From Fees to Tax: Probate is Alive and Well

This Tax Topic will examine the recent developments in the area of probate fees. In the first of a two part series on this topic, the history of probate fees will be reviewed. As well, the parties who may request probate will be discussed and the necessity of probate in certain instances will be reviewed. Part two will consider the value of assets to be included in the estate to calculate probate fees and a discussion on planning opportunities to avoid probate fees will be covered. The words fee and tax will be used interchangeably throughout both Tax Topics. This Tax Topic will primarily focus on Ontario legislation but commentary on other provincial legislation will also be included.

Introduction
Probate fees came into existence in England during the Reign of Edward IV in the 15th Century. The purpose of probate was to determine the validity of a will. Fees were charged to an applicant seeking, what was then known as the granting of letters probate. The fees were introduced to essentially assist in financing the court structure and the administrative function. These fees were based on the value of property under a will.

Today, in all provinces except Quebec, probate fees continue to exist for the same purpose: the court validates a deceased's will and confirms the appointment of the executor(s). The fees are based on the value of the estate and vary from province to province depending upon how the value is determined in applicable provincial legislation. With the exception of Quebec, if assets exist within a particular province, probate will be required in that province. The estate may end up paying probate fees in more than one province. There is no reduction for fees to credit for fees paid in another jurisdiction. In part two of this Tax Topic, a discussion regarding planning opportunities for limiting probate by moving assets into other jurisdictions will be discussed.

The word "probate" can be used in different contexts. Probate may mean the court's approval of the will or it can mean the actual tax or fees paid on the value of the estate when the court administers an application.

While provincial legislation varies regarding probate, it is mainly in detail rather than in substance. British Columbia and Ontario have seen significant increases in probate fees since their inception. Ontario probate fees have tripled since 1992 and in British Columbia, such fees have doubled since 1997. Alberta has traditionally had the lowest fees and the fee is capped. In Quebec, a nominal administrative fee is charged but is not based on the value of property of the estate.

Ontario Change in Probate
Due to this trend of increasing probate fees and the large transfer of wealth expected with the demise of the baby boomers, it is not surprising that a constitutional challenge arose in
Ontario regarding the validity of such fees. In Re Eurig, [1998] 2 S.C.R. 565, (1998) 40 O.R. (3d) 160, (1998) 165 D.L.R. (4th) 1, (1998) 231 N.R. 55, (1998) 114 O.A.C. 55, (1998) 23 E.T.R. (2d) 1, the Supreme Court of Canada determined that the fees imposed under the Ontario Regulation were not related to the services provided and such fees were, in reality, an indirect tax. The court ruled that the Province did not have the authority to impose the fee. It was therefore determined that such fees were unconstitutional. Since 1935 in Ontario, the Lieutenant Governor had been empowered to make regulations requiring payment and the prescribed amounts for probate fees pursuant to provisions in the Administration of Justice Act. The Supreme Court indicated that the authority to impose such fees must come from the legislature and not pursuant to the Regulations under the Administration of Justice Act. The Province of Ontario was given six months by the Court to rectify the problem retroactively. The Ontario government promptly responded in November of 1998, by proposing a new act known as the Estate Administration Tax Act. This legislation was a schedule to Bill 81, an omnibus bill which received first reading November 23, 1998 and received Royal Assent in December of 1998. Complimentary changes to the Estates Act also were part of Bill 81.

In Ontario, the result is that probate is now a tax. The decision in Re Eurig, unfortunately, did not lead to relief from paying a "fee" based on the value of property held in an estate at the time of death.

The Ontario Estate Administration Tax Act imposes a tax (now referred to as "Estate Administration Tax" (EAT)) on the value of an estate when an estate certificate is issued. This Act is retroactive to all estate certificates issued after May 14, 1950. It was hoped that with the Supreme Court of Canada's decision in Re Eurig, the Ontario Government would review the issue of probate and reduce the fees charged. However, the amount of tax exactly mirrors the fees in the previous regulations.

While the Ontario government did not provide any relief with respect to probate fees, it did not incorporate anti-avoidance rules into the new legislation. This means that proper planning can still result in reduced liability for probate.

**Who can request probate?**

There is no legislative restriction on who may make a request for probate. Generally, any "interested party" who seeks to confirm the validity of a will may request probate. In most instances, an interested party will be directly affected under the distribution of a will (for instance, a beneficiary) but in certain circumstances those indirectly affected may also request probate. For the most part, beneficiaries who question the testator's capacity to provide instruction for the will may request probate. Beneficiaries may believe that the testator did not understand the distribution made in the will or they may believe that the testator did not have the mental capacity to provide instruction to appoint the executor and make the distributions set out in the will. As well, a beneficiary may question whether the testator freely and without influence from others made the provisions under the terms of the will.

