



ONTARIO PROBATE PROCESS CHANGES

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NEW PROBATE PROCESS

Effective January 1, 2015, new probate filing rules took effect for Ontario estates. This is expected to significantly alter the way Ontario's probate fee is administered as the Ontario government has developed more defined processes for assessing and collecting probate tax revenue. This information is important for clients who are, or will be, executors of Ontario estates.

Probate is a process that confirms executor authority to distribute assets of a deceased's estate. Where required, provincial governments grant this authority by issuing a probate certificate known in Ontario as a "Certificate of Appointment of Estate Trustee With (or Without) a Will". The government of Ontario charges a fee for the certificate based on the value of the deceased's estate.

Prior to January 1, 2015, when determining the value of an estate for probate purposes, detailed information regarding estate assets was not required when applying for a probate certificate. Executors could provide a single amount representing the value of the deceased's estate, which as long as the executor provided a sworn affidavit confirming the estate's value, was generally accepted for probate purposes. There was no requirement to provide documentation to support the asset value reported. This lack of requirement for supporting information with regard to the estate's value provided an opportunity for assets to be underestimated in order to minimize probate tax.

Effective January 1, 2015, executors who apply for a Certificate of Appointment of Estate Trustee With (or Without) a Will (a "Probate Certificate") will be required to file an "Estate Information Return" with the Ministry of Finance within 90 calendar days after the Certificate of Appointment of Estate Trustee is issued by the government. Once the executor applies for and receives a Certificate of Appointment of Estate Trustee, the executor must submit a detailed Estate Information Return within 90 calendar days to provide details of how the estate's value was determined. Failure to do so can result in a fine and/or imprisonment.

Probate taxes must still be paid at the time the Probate Certificate is requested (i.e. at the time of application). Therefore the executor would still need to know, at that time, the

value of the deceased's estate. What is changing is the added responsibility of filing an Estate Information Return within 90 days of receiving the Probate Certificate. The Estate Information Return will provide more transparency and accountability and provide the government with more details with regard to the estate assets for assessment purposes.

Information about the deceased and the executor is required in the Estate Information Return along with a list and description of each estate asset. Assets that should be included are as follows:

- Real estate in Ontario;
- Bank accounts including account numbers;
- Non-registered investments (i.e. stocks, bonds, trust units, options);
- RRSPs, RRIFs, TFSAs if no named beneficiary other than the Estate;
- Vehicles and vessels including vehicle identification numbers;
- All property of which the deceased had beneficial interest even if legal title was held by someone else;
- Jointly owned assets without a right of survivorship (i.e. joint tenants in common);
- All other property, wherever situated, including:
 - goods/household contents- which will likely become more challenging to establish a reasonable estimate of value;
 - intangible property;
 - business interests; and
 - insurance, if no named beneficiary other than the Estate.
- RESP assets belong to the plan subscriber until paid to a beneficiary for school purposes. In the case of a single subscriber, death of the subscriber will require the RESP to be part of the deceased's estate, which would normally require probate tax and inclusion in the Estate Information Return.

A calculation of applicable probate tax is included in the Estate Information Return

Ontario probate rates are calculated as follows:

- 0.5% on the first \$50,000 of the value of the estate assets; and
- 1.5% on the value of the estate assets exceeding \$50,000.

No probate tax is payable if the value of the estate is \$1,000 or less.

An executor will not be advised if the Estate Information Return they prepared is being reviewed by the Ministry unless it is chosen for audit. The audit will review the estate asset valuation documentation and the auditor may seek additional evidence of value. The Ministry of Finance may assess or reassess the estate for probate tax payable within four years after the probate tax became payable. Therefore, records and supporting documents should be kept for a minimum of four years after a Probate Certificate is issued. The Ministry of Finance will not provide a clearance certificate in the same way that Canada Revenue Agency does for taxation purposes.

If the Ministry of Finance determines, through audit, that estate values were underestimated, the Ministry will issue an assessment or reassessment notice, typically within four years after the date the Probate Certificate was issued and probate tax became payable.

If, within four years of receiving a Probate Certificate, an executor realizes that an Estate Information Return was incorrect or incomplete, an amended Estate Information Return must be received by the Ministry of Finance within 30 calendar days of the executor becoming aware of the incorrect or incomplete information. If an executor becomes aware of incorrect or incomplete information after four years has passed, there is no requirement to file an amended Estate Information Return.

Despite the above four year time limit, the Ministry of Finance can, at any time, assess or reassess an estate where it is determined that an executor has failed to file an Estate Information Return on time or has made a misrepresentation through neglect, carelessness or willful default, or committed fraud in supplying or omitting information regarding the value of the estate assets.

Executors who fail to file an Estate Information Return as required, or who make false or misleading statements on the return, can be liable to a fine of at least \$1,000 and up to twice the tax payable by the estate and/or imprisonment of up to two years.

Both the Estate Information Return and the Guide for Preparing the Estate Information Return can be found online at the link below:

<http://www.fin.gov.on.ca/en/tax/eat/>

The above information should not be considered to be legal advice. Please consult your advisor.