit. The Ministry is also permitted to enter premises, inspect properties, and examine documents, such as a secondary will that is not being submitted to probate, in the course of its audit, subject to provisions relating to the right to claim solicitor-client privilege.

Although the CRA is ordinarily not permitted to disclose any of the information that is obtained through an audit, the Ministry of Finance may disclose information it obtains to any representative of the Crown for the purpose of collecting taxes under any legislation. Due to this type of informational sharing between the Ministry of Finance and other government bodies, all documents that are filed with the Ministry of Finance

should be consistent with documents that are provided to other federal and provincial departments.

Anyone who fails to provide the information prescribed under the regulations or requested during the course of an audit to the Ministry of Finance in a timely manner will have committed an offence. Additionally, it is an offence where an individual makes a statement that is false or misleading in respect of any fact at the time it was made, and in the circumstances in which it was made. An omission to state a fact whose omission makes a statement false or misleading is also an offence. On conviction, offences may be punishable by fines, from a minimum of $1,000 to a maximum of twice the EAT payable, and/or imprisonment of not more than two years.

An estate representative who fails to file an Information Return within the prescribed time, or who makes false or misleading statements on an Information Return, is guilty of an offence and, on conviction, is liable to a fine of at least $1,000 and up to twice the tax payable by the estate and/or imprisonment of not more than two years.

(iv) ADDITIONAL CONSIDERATIONS FOR ESTATE REPRESENTATIVES

The recent amendments create much uncertainty regarding the personal liability of an estate representative because there is no guidance as to whether an estate representative is entitled to distribute the estate prior to providing the Ministry of Finance with the prescribed information or after supplying the Ministry with the relevant information but before an assessment is made.

Since the Ministry of Finance is legally entitled to reassess the estate until four years after the date that the EAT becomes payable, distributions of estates may be delayed, as estate representatives may be reluctant to settle the estate before the four-year reassessment period has passed. The Ministry of Finance has stated that inquires about the status of an EAT account should be directed to its Advisory and Compliance Branch. Fortunately, in the event of additional EAT being payable upon an audit, interest will not accrue on the unpaid EAT from the date it became payable.

The Ministry of Finance takes the position that subsection 2(8) of the *Estate Administration Tax Act*, which states that EAT is payable by an estate representative in his/her representative capacity only, renders a clearance certificate unnecessary. However, the Ministry has stated that it intends to offer comfort letters to estate representatives. An estate representative would need to request a comfort letter from the Ministry and would only be able to do so after the CRA has issued a clearance certificate to the estate and the Ministry has had time to review the estate to determine

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whether it has any concerns at that time. If an estate representative has acted reasonably and an estate's assets have been distributed before the estate is reassessed for unpaid EAT, the Ministry will most likely have to rely on common law principles (i.e. tracing) to recover any unpaid EAT from the beneficiaries.

Given that the role of an estate representative is now more complex, testators must give careful consideration to who is appointed to that role and may need to revise their existing wills accordingly. Additionally, the new regulations have made estate planning techniques that were once considered unsuitable for relatively uncomplicated estates into options that may now be suitable so as to minimize the need for an Estate Certificate. Testators would be well-advised to review their existing estate plans with a qualified estate planning lawyer in light of the amendments to the Ontario *Estate Administration Tax Act*.