Family and succession legislation will allow a challenge if a dependant is not adequately provided for within the will. Where there is an intestacy, a dependant may also make a claim under the appropriate provisions of the provincial legislation pertaining to dependant relief claims. Generally, a dependant means a person whom another has an obligation to support. Usually dependants would include minor children, disabled children, an individual to whom the testator has provided support at the time of death and a spouse. Depending upon the province, spouse may include common law and an individual of the same-sex. Where dependant relief is claimed, an application to court will cause a triggering of probate fees.
Potential beneficiaries (that are not dependants) may also seek confirmation of validity where they question the bequests made under the provisions of the will. If an individual believes that the testator left him or her out of the will or that he or she should have been identified as a beneficiary under the will, probate will be requested. For instance, a child who is not made a beneficiary will undoubtedly question the will and in doing so will seek probate in order to confirm the will’s validity. Another example exists where a child born out of wedlock requests probate. Unless the provisions in the will speak to the exclusion of children born out of wedlock, they may seek probate to be included as a beneficiary receiving a portion of the estate.

Most financial institutions such as banks, mutual fund companies, insurance companies, investment companies or trust companies will request probate. Generally, such institutions will seek to pay out funds as quickly as possible but will want to ensure that proper payment is made to the correct party. If there is any question, a payment into court will usually be sought by way of court order.

A charity named as a beneficiary under a will may also request that the will be validated by probate. This allows the charity to confirm that it is a beneficiary and to ensure the distribution made to the charity is not challenged or questioned by other beneficiaries or potential beneficiaries.

Parties indirectly affected by the will may also request probate. For instance, in a real estate transaction, regardless of whether a notarial copy would be permitted under the registry system, the purchaser’s solicitor may requisition letters probate or a Certificate of Appointment of Estate Trustee. While in most instances, the purchaser’s lawyer will probably be satisfied with a notarial copy, if there is any concern over the authority of the executor, probate will be sought (see Re Rumble and Simmons (1985), 38 R.P.R. 29 (Ont. Dist. Ct.). However, a purchaser cannot force a vendor to obtain letters probate, under the registry system. Where there is intestacy in Ontario, the vendor will seek a Certificate of Appointment of Estate Trustee without A Will to confirm his or her authority to sell. The purchaser’s solicitor will request this Certificate to also confirm the vendor’s authority to sell the property. The vendor in this instance will become the personal representative of the estate only by way of Certificate and may be any relative, friend or interested party for which the court has accepted an application for appointment as Estate Trustee.

In some instances, an executor may seek probate to confirm the authority to act under the will especially if contentious dealings with beneficiaries are expected or if a minor child is involved. An executor may seek probate mainly to protect him or herself from liability. An executor may also seek to have the will probated because he or she knows it will be required to deal with financial institutions.

A former spouse may request probate to challenge the validity of the will where he or she questions the appointment of the executor within the will or the distribution of assets under the provisions of the will. In Ontario, a spouse may within six months after the death of a spouse, elect under the Family Law Act, R.S.O. 1990, c. F-3, to an equalization of assets of the deceased or proceed to take under the provisions of the will.

**When will probate be required?**

As previously mentioned, probate is an administrative procedure to validate a will. It confirms the authority of an executor. Probate does not however create the powers of an executor. Such powers are conferred and arise under the provisions of the will. Probate is not required by law but is used when a third party seeks to ensure that a will is valid and an executor has authority to act. This makes the scope of parties who may request that a will be probated very wide. While "any" interested party may request that a will be probated, the requirement
for probate and consequently the liability to pay the probate tax in Ontario generally arises in the following scenarios (where a will exists):

1) Litigation - if the estate is involved in litigation, probate maybe necessary: However, on the necessity to obtain a Certificate of Appointment of Estate Trustee after litigation has been settled see Thompson v. Watson (1999), 27 E.T.R., (2d) 138 (Ont. S.C.J.);

2) Minor beneficiaries - in most instances, the executor wants the protection of having the court approve how funds have been handled by the executor to limit his or her liability;

3) Continuing trusts - where there exists a lengthy period of time for a trust to be in existence, an executor may seek probate to protect his or her handling of the trust;

4) Real property - requirements under the Land Registration Reform Act, R.S.O. 1990, c. L. 4 and the Registry Act, R.S.O. 1990, c. R.20. Probate may be required on certain real estate transactions to effect title. Where an intestacy exists, probate will be required.

5) Bank accounts - where assets are transferred and are in excess of $10,000 a bank or trust company normally requires probate. Joint accounts and safety deposit boxes can usually be transferred without probate if the survivor produces a notarial copy of the death certificate;

6) Shares - probate appears not to be required in some circumstances for shares to be transferred under the provisions of The Ontario Business Corporation Act R.S.O. 1990, c. B. 16. (See sections 67(2): a corporation may treat the executor, administrator, heir or legal representative of heirs as a registered security holder, if the person provides certain evidence). The Canadian Business Corporation Act R.S.C. 1985, c. C-44, also appears to allow for a transfer of shares without probate in limited situations (see s. 76 (1): a fiduciary of a deceased shareholder is deemed to be an appropriate person to whom to transfer shares). However, an interpretation has not been provided in either instance by the court and as such the law is not entirely clear. However, transfer agents dealing with Ontario corporate shares worth over $1,000 generally require probate. Where shares are held jointly, a transfer can occur without probate. In B.C. shares, bonds, and debentures were determined not to be subject to probate fees. In Re Bloom Estate, [2004] B.C.S.C. 70, assets in the estate consisting of stocks, bonds, debentures and dividends were classified as not being subject to probate due to the situs of the asset. The securities were purchased in Toronto and maintained there and as a result the court determined that they were situated outside of B.C. and not subject to probate;

