STRATEGIES FOR AVOIDING ESTATE ADMINISTRATION TAXES ON FORGIVEN LOANS

By Suzana Popovic-Montag - August 2023

As noted in last month's Solicitor's Tip, if a loan is forgiven under a will that is admitted to probate in Ontario, estate administration taxes will be payable on the forgiven loan. This month's Solicitor's Tip explores two strategies currently available to avoid the payment of estate administration taxes on a forgiven loan – utilizing multiple wills, or forgiving the loan in an instrument other than a will.

Forgiving a Loan in a Secondary Will

If a client wants to forgive a loan and has engaged in a multiple will estate planning strategy, estate administration taxes will not be payable on the forgiven loan as long as it is not forgiven under the primary will, being the will that is admitted to probate. Since only one will must be admitted to probate, assets devised under a will not requiring probate are not included in the calculation of estate administration tax.[1] On this point, section 32 of the *Estates Act* confirms that a grant of probate may be limited to only part of the deceased's property.[2] The Superior Court of Justice also affirmed in *Granovsky Estate v. Ontario* that it only has jurisdiction over assets governed by the will admitted to probate, and that testators "have the right to organize their affairs in a way which will allow their estates to pay as few probate fees or as few taxes as legally possible."[3]

Forgiving a Loan in a Separate Instrument

While executing more than one will appears to be the simplest way to avoid the payment of estate administration tax, a loan owing to the testator may also be removed from the estate if it is forgiven in an instrument other than the will, prior to the testator's death. For example, a loan was forgiven in *Singh Estate v. Shadil* through a statutory declaration executed at the same time as the testator's will.[4] The testator in this case executed the statutory declaration to explain his will, and used the declaration to forgive an intrafamilial loan made to his daughter. The will itself made no mention of the loan. Both the lower court and the Court of Appeal confirmed that the loan forgiveness was an *inter vivos* gift rather than a testamentary bequest, and therefore the forgiven loan was not part of the testator's estate.

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[1] See Anne E.P. Armstrong*, Estate Administration: A Solicitor's Reference Manual* (Toronto: Thomson Reuters, 1994) [Armstrong] at § 3:7. Ontario Estate Administration Tax.

[2] *Estates Act*, RSO 1990, c E.21, s. 32.

[3] *Granovsky Estate v. Ontario*, 1998 CanLII 14913 (ON SC) at paras. 15, 28.

[4] *Singh Estate v. Shadil*, 2005 BCSC 1448, affirmed 2007 BCCA 303 [*Singh*].

If a separate instrument is used to forgive a loan owing to the testator, the authenticity of that instrument may need to be corroborated by the party relying on it. In *Middleton Estate v. Middleton*,[5] for example, the testatrix's daughter claimed that her mother forgave a loan owed by the daughter and produced a promissory note as evidence in support of her position. The estate trustee brought an application seeking the opinion of the court as to the validity and enforceability of the promissory note. To decide this issue, the court held that section 13 of the *Evidence Act* applied under the circumstances and that corroboration was required.[6] Unlike the statutory declaration in *Singh Estate*,[7] the promissory note in *Middleton Estate* did not prove effective – the loan was not forgiven, as the daughter was unable to provide corroborating evidence, and presumably the loan was considered an asset of the estate.

If any issue arises as to whether a loan is forgiven in a separate instrument, the standard of proof for the forgiveness of the loan will be the ordinary civil burden.[8]

Another thing to bear in mind and also bring to an estate planning client's attention is that if a loan is forgiven in a separate instrument such that it is an *inter vivos* gift, the gift may not be revocable after it is given. Returning to *Singh Estate*,[9] after the testator executed his will with the statutory declaration in that case, he changed his mind and executed another will in which he stated his intent to revoke both the prior will and the statutory declaration, and also instructed the executor of his estate to collect on the intrafamilial loan. Since the court found that the loan forgiveness took effect immediately, and the statutory declaration did not reserve a power of revocation, the testator was unable to revoke the *inter vivos* gift. In light of that case, if a client wishes to forgive a loan in a separate instrument, it would be prudent to also reserve a power of revocation – otherwise, it is probable that the client will not be able to revoke the loan forgiveness at a later date.[10]

Conclusion

While there may be other ways to lawfully avoid paying estate administration taxes on forgiven loans, either of the aforementioned strategies should achieve this goal – either the loan may be forgiven in a secondary will that is not admitted to probate, or the loan may be forgiven in an instrument other than the testator's will, such that the loan forgiveness qualifies as an *inter vivos* gift.

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[5] *Middleton Estate v. Middleton*, 2020 ONCA 552, affirming *Lacasse v. Middleton*, 2018 ONSC 3461.

[6] *Evidence Act*, R.S.O. 1990, c. E.23, s. 13.

[7] *Singh*, *supra* note 4.

[8] *Wilson v. Lougheed*, 2010 BCSC 1868 at para. 314, citing *Singh*, *ibid.* (C.A.).

[9] *Singh*, *ibid.*

[10] *Ibid.* at para. 26 (S.C.).