

Legal Update

Physician incorporation and estate planning; Ontario expert witness rules revised

by Jennifer Gold, LLB
OMA Legal Services

Medicine Professional Corporations and Estate Planning

Ontario physicians frequently incorporate their medical practice to benefit from associated tax savings. Therefore, a physician may wish to consider that the income retained in a corporation can affect taxes owed on his or her estate upon death.

In Ontario, this tax is called the Estate Administration Tax, and is calculated as 0.5% of the first \$50,000 of assets in the estate, and 1.5% of the assets above \$50,000 in the estate. Hence, for an estate that is worth \$100,000 on the date of death, the tax would be \$1,000.

The Estate Administration Tax owing may be reduced by having two separate wills: one for any real estate and investment accounts, and a second addressing the assets of the medicine professional corporation. While the first will is presented to the courts for tax considerations "for probate," the second will is not probated, and hence is not subject to the Estate Administration Tax Act, therefore offering tax savings to the estate. This was recognized by the Court in *Granovsky Estate v. Ontario* [1998, O.J. No. 508]. Since then, government has amended the Act to codify this principle.

Physicians who draft a second will should also be aware that the existing will requires an amendment in order to exclude the corporate shares that will be dealt with in the second will. Otherwise, the standard clause

in the existing will that states, "and all my other assets...", includes the corporate shares as well.

Since the cost of amending one's existing will, and then having a second will prepared, may cost anywhere from \$700 to \$1,000, the physician should consider his or her individual corporation and financial situation before proceeding. Drafting a second will may only be of value if the physician anticipates having more than \$100,000 worth of assets in his or her corporation at the time of death.

Physicians are advised to speak with their accountant and estate lawyer to determine if a second will would be beneficial in their individual circumstances.

Changes to Rules Governing Expert Witnesses in Ontario

On January 1, 2010, new requirements for expert witnesses came into force in Ontario through amendments to the *Rules of Civil Procedure*.

Changes to procedures for expert witnesses

Rule 53.03 has been amended to state that when an expert is called at trial by a party, then the expert's report shall set out the following:

- The expert's contact information;
- The expert's area of expertise and qualifications;
- The instructions provided by legal counsel to the expert;
- The nature of the opinion sought

and how it relates to each issue in the legal proceeding;

- The expert's opinion on each issue; and,
- The reasons for the opinion, including all factual assumptions, supporting research, and a complete list of all documents relied upon by the expert.

Expert reports must now be served at least 90 days before the pre-trial conference. Under the old rule, reports needed to be served at least 90 days before trial. As well, responding expert reports must now be served at least 60 days before the pre-trial conference. Supplementary reports can still be served at least 30 days before trial.

Changes to duties of expert witnesses

A new rule, Rule 4.1.01, has been added to the *Rules of Civil Procedure*. This rule holds that an expert has a duty to provide opinion evidence that is fair, objective and non-partisan. Experts may provide opinion evidence that is within their area of expertise, and as required by the Court.

Experts providing reports must also now sign a document called "Form 53." This form must be attached to any report. A Form 53 is an acknowledgment of the expert's duty. The form sets out that the expert's duty to the Court to provide evidence that is fair, objective and impartial, prevails over any obligation the expert might owe to the party who engaged his or her services. **OMR**