In situations where a company is family-run or the directors have confidence in the validity of the will, probate may not be necessary. This situation arose in Estate of Philip Granovsky, (1998) 156 D.L.R. (4th) 557, 53 O.T.C. 375, 21 E.T.R. (2d) 25. There the testator had created two wills. The first will excluded corporate shares and capital, while the second will dealt with the disbursement of shares and capital. The issue faced by the court was whether the second will ought to be submitted for probate to determine the validity of the will. The court held the second will did not need to be probated because the directors of the company in which the testator held shares were satisfied with the validity of the will and the distribution under the provisions of the will. Note should be taken that planning with multiple wills in the province of Nova Scotia is no longer an effective planning strategy and is also not permitted in Manitoba. In B.C., the Probate Fee Act does not expressly provide for an application for limited grants of probate. The key issue under BC legislation is the reference to "personal representative". All assets must be disclosed regardless of whether those assets passed through the estate meaning double taxation may occur. The B.C. courts have not yet been able to clarify this issue;

7) Canada Savings Bonds (CSB) - probate is not necessary if the value of the CSB does not exceed $20,000 and the applicant-beneficiary is entitled to the entire estate. In the case of a transfer to a surviving spouse who is entitled to the entire estate, the value of the CSB is increased to $75,000 before probate is required. Bonds may be transferred without probate where they are held jointly. It should be noted that unless joint tenancy is specifically identified, The Bank of Canada assumes a tenancy
in common arrangement. Tenancy in common is where the interest is severed and does not revert to the survivor;

8) Structured Settlements - these type of settlements are unusual in that the testator is not actually the owner of the settlement although the testator will be the recipient of payments from the structured settlement over a period of time and pursuant to the contract. The owner is the funding casualty insurer or an assignee. The owner of the structured annuity makes the designation in the structure contract. The testator who receives the monthly payment does not make the designation. If the testator makes a designation within the will, that designation may only deal with the money after the guaranteed payment period. In most instances, the casualty insurer will designate the estate and as a result probate will be applicable. The insurance carrier will provide a value (not the commuted value) for remaining payments on which probate fees will be levied. Designations to the estate are the norm because the casualty insurer would rather have certainty when it comes to pay out at death;

9) At one point when an executor had come to a point when it was time to pass the accounts of the estate before distribution, probate would be sought unless the beneficiaries agreed to the proposed account. However, case law in Ontario indicates it is not necessary for an executor to have obtained a Certificate of Appointment of Estate Trustee in order to voluntarily pass his or her accounts. (See Re Silver Estate (1999), 31 E.T.R. (2d) 256 (Ont. S.C. J.).

10) Life insurance policy death benefit - where the death benefit is payable to a named beneficiary probate will not be required. Generally, the rule of most insurance companies requires probate if the death benefit is payable to the estate. Life insurance carriers differ in the various requirements. Generally, where an individual dies intestate, in Ontario, a Certificate of Appointment of Estate Trustee without a Will, must be sought. Where a holograph will (this is a will entirely in the writing of the testator) exists, a certified copy of the will and probate will be necessary;

Note should be taken of the Ontario Court of Appeal Case, Transamerica Life Insurance v. Rozon, [1999] O.J. No. 4538 (C.A.). Proceeds were in this case payable to the estate and the insurance carrier required probate before proceeds would be paid out. The Ontario Insurance Act requires "sufficient evidence" for the right of the claimant to receive payment. The Court of Appeal held that there was no prerequisite for a probated will as a precondition to payment of life insurance proceeds to an estate claimant under the Insurance Act.

11) Life insurance policy transfer - in the scenario where an owner has died and a successor owner has not been named in the policy but the will provides direction as to the transfer of this type of asset upon death, then probate of the will may be required. While insurance carriers will differ, generally if the face amount is $100,000 or less and the cash value is $5,000 or less, consideration to waiving probate and accepting an affidavit may occur. However, this may not be an automatic waiver. Most insurance companies will first review the will and the information contained within the affidavit to ensure that it is an appropriate case to waive probate requirements. To ensure that probate will not be required, an advisor should suggest to his or her clients that a successor owner be named (for instance where a child protection rider continues in force and is paid up);

Where a policy is owned under a joint tenancy arrangement, the interest in the policy of the deceased will revert to the survivor. If the policy is owned as tenants in common, the deceased's interest in the policy will be severed from the survivor. The provisions of the will then will determine distribution of the asset and probate would be dealt with as discussed above.
Conclusion
Probate validates a deceased's will and confirms the appointment of an executor. Any interested party can request probate. However, there are usually three instances where probate is required: when dealing with financial deposits, transfer of real estate and the transfer of shares in a public company. What is included and what is excluded from the value of the estate for probate fee purposes has become a point of planning because probate fees have become more than just fees. In Part 2, a review of planning to avoid probate fees will be considered.

Note: An up-to-date probate chart may be found on Repsource

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