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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 Taxation Law, and also as a Specialist in Corporate and Commercial Law.

A. *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 the rate of $15 per $1,000 on the value of the estate exceeding $50,000. Beginning January 1, 2020, the EAT has been eliminated for the first $50,000 of the value of the estate. As an example, for an estate valued at $240,000, the EAT would be calculated as follows:

- $0 for the first $50,000 of the estate
- $15 per $1,000 for the remaining $190,000 of the estate = $2,850
- Result: EAT totaling $2,859 is payable to the Minister of Finance

(i) INFORMATION RETURN

An estate representative is required to file certain information about a deceased person and his/her estate. Prior to January 1, 2020, the estate representative was required to file an Estate Information Return ("Information Return") with the Ontario Ministry of Finance within 90 calendar days of receiving the Estate Certificate. Beginning January 1, 2020, the deadline to file the Information Return has been extended from 90 days to 180 days after the Estate Corticated is issued An Information Return must be filed even if no EAT is payable, including estates that are exempt from

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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.

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, even if the deceased did not hold legal title and legal title was held in another person's name. 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. If the court issued a Certificate of Appointment of Estate Trustee with a Will Limited to the Assets Referred to in the Will, only those assets referred to in such will are to be included. 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

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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.

In calculating the value of the estate, encumbrances such as mortgages against real estate are permitted to be deducted from the FMV of real estate assets. Encumbrances against any asset other than real estate cannot be deducted from the FMV of the assets. For example, the amount of a car loan does not reduce the value of the car. Similarly, debts (eg. credit card debts) may not be deducted from the value of the estate.

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 60 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. The net value of real estate (ie. the value of the property owned minus the value of encumbrances on the title to the property) is included in calculating the total value of the estate. 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

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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 deals with bank accounts. For each bank account owned by the deceased, 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. These include Canadian banks (includes banks owned by companies such as grocery stores or hardware stores), foreign banks, credit unions and caisses popularizes, cooperatives, loan companies and trust companies. Joint bank accounts, where the surviving owners(s) automatically assumes the deceased's interest on the death of a co-owner of the account, should not be included in the list of estate assets. The cash portion of a brokerage account should be included under Section F: Investments.

Section F of the Information Return relates to investments, including (i) Canada Savings Bonds; (ii) guaranteed investment certificates; (iii) securities such as common shares, bonds, treasury bills and mutual funds; (iv) segregated funds; (v) derivatives such as options, future contracts, rights and warrants; (vi) partnership interests and (vii) brokerage accounts. 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.

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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.

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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 60 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 60 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 60 calendar days of receiving the refund.

(ii) 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

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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.

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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.

(iii) 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 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*.

B. 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. 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.

C. STRATEGIES TO MINIMIZE ESTATE ADMINISTRATION TAX

There are several strategies that can be used to reduce the probate fees payable upon death, including the use of: (i) multiple wills; (ii) multiple wills in multiple jurisdictions; (iii) beneficiary designations; (iv) bare trust designations; (v) powers of appointment; (vi) alter-ego or joint partner trusts; (vi) self-benefit trusts; (vii) joint tenancies; (viii) principle residence trust; and (ix) “death bed” transfers.

D. MULTIPLE WILLS

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. These assets normally include: (i) assets that normally require probate to be realized or conveyed on death, such as publicly traded securities, bank deposits, real estate, etc; (ii) special household and personal effects that may require verification of ownership and provenance; (iii) widely-held private company shares, where the other

shareholders may require probate; and (iv) life insurance designations, where the insurance company may require probate to release the proceeds.

Assets that can be distributed without probate are covered in a secondary will. These assets may include: (i) shares of privately-held corporations and related shareholders' loans and receivables; (ii) household goods and personal effects; (iii) assets where the testator has a power of appointment; (iv) partnership interests and related loans and receivables; (v) beneficial interests in trusts or other estates; and (vi) unsecured debts. 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 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.

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.

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.

In a recent 2018 decision, *Re Milne Estate,* the Ontario Superior Court of Justice held that multiple wills containing language granting estate trustees the discretion to determine which assets belong in each of the testator's wills after the testator's death

were invalid. The *Re Milne Estate* decision is currently under appeal to the Ontario Divisional Court.

Then, on November 13, 2018, the Ontario Superior Court of Justice issued another decision, *Re Panda Estate,* where the Court expressly rejected the reasoning and factual analysis in *Re Milne Estate* and held that multiple wills containing basket clauses granting estate trustees the discretion to determine which assets belong in each will were valid. The decision in *Re Panda Estate* may provide some comfort to taxpayers concerned with the implications of *Re Milne Estate*, and it will be up to the Ontario Divisional Court to resolve the conflict between the two decisions when the appeal of *Re Milne Estate* is heard.

