

Ontario Executors Face New Probate Filing Rules - Effective January 1, 2015

Effective January 1, 2015, new probate filing rules took effect for Ontario estates. This information is important for clients who are, or will be, executors of Ontario estates.

What is probate?

Probate is a process that authorizes an executor 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 Ontario government charges a fee for the certificate based on the value of the deceased's estate.

Why were changes required?

In the 2011 Ontario budget, the Ontario government indicated that they would tighten probate filing rules to enhance compliance by transferring administration of the fee from the Ministry of the Attorney General to the Ministry of Revenue/Finance. This change, which received Royal Assent in 2011 with a recently announced in force date of January 1, 2015, is expected to significantly alter the way Ontario's probate fee is administered as the Ministry of Revenue (since merged into the Ministry of Finance) – the department which used to collect Ontario's PST – has more defined processes for assessing and collecting tax revenue.

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. Executor(s) 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 amount, was generally accepted for probate purposes. There was no requirement to provide supporting documentation to back up the asset value reported. Consequently, it was believed that asset values were being conservatively estimated, and in some cases, significantly underestimated.

What has changed and when do the changes take effect?

Effective January 1, 2015, executors who apply for a *Certificate of Appointment of Estate Trustee With (or Without) a Will* (ie. "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. That is, 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.*

At what point are probate taxes paid?

It appears that probate taxes must still be paid at the time the Probate Certificate is requested (ie. at the time of application). So, 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, presumably, provide more transparency and accountability and provide the government with more details for assessment purposes.

Note, Estate Information returns are *not* required for Probate Certificates requested before January 1, 2015. Also, it appears that returns would not normally be required if the estate does not need to be probated (which can occur if all assets pass outside of the estate or if assets are readily transferrable without requiring a probate certificate).

What information is included in an Estate Information Return?

Information about the deceased and the executor is required in the Estate Information Return along with a list and description of each estate asset (some estate assets such as household contents can be grouped together). Assets that should be included include:

- real estate in Ontario (less encumbrances)
- bank accounts
- non-registered investments (e.g., stocks, bonds, trust units, options)
- RRSPs, RRIFs, TFSAs if proceeds pass through the estate (e.g., no named beneficiary other than 'Estate')
- vehicles and vessels (e.g., cars, trucks, boats, ATVs, motorcycles)
- 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 (e.g., joint tenants in common - JTIC)
- all other property, wherever situated, including:
 - goods
 - intangible property
 - business interests, and
 - insurance, if proceeds pass through the estate (e.g., no named beneficiary other than 'Estate').
- A calculation of applicable probate tax is also included

What assets are excluded?

- Real estate outside Ontario
- Canada Pension Plan (CPP) death benefits

- Assets that pass outside of the estate including:
 - Jointly owned assets *with* a right of survivorship (JTWROS)
 - RRSPs, RRIFs, TFSAs with a with a named beneficiary other than 'Estate'
 - Insurance proceeds paid to a named beneficiary other than 'Estate'

How are RESPs and RDSPs impacted?

RESP assets belong to the plan subscriber until paid to a beneficiary for school purposes. In the case of joint RESP subscribers (spouses only), the RESP is not included in the estate of a deceased subscriber as his/her spouse or common-law partner, as joint subscriber, will continue to manage the plan. 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. Because RESP assets do not belong to RESP beneficiaries until paid from the plan for school purposes, death of an RESP beneficiary does not require RESP proceeds to be part of the deceased's estate.

RDSP assets belong to the RDSP beneficiary. Death of an RDSP beneficiary requires RDSP assets to be part of the deceased's estate, meaning probate tax and inclusion in an Estate Information Return.

How do executors file an Estate Information Return?

Estate Information Returns can be filed by mail or courier, fax or in person. Details can be found here: <http://www.fin.gov.on.ca/en/tax/eat/index.html>.

With the new process, is there a change to probate rates?

No. The probate rates and the way they are applied remain the same. Current rates are as follows:

- \$5 for each \$1,000, or part thereof, of the first \$50,000 of the value of the estate, and
- \$15 for each \$1,000, or part thereof, of the value of the estate exceeding \$50,000.

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

What happens if estate values are understated or if an Estate Information Return is not filed?

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.

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 day estate tax became payable (ie. the day a Probate Certificate was issued).

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 (1) failed to file an Estate Information Return on time or (2) made a misrepresentation through neglect, carelessness or willful default, or committed fraud in supplying or omitting information regarding the estate.

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.

How long should executors keep supporting documents in case of audit?

The Ministry of Finance may assess estates 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.

Need more information?

i) General information: <http://www.fin.gov.on.ca/en/tax/eat/>

ii) FAQs: <http://www.fin.gov.on.ca/en/tax/eat/faq.html>

iii) Estate Information Return Guide:

[http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/9955E~2/\\$File/9955E_Guide.pdf](http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/9955E~2/$File/9955E_Guide.pdf)

iv) Estate Information Return:

[http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/9955E~1/\\$File/9955E.pdf](http://www.forms.ssb.gov.on.ca/mbs/ssb/forms/ssbforms.nsf/GetFileAttach/9955E~1/$File/9955E.pdf)

If you have questions, please contact your Mackenzie Sales Team or Mackenzie's Tax and Estate Planning team at taxandestate@mackenzieinvestments.com.