

Confidentiality Matters: Thoughts on Death and Privacy

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Privacy and the protection of personal data are a major concern in modern society. Complicated privacy legislation exists in many jurisdictions with the objective of protecting personal information by imposing multiple safeguards, some of which can be frustrating to deal with. With the increasing stores of digital information, we also frequently see reports of security breaches of government and major corporations' databases, not to mention instances of identity fraud, theft and other cyber-attacks.

Juxtaposed against society's increasing vigilance to attempt to safeguard the privacy of our financial and personal matters in a digital age, is the lack of such protection, and in fact, open public disclosure of sensitive personal information after a person dies which arises out of the probate process.

Many people are unaware that in a large number of Canadian and foreign jurisdictions, a probated will is a public document. Information regarding estate values included in court records relating to wills and probate applications is accessible and searchable by the general public.

For example, in Ontario, the public can obtain copies of wills as well as probate applications and grants for a fee where the personal representative of an estate filed a probate application with an Ontario court (except in the rare circumstance where a judge has ordered a file sealed) including probate grants from 1793 to 1970 held by the Archives of Ontario. The probate application includes the value of the deceased's estate, including personal assets and real estate assets.

Why is it that, particularly with respect to non-contentious estates, the value of a person's estate and the

contents of his or her will, all of which we would consider private and sensitive information, is publicly disclosed upon death? In particular, given modern attitudes and public policy concerning privacy of information? There seems to be a huge disconnect.

While some documents may have historical and archival interest and importance to family members and genealogists, it would seem that the public display of one's will and probate grant after death has no value or significance, and should remain confidential. And a strong argument can be made that there is a potential harm in making this information available. For example, vulnerable persons and beneficiaries could become targets for financial abuse.

In 2013, perhaps recognizing this unnecessary invasion of personal privacy, the Law Society of England and Wales proposed an "opt-out" procedure for removing certain information from the grant of

probate, including the value of estate assets in non-contentious proceedings.

There are planning options that can be considered to protect privacy. A trust set up during one's lifetime can be used as a will substitute. If a trust is established prior to death and assets are transferred to the trustees to be held by them, the trust agreement, the trust assets and beneficiaries generally remain private upon the client's death.

For assets that do not require a court grant to administer, one technique that may be available in certain jurisdictions, including Ontario, is the use of "multiple wills", i.e., executing a primary will and a secondary will. The primary will deals with assets that require a grant of probate to administer them, such as financial assets with large institutions and real estate, and the second will deals with assets that typically do not require probate, such as shares of private family corporations, family loans and personal and household effects. Upon the death of the person who made the will, the executor discloses the existence of both wills to the court, but application is made for a limited court order for only the primary will, and matters relating to the secondary will (which often has the most significant value) generally do not become public. This technique also results in minimizing probate fees and Ontario Estate Administration Tax on the assets passing under the secondary will.

Jointly-held property with right of survivorship and beneficiary designations may be other ways to achieve enhanced privacy of one's estate affairs upon death, and can also reduce probate fees and Ontario Estate Administration Tax.

As with any estate planning, including the strategies briefly reviewed above, proper advice from a professional advisor based on a client's particular situation is critical.

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