

## Ontario Estate Administration and Bare Trustees



**Joan E. Jung**

*Partner, Minden Gross LLP*

*Member, STEP Toronto*

[jjung@mindengross.com](mailto:jjung@mindengross.com)

(416) 369-4306

In Ontario, estate administration tax (sometimes colloquially called “probate fees”) is charged under the *Estate Administration Tax Act, 1998*. This statute was amended as a result of the 2011 Ontario budget to add assessment, audit, and inspection provisions. One amendment, which triggered considerable commentary, imposed a new duty to provide to the Minister of Revenue “such information about the deceased as may be prescribed” in applications for the appointment of an estate trustee made after January 1, 2013. The Ontario Ministry of Finance recently announced that no regulation will take effect on January 1, 2013 and that until a regulation takes effect, estate representatives are not required to provide any additional information to the ministry. Therefore, the extent to which representatives must supply additional information in the future remains a mystery.

Practitioners were concerned that the new disclosure rules might affect the prevailing practice of executing multiple wills by requiring disclosure of the ownership of private company shares, including the shares of bare trustee corporations. Bare trustee corporations are now the instruments of choice for probate fee planning because they are capable of holding title to real estate or acting as the registered account holder for financial instruments or securities.

*Peragine v. The Queen*, 2012 TCC 348, is a recent income tax case that deals with bare trustee ownership of real property. It serves as a reminder that all actions taken by a bare trustee, including tax reporting, should be consistent with bare trustee status. For example, a bare trustee should not report income from the property which it holds as bare trustee.

In *Peragine*, the registered titleholder of certain Ontario real property was an individual, Salvatore Peragine. The sale of this property resulted in a capital gain. Salvatore reported an \$8,500 taxable capital gain in his tax return. The Canada Revenue Agency (CRA) reassessed on the basis that he should have reported a much larger taxable capital gain. On appeal to the Tax Court of Canada, Salvatore maintained that he was not the beneficial owner and therefore should not have reported any capital gain.

A 1998 declaration of trust, executed in the year that the property was purchased, stated that Salvatore was the bare trustee of the property and that the property was held for the benefit of Salvatore’s brother Leo, who was “carrying on business as Cataract Towing.” This statement was inaccurate because the business was not carried on by Leo as a sole proprietor but by a numbered company. The purchase price of the property was financed by a mortgage on the mother’s home and by a private mortgage secured by the property. Salvatore adduced

evidence that Cataract Towing funded the mother's payment of the mortgage on her home by periodically depositing the necessary funds into her account. There was also evidence that Cataract Towing funded the payment of the other mortgage. When the property was sold, Salvatore claimed that he acted under Leo's instructions regarding the disbursement of the proceeds. Although the proceeds from the sale were deposited into Salvatore's bank account, all of the funds were disbursed within 30 days of closing. The Tax Court accepted that Salvatore was merely a bare trustee or agent and therefore determined that the profit on the sale of the property should not be taxed in his hands.

*Peragine* illustrates the importance of acting in accordance with the terms of a bare trustee arrangement because inconsistent action may cause the CRA to reassess. It is usually preferable that a bare trustee only holds as bare trustee and that it does not also hold assets of which it is the beneficial owner. The holding of assets in different capacities invites confusion, both regarding tax reporting and regarding the funding of expenses for the property held as bare trustee.