PROBATE UPDATE: Be prepared

– By Léony deGraaf, CFP, EPC

At some point, we are all going to end up either being an Executor or needing an Executor. For this reason, it is important to understand the recent changes to Ontario's Estate Administration Tax, which came in to effect January 2015.

The good news is the fee schedule did not change – it is still calculated as $5/$1,000 for the first $50,000 of assets and $15/$1,000 or 1.5% thereafter in Ontario.

The bad news is the government intends to collect a lot more of this tax, by requiring anyone who receives a Certificate of Estate Trustee to file a new 7 page Estate Information Return (EIR) with the Ministry of Finance.

The new legislation is an effort to ensure the Province receives its fair share of estate tax, which it believes it has been shortchanged in the past due to conservative, or significantly understated, estate values. Since the old system did not have any form of 'checks and balances', there was no way for the province to know if the values reported were correct, or even how to enforce compliance. In short – the old system was a joke, the new system has teeth.

The first two steps of the Probate process remain unchanged, whereas persons seeking to be appointed by the Court as the Estate Trustee (commonly known as the Executor) first need to file an application with the Superior Court of Justice and submit the last known Will of the deceased. This application is made to the Court where the deceased had permanent residence. This initial application requires the named Executor and/or the lawyer to locate and list the known assets of the Estate and their value, and attach payment to the Court of 1.5% of the estate value. This is now referred to as the 'deposit paid' toward the Estate Administration Tax . . .hint . . . hint.

Second, if the Court finds the Will to be in good order and the most recent, they will go ahead and issue a Certificate of Appointment of Estate Trustee, so the Executor now has the legal authority to act on behalf of the estate and administer the provisions of the deceased's Will.

It is the third step that is new, which requires any person(s) appointed an Estate Trustee to file the new Estate Information Return within 90 days from the date the Certificate of Appointment of Estate Trustee was issued. It is very important to be aware of this new third step, since this is the step that is punishable by a minimum fine of $1,000 and up to twice the amount of the tax payable by the estate if missed. Failure to file this new EIR or intentionally reporting false information can also result in up to two years of jail time for the Executor.

Step three also comes with a 4 year reassessment period, meaning the Minister of Finance can audit the Estate Information Return at any time from the date of filing and up to four years after. If no EIR is filed, there is no statute of limitation. Dying intestate (without a Will) is not the answer either, as practically all estates are expected to file this return. It used to be common practice that if an Estate had less than $10,000 in reportable assets it didn't need to be probated. That dollar value has now been brought down to $1,000 of estate value.

So what information will the Executor have to provide on this new EIR? The Ministry of Finance would like to know some personal details about the deceased and where they lived, as well as personal contact details for the Estate Representative (the Executor). Next, the Ministry wants to know about all real estate owned by the deceased in Ontario, as well as its fair market value and the deceased's percentage of ownership. The value can be decreased by any outstanding encumbrances registered against the property.

With many seniors having put their adult children on title of their home or bank accounts to avoid probate, this can now be a tricky area to navigate without the guidance of a lawyer. On one hand the EIR Guide states not to list any property the deceased owned as a joint tenant, but on the other hand it states to include any property the deceased had a beneficial interest in. Ownership is at two levels: legal and beneficial. If the deceased still lived in the home or still had beneficial access to their bank account, these assets will most likely now be subject to Estate Administration Tax.

The Executor will also have to provide details about the deceased's bank accounts and the balances at the date of death, the value of all investment accounts (except those which pass outside the Estate by way of a beneficiary designation, such as a RRIF or RRSP or any Segregated Funds with a named beneficiary) and the value of all vehicles and vessels the deceased owned at the time of their passing, and their fair market value. Lastly, the Ministry of Finance wants to know about any other property the deceased owned, such as business interests, copyrights, patents, household contents,

art, jewelry, etc. If there were any assets insured under a rider on the home insurance policy, be sure to list these items on the Return.

The totals of each section are transferred to the last page which calculates the total Estate Administration Tax owing, minus any deposit already submitted.

The details reported in the Estate Information Return will be used as the basis for any future audits, within the 4 year period. Since the valuations reported can be disputed by the Ministry, it is wise to obtain professional appraisals, and the Executor should hold back some funds in the estate account until the 4 year audit cycle has passed, as they could be held personally liable for additional Estate Administration Tax owing.

Not only are the new rules more complex and designed to increase the amount of EAT collected, they are also expected to increase the costs associated with Estates. These additional costs could include legal fees (up to 5% of reported estate value), accounting fees (2-5% of estate value or $250/hr), appraisal costs, costs of disposition and fees paid to other professionals.

There is no doubt this new process has turned the position of an Executor from one of honour, to one of avoidance. Nevertheless, it is an important step in the circle of life and one we must go through if a loved one has requested it of us. It is the last thing we can do for them and we want to do a good job honouring their wishes.

Fortunately there are some proactive, yet simple steps you can take to prepare your eventual estate for your Executor and minimize the tribulation. Structured properly, most savings and investment assets can bypass the probate process/fees and be paid directly to named beneficiaries, avoiding the estate all together. Since joint ownership is no longer the simple solution, now may be a good time to revisit your estate expectations with a Certified Financial Planner and discuss the merits of Segregated Funds and their ability to bypass the estate. As they say, "an ounce of prevention is worth a pound of cure" and with the acronym EAT, you know the province wants to take its bite out of your estate. •

For more information visit:
www.fin.gov.on.ca/en/tax/eat/faq.html
www.attorneygeneral.jus.gov.on.ca/english/estates/estates-FAQ.asp

Léony deGraaf Hastings is a Certified Financial Planner, Retirement & Estate Specialist. www.dgfs.ca 905-632-9900