

THE PROBATER

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Probate Fees – Now Probate Tax

On December 18, 1998, the Ontario Government enacted into law Bill 81, the *Tax Credits and Revenue Protection Act*, 1998 and the *Estate Administration Tax Act*, 1998. The Ontario Government proceeded to pass legislation to protect the existing probate fee structure. This protects probate fees that have been paid since 1950 and the Government of Ontario will continue to collect the probate tax on the same basis and at the same level that they have since the early 1990's when the probate fees were increased dramatically.

“In Trust For” Trusts – Has its Time Passed?

A recent decision of the Saskatchewan Court on Queen's Bench in *Koons v. Quibell* (1998) 21 E.T.R. (2d) 66 (Sask.Q.B.) has dealt with the long-standing practice of the creation of an “in trust for” trust.

Twenty years ago, solicitors, financial advisors and accountants were recommending to their clients that they set up bank accounts or investment accounts on the basis that the assets are held “in trust for” a particular child.

The problems that the “in trust for” trusts created are numerous and this particular planning step should be very seriously considered before it is used today.

There are numerous unanswered questions which arise when an “in trust for” account is set up. For example, is it necessary to file a T3 Return? Presumably, this obligation arises in any event and from a practical standpoint, a T3 Return is rarely filed by the parent.

The very informal nature of “in trust for” accounts create other problems.

Often, the account is set up “in trust for” only one beneficiary. No alternate beneficiaries are provided for and this may create problems.

As a result of the fact that the “in trust for” accounts are usually arranged for by a financial institution, it is often the case that there is no provision with respect to trustee powers and as such presumably the “in trust for” trustee may be restricted in investing only in *Trustee Act* investments.

Recently, with changes to the federal budget, Registered Education Funds are now much more financially viable. In many respects funds of this nature are formally arranged and therefore avoid many of the problems that the informal “in trust for” accounts created in the past.

The recent decision of the Saskatchewan Queen’s Bench in *Koons v. Quibell*, highlights the difficulties faced by the trustees and beneficiaries of the “in trust for” accounts.

In *Koons v. Quibell*, the court considered whether or not a trust had been created with respect to a trust account that was established for the deceased’s granddaughter. Before the granddaughter turned eighteen, the trustee closed the account and retained the funds. The trustee took the position that the funds were not in trust but that they had been intended as a gift when the granddaughter reached the age of eighteen. It was argued that the creation of the trust required certainty of intention, certainty of subject matter and certainty of objects.

When the granddaughter reached the age of eighteen, she sued the trustee, claiming the funds plus costs, interest and punitive damages.

The court held that an irrevocable trust was created when the funds were transferred into the “in trust for” account and that the grandchild was entitled to the funds.

Koons v. Quibell is an excellent illustration of the types of problems that can arise when an “in trust for” account is opened and it is clearly better practice to proceed to plan for a child’s financial future by way of a more formal trust arrangement such as the trust deed or a registered education plan.

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**Please note: *The Probater* is a quarterly newsletter provided as an information service. It is a summary of current legal issues of concern to estate law practitioners. The comments and articles are not meant as legal opinions and readers are cautioned not to act on information provided without seeking specific advice with respect to the particular situation.