E. 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.

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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.

F. BENEFICIARY DESIGNATIONS

Another method of reducing EAT is to designate a named beneficiary to directly receive the proceeds from a life insurance policy, a registered plan (ie. a RRSP or a RRIF) and/or a tax-free savings account. Where a beneficiary is designated in an life insurance policy or in the deceased's will pursuant to the Ontario *Insurance Act,* the proceeds are paid directly to beneficiary and do not form part of the deceased's estate. Accordingly, the proceeds from the policy are not subject to EAT. However, if the estate or executor is named a beneficiary, the proceeds will form part of the estate and be subject to EAT.

G. POWERS OF APPOINTMENT

A power of appointment is an authority given to a person to select the beneficiaries of a trust. If no limits are imposed on the persons who may be selected as beneficiaries, it is considered to be a general power of appointment. If the power can only be exercised in favor of specified individuals or a defined class of individuals, it is considered to be a special power of appointment. The exercise of a special power of appointment under a will is not subject to EAT. The exercise of a general power of appointment under a will is subject to EAT based on the value of the assets that are subject to the appointment. An estate planning strategy would be to include general powers of appointment in a non-probate will to avoid EAT.

H. ALTER-EGO AND JOINT PARTNER TRUSTS

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. Living trusts provide another alternative method to avoid probate fees. A living trust, such as an alter-ego trust or a joint partner trust, allows a transferor to transfer assets to the trust on a tax-deferred basis. Property held by the trust need not go through probate. After the death of the transferor or the transferor's spouse (as the case may be) the beneficiaries named in the trust will be able to receive the income and capital of the trust without the necessity of obtaining probate. This matter is dealt with in more

detail in the issue of the Legal Business Report on Alter Ego trusts and Joint Partner trusts.

I. JOINT TENANCY

In common law jurisdictions in Canada, joint tenancy is a form of co-ownership with a right of survivorship. When a joint tenant dies, the interest of the deceased passes automatically and immediately to any surviving joint tenants by operation of law, enlarging those interests. Where there are only two joint tenants, upon the death of one, complete title will vest in the lone survivor. Property held in joint tenancy need not go through probate until the death of the last remaining joint tenant.

Adding another individual (usually a family member) to title as a joint tenant is a popular strategy to minimize probate fees. The right of survivorship allows probate fees to be deferred until the death of the last joint tenant, and the process of changing title is relatively straightforward and inexpensive. This matter is dealt with in more detail in the issue of the Legal Business Report on Joint Tenancy considerations.

J. BARE TRUSTEE DECLARATIONS

This strategy involves separating legal title from beneficial title in regards to an asset. A bare trustee exists where the legal owner merely holds legal title to the asset on behalf of the beneficial owner but has no discretion over how the asset can be dealt with.

Typically, a bare trustee is a private corporation whose shares are owned by the beneficial owner of the asset. To implement a bare trust, the transferor would transfer the legal title to the asset to the bare trustee corporation and the bare trustee corporation would execute a declaration of bare trust in favor of the transferor, who remains the beneficial owner of the asset. Neither income tax nor land transfer tax should be triggered on the transfer of legal title to the bare trustee corporation because such taxes generally only apply to transfers of beneficial title and not to transfers of legal title alone.

On the death of the transferor, the legal title does not change and the beneficial ownership of the property may be transferred without probate. As a result, the transferred property is not subject to EAT.

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If the deceased only has one will and there are other assets in the will which are subject to probate, the value of assets held in a bare trust must still be included in calculating the value of the estate for EAT purposes. Therefore, the bare trustee strategy should be coupled with the multiple wills strategy by having a secondary will to govern the assets that will not be subject to probate, including assets held in a bare trust.

K. PRINCIPAL RESIDENCE TRUST

A residence held in a trust will not form part of an estate for probate purposes and will not be subject to EAT because it is property of the trust. Additionally, a personal trust may also claim the principal residence exemption to shelter an accrued capital gain if the trust is (i) an alter ego trust, (ii) a joint partner trust, (iii) a certain trust for the exclusive benefit of the settlor during the settlor's lifetime; (iv) a “qualified disability trust” in which the beneficiaries are the spouse, common law partner, or child of the settlor; and (v) an inter vivos trust in which the beneficiaries are (a) the minor children of the settlor; and (b) have parents who died in preceding years.

L. “DEATH BED” TRANSFERS

Pursuant to subsection 7(2) of the *Substitute Decisions Act,* an agent acting under a power of attorney cannot make testamentary dispositions for the grantor of the power of attorney. However, the agent can engage in estate planning for the benefit of the incapacitated grantor as long as the planning does not conflict with the grantor’s existing testamentary intentions and does not endanger the grantor’s welfare during his or her lifetime. Assets that are validly transferred by an agent acting under a power of attorney during the grantor’s lifetime will not form part of the grantor’s estate for the purposes of EAT.

