



ESTATE ISSUES ARISING FROM MORTGAGE INSURANCE

June 2024

If a person passes away with mortgage insurance in place at the time of death, an insurance payout could impact the administration or division of the deceased person's estate. This month's Solicitor's Tip considers two specific issues related to mortgage insurance – how it impacts the calculation of estate administration tax, and, in the case of intestacy, the impact that mortgage insurance will have on the determination of the preferential share of a surviving spouse.

What is Mortgage Insurance?

Mortgage insurance, also referred to as mortgage life insurance, is intended to cover the insured's mortgage balance – either in full or in part – should that individual pass away before the mortgage is paid in full.¹ Often, mortgage insurance is paid directly to the mortgage lender rather than to the estate of the deceased.

It should be noted that a life insurance policy intended to cover an outstanding mortgage after death is not the same as mortgage insurance. For example, in *Perry v Hicknell*,² the Ontario High Court of Justice made it clear that adding a rider to a life insurance policy for the purpose of covering mortgage payments after death will not result in an obligation to use the proceeds of that policy to make payments on the outstanding mortgage if there is no explicit reference to the mortgage in the insurance policy.

Mortgage Insurance and the Calculation of Estate Administration Tax

Before a person can receive a certificate of appointment of estate trustee or a small estate certificate under the *Rules of Civil Procedure*,³ it is generally necessary to determine the estimated value of the deceased's estate and to pay estate administration tax.⁴ The requirement to provide a statement of the total value of the deceased's property is also articulated in the *Estates Act*.⁵

If the deceased had mortgage insurance, an applicant may wonder whether the insurance needs to be included in the value of the deceased's estate when applying for a certificate of appointment, particularly if the mortgage lender received the proceeds rather than the estate.

¹ While this topic is beyond the purview of this Solicitor's Tip, mortgage disability insurance is another type of mortgage insurance service that may be available to pay out the mortgage of the insured.

² 1981 CanLII 1702 (Ont HC).

³ R.R.O. 1990, Reg. 194, rr 74.04, 74.1.03.

⁴ *Ibid*, r 74.13.

⁵ RSO 1990, c E.21, s 32(1).

This point is addressed, albeit indirectly, in the *Estate Administration Tax Act, 1998*.⁶ Subsection 1(1) defines the “value of the estate” as the value “of all the property that belonged to the deceased person at the time of his or her death less the actual value of any encumbrance on real property that is included in the property of the deceased person” (emphasis added).⁷ Since a mortgage is a type of encumbrance imposed on real property, it follows that any outstanding mortgage must be subtracted from the value of real property held by the deceased for the purpose of determining the value of the estate for estate administration tax purposes. However, if a mortgage is reduced or eliminated altogether by mortgage insurance after the deceased’s date of death (the relevant date for the purposes of calculating estate administration tax), it may remain appropriate to nevertheless deduct the balance of the mortgage at the date of death from the value of the property for probate purposes.

It should also be noted that, if the insured property was held by the deceased and another party as joint tenants, the land will not normally form part of the deceased’s estate and will instead be held by the surviving joint tenant. Therefore, any mortgage insurance payable on the property is unlikely in those circumstances to have an impact on the net value of the deceased’s estate.

Mortgage Insurance and the Determination of a Spouse’s Preferential Share

If it is necessary to determine the net value of the deceased’s property for the purpose of calculating a surviving spouse’s preferential share of the estate under section 45 of the *Succession Law Reform Act*,⁸ a mortgage insurance payout ought to be included in the calculation. For a case on point, see *Crane Estate*.⁹ While Justice Broad noted that the voluntary payment of a charge, debt, or expense by another person should not be taken into account when determining the net value of the deceased’s property under section 45 for the purposes of determining whether the assets of the estate exceeded the preferential share and the children of the deceased were entitled to an interest “because it would have nothing to do with determining the true value of the property in the intestacy”, the analysis changes “where a third party such as a mortgage insurer ... is contractually bound to the estate to pay off a charge or debt of the estate on the death of the deceased.”¹⁰ Since the value of property held by the estate increases if insurance pays off an outstanding charge against that property, a mortgage insurance payout will impact the true value of the estate, even if the insurance is not paid directly to the estate and technically may not form part of the estate.

The Bottom Line

Mortgage insurance can be an effective supplement to an estate plan and can lead to different considerations when it comes time to estimate the value of the estate, whether for the purposes of determining the individuals entitled to an interest in the estate on intestacy, or calculating estate administration tax when an applicant is applying for a certificate of appointment of estate trustee (or a small estate certificate). When assisting clients with the administration of an estate where the estate property was subject to a mortgage, it is prudent to explore whether the deceased had mortgage insurance and, if so, how this may impact the administration of the estate.

⁶ SO 1998, c 34, Sch.

⁷ Also See also the *Estate Court Staff Procedures Manual* (Court Services Division, February 2024) at s 4.02.

⁸ RSO 1990, c S.26 [SLRA].

⁹ 2016 ONSC 291.

¹⁰ *Ibid* at para. 17.