

# Estates Law Bulletin

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## Planning to Reduce Estate Administration Tax

By Elise Pulver and Clare Sullivan

When a person resident in Ontario dies and is the sole owner of property (like funds in a bank account, investments with a broker, or real estate), generally a “probated” Will is required by the bank, investment advisor or the land registry office before the deceased’s property can be transferred. The probated Will is proof that this is the deceased’s “last” Will and Testament and that the executor presenting the Will is the duly appointed personal representative of the deceased person.

While it is commonplace to talk about “probating” a Will, the process actually involves applying to the court for a Certificate of Appointment of Estate Trustee with a Will (“**Certificate**”). The application must be accompanied by an affidavit attesting to the fair market value of all property owned by the deceased at the time of death together with payment of estate administration tax (also referred to as “**EAT**” and formerly referred to as “probate fees”) based on the value of the property.

EAT is 0.5% of the value of the first \$50,000 of assets and 1.5% of the value of the assets in excess of \$50,000. This translates to \$250 for the first \$50,000 and \$15 per \$1,000 in value after that. So, after the first \$50,000 in assets, for every million dollars in assets owned by the deceased, the tax will be \$15,000.

There are a number of ways to minimize or eliminate EAT:

- *Designating a Beneficiary:* If a beneficiary is designated to receive the proceeds of an insurance policy on the life of the deceased, or to receive the proceeds of a registered plan such as a Registered Retirement Savings Plan, a Registered Retirement Income Fund or a Tax-Free Savings Account, then the proceeds do not form part of the estate and EAT is not calculated on these values.
- *Joint Assets:* Joint ownership with a right of survivorship allows the assets being held jointly to pass directly to the survivor on the death of the first joint holder. In Ontario, assets held in joint names by spouses have the right of survivorship. However, the Supreme Court of Canada has declared that if assets are put into the joint names of a parent and an adult child, without any other evidence to contradict this, it will be presumed that it is not a true joint tenancy with right of survivorship, and the assets belong to the person who put them into joint names. If this person dies, then these assets form part of the person’s estate and EAT will be payable on the value of these assets. On the other hand, if the intention is to create a true joint tenancy between two persons, such as a parent and child, documentation proving this intention can be executed at the time. However, there may be negative tax consequences when transferring any asset other than cash. Furthermore, putting U.S. property into joint names, even if the parties are spouses, can have very negative tax consequences. For these reasons, it is recommended that legal and tax advice be sought before putting assets into joint names for estate planning purposes.

- *Executing Primary and Secondary Wills:* Certain assets can be transferred without a Certificate (probate of the Will). Such assets include shares in private corporations because, in Ontario, corporate law does not require a probated Will before making an effective transfer of private company shares into the name of the executor appointed under the Will. Most personal effects can also be dealt with without the necessity of a Certificate. This is also true for assets being held in trust for the deceased as well as certain debts owing to the deceased. So, it has become fairly common practice for persons owning shares of private companies to have two Wills: a Primary Will covering all assets for which a Certificate may be required in order to deal with such assets, and a Secondary Will covering all assets which will not require a Certificate. A person who has two Wills can also consider transferring legal title to assets to a private corporation while retaining beneficial ownership. Then these assets can also be dealt with under the Secondary Will to reduce EAT, which would otherwise be payable.

For instance, to save the EAT on the value of a home, the following steps can be taken:

- Incorporate a company (or use a corporation already owned) to act as a bare trustee (agent) for the owner.
- The owner transfers legal title to the corporation to hold “in trust” for the original owner, who remains the beneficial owner.
- The corporation executes a simple document declaring that it holds legal title to the property as a bare trustee only and that in all respects the original owner remains the beneficial owner. The property would not be recorded as an asset on the books of the corporation since it does not own the beneficial interest. Furthermore, the transfer does not attract land transfer tax and does not affect the use of the principal residence exemption by the beneficial owner.
- The beneficial owner executes a Primary Will and Secondary Will. The Secondary Will governs all assets being held in trust for the testator, including the house, and therefore, any EAT calculation will not include the value of the house. The corporation can be directed by the executors appointed by the Secondary Will to deal with the property in accordance with the requirements of the Will.
- This technique can also be used to save EAT on other assets, such as personal investment portfolios. It is recommended that legal and tax advice be sought before proceeding with this planning.

The Estates & Trusts Group at Aird & Berlis LLP has extensive experience in advising clients on Wills and estate planning. For more information, please contact any member of the Estates & Trusts Group. Details can be found on our [Estates & Trusts Group](#) web page, by clicking on [members](#).

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