N. ADDITIONAL CONSIDERATIONS

Minimizing EAT may not be the only reason for using these strategies. 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.

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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.

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.

O. CASE LAW

(i) Re Milne Estate, 2018 ONSC 4174

In this Ontario Superior Court of Justice case, a husband and wife each created two wills (i.e. a primary will and a secondary will). The language in the primary wills settled upon the estate trustees "all property owned by me at the time of my death EXCEPT… [certain named assets and] any other assets for which my Trustees determine a grant of authority by a court of competent jurisdiction is not required for a transfer or realization thereof." The language in the secondary wills settled upon the estate trustees "all property owned by me at the time of my death INCLUDING… [certain named assets and] any other assets for which my Trustees determine a grant of

authority by a court of competent jurisdiction is not required for the transfer or realization thereof." In effect, the language of the wills permitted the estate trustees to determine which assets belonged in the testators' primary wills after the testators' deaths.

The issue before the Court was whether the wills were valid if they grant the estate trustees the discretion to determine which property is subject to the wills. The Court commented that a will is a form of trust, and in order to be valid, a will must satisfy the "three certainties": (i) certainty of intent to create the trust; (ii) certainty of subject matter or property committed to the trust; and (iii) certainty as to the objects of the trust or the purposes to which the property is to be applied. The sole issue in this case is the second of the three certainties: certainty of subject matter.

The Court noted that inclusion of all assets in a trust subject to the power to exclude all of them – as has been attempted by the testators in their primary wills – is no different than conferring the power upon the estate trustees to determine which if any assets will be subject to the trust. The Court determined that this does not satisfy the certainty of subject matter, which requires assets to be specifically identified or objectively identifiable by reference to the intention of the testator and not the subsequent decision of the estate trustees.

Furthermore, the Court found that the primary and secondary wills overlapped completely. Each primary will sought to carve out a subset of the testator's property based upon the determinations of the estate trustees, while each secondary will applied to all property owned by the testator without excluding the property already subject to the primary will. The Court concluded that the secondary wills must be probated since their language failed to exclude the subset of probate assets that were intended by the testators to be subject to the primary wills.

The Court ultimately held that the secondary wills were valid and the primary wills were invalid. As a result of the Court's decision, all of the estates' assets formed part of the secondary wills and the testators were unable to benefit from probate planning using multiple wills.

This case is currently under appeal to the Ontario Divisional Court.

(ii) Re Panda Estate, 2018 ONSC 6734

In this Ontario Superior Court of Justice case, the deceased testator executed a primary will and a secondary will containing language substantively similar to the wills in the above-mentioned decision, *Re Milne Estate*. A basket clause in the wills essentially

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allowed the estate trustees to determine which assets fell under the primary will and which assets fell under the secondary will after the testator's death.

The estate trustees brought an application in the Ontario Superior Court of Justice seeking probate for the primary will. The application for probate was initially rejected by Justice Dunphy based on the same reasoning as set out in *Re Milne Estate*: that the primary estate lacks certainty of subject-matter and that the estate trustees cannot retroactively exclude assets from the estate. A motion for directions was then heard by Justice Penny who expressly rejected the reasoning and factual analysis in *Re Milne Estate* and granted the estate's application for probate.

Justice Penny rejected the assertion that a will is a form of trust, and that in order to be valid, a will must satisfy the "three certainties" of trust. Justice Penny noted that while a will shares some of the attributes of a trust, it is its own, unique creature of the law. Therefore, failure to establish certainty of subject matter is an irrelevant consideration in establishing formal validity of the will for purposes of probate. Based on this reasoning, Justice Penny held that both the primary and secondary wills were valid. Justice Penny also commented in obiter that it was not clear how the discretionary power conferred upon the estate trustees to determine which assets fell under each of the testator's multiple wills was "any more extreme or uncertain than other, well-established discretionary choices frequently conferred on and exercised by estate trustees."

The decision in *Re Panda Estate* may provide some comfort to taxpayers concerned with the implications of *Re Milne Estate*, and it will be up to the Ontario Divisional Court to resolve the conflict between the two decisions when the appeal of *Re Milne Estate* is heard.

This issue of the Legal Business Report is designed to provide information of a general nature only and is not intended to provide professional legal advice. The information contained in this Legal Business Report should not be acted upon without further consultation with professional advisers.

Please contact Howard Alpert directly at (416) 923-0809 if you require assistance with tax and estate planning matters, tax dispute resolution, tax litigation, corporate-commercial transactions or estate administration.