PROBATE RULES FOR ONTARIO – THE ESTATE INFORMATION RETURN

OVERVIEW

In 2015, Ontario introduced a mandatory Estate Inventory Disclosure process. An estate trustee who applies for a Certificate of Appointment of Estate Trustee ("probate") must file an Estate Information Return (EIR) with the Ministry of Finance within 120 days after the issuance of probate.

The purpose of the EIR is to ensure that all estate administration taxes ("probate fees") owing are paid by confirming the value of assets forming the estate. Historically, when an estate trustee applied for probate, no formal substantiation of value was provided. All that was required was an affidavit by the estate trustee confirming value, broken down between real estate and non-real estate assets. The EIR will be subject to an audit by the ministry, so estate trustees will need to be able to substantiate their valuations. This need to substantiate valuations could add additional administrative expense. For instance, a principal residence valuation is not needed for tax purposes but may be needed to complete the EIR.

After completion, the EIR may be hand delivered, mailed or faxed to the ministry. It is recommended that it be sent in a manner that can be confirmed. Failure to file can lead to fines, penalties and possible imprisonment. All EIRs are subject to an audit and reassessment for a period up to four years after filing. A late filed return can be reassessed at any time, even after the prescribed four-year assessment period.

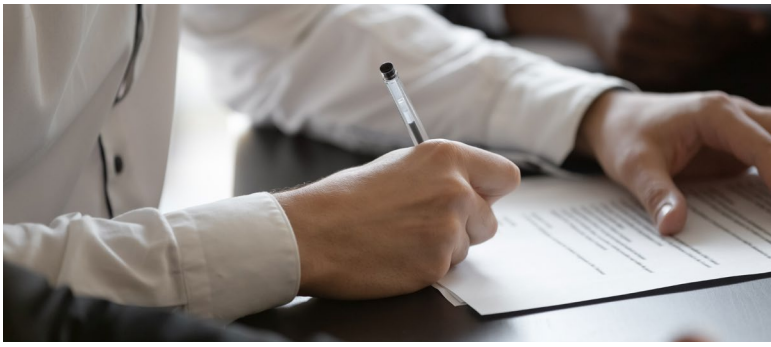
If an estate trustee fails to comply or if the trustee or an advisor, valuator, appraiser or lawyers makes or assists in making a false statement, they are guilty of an offence. The fine is between $1,000 and double the amount of the estate administration tax owing and/or two years in jail.

The ministry has provided two tools on its website to assist with the filing of the EIR – a fillable PDF EIR and an Estate Information Return Guide.

COMPLETION OF THE FORM

Most of the information required for the EIR, such as the name of estate and the name of the trustees, is readily available. However, the more complicated issue relates to the value of the estate. The EIR must disclose the value of all property owned by the deceased less any encumbrances on real property. Assets governed by a will not submitted for probate (such as a secondary will) are not to be included in the valuation.

Assets which were beneficially owned by the deceased even though legal title rests with someone else are also not included. The guide specifically refers to" joint bank accounts" where the "deceased continued on as an owner." This would appear to be a response to the Supreme Court of Canada decision Pecore v. Pecore (2007) 1 SCR 795, where assets held jointly between a parent and an adult child were presumed to be beneficially owned by the parent. The EIR guide does not specifically mention real property and investments held in the same manner. However, subsequent court decisions have held that the principle in Pecore also applied to them.



Since the ministry appears to be applying Pecore, an estate trustee will have to gather sufficient evidence to rebut the presumption if those assets are not being included in the EIR. Another alternative would be to ensure multiple wills are in place to transfer those joint assets in a secondary will.

The Act states only encumbrances against real property may be deducted, so advisors with clients with non-registered encumbrances may wish to consider re-registering the encumbrance against the real property.

Life insurance raises another issue. Usually, life insurance proceeds that pass to a named beneficiary do not have to be included in a probate application. However, it is quite common to name the same person as the trustee of insurance proceeds and estate trustee and to direct that the insurance is to be distributed in the same manner as set out in the will. The predominant opinion is that these proceeds to do not form part of the estate.

ADDITIONAL FORMS THAT MAY BE REQUIRED

Often an application for probate is sought without knowing all asset values, with an undertaking to forward the actual value within six months. In this case, it may be necessary to file two EIR forms, one to meet the 120-day filing requirement and another when the property is valued. There is also an obligation to advise the court and the ministry of subsequently discovered assets and pay additional probate fees. An amended EIR form is required within 30 days after the statement is delivered to the court.

ASSESSMENT BY THE MINISTRY OF FINANCE

EIRs can be assessed or reassessed up to four years after the probate fee was payable. If the return was filed late, there is no limitation on timing of the assessment or reassessment. However, the ministry is not expected to review all forms, so unlike income tax filings, the estate will not receive a notice of assessment. A notice of assessment will only be delivered if the ministry deems the probate fees to be inaccurate or incomplete. An appeal from an assessment is available to the Superior Court of Justice.

Probate fees are payable by the estate trustee in his representative capacity only and not personally. However, a question may arise as to liability where the estate trustee distributes the entire estate and then receives a Notice of Assessment. The ministry has indicated it is willing to write "comfort letters" for estate trustees prior to distribution, which may be advisable in large estates.

SOME PRACTICE POINTS

A few points you may wish to consider when discussing this process with your clients:

- Alter ego trusts and other probate avoidance techniques, such as secondary wills, will need to be considered in estate planning as the ministry's assessment process adds uncertainly to estate administration.
- Lawyers practising estate law have developed precedent clauses for new wills to protect estate trustees from liability. A client might wish to discuss inclusion of such clauses in their wills.
- Applications for estate trustee will take longer and delay estate administration as valuations will need to be obtained. It is also likely the cost of administration will increase as the valuations will generate a disbursement.
- An estate trustee should consider receiving a comfort letter from the Ministry before distributing the entire value of the estate when administering a large estate.
- Lastly, estate trustees must be aware there is an increased risk of estate litigation over the ministry assessment and should consider this risk when agreeing to act as trustee.

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