

Hull on Estates Podcast #35

Will Challenges

Posted on November 21, 2006

David Smith: Hi, and welcome to Hull on Estates. You are listening to Episode #35 on November 21st, 2006.

Welcome to Hull on Estates, a series of podcasts for the Canadian legal community dealing with issues and insights surrounding estate planning in Canada. Hosted by the lawyers of Hull and Hull, the podcast will touch on some key considerations when planning estates and Wills. Now, here are today's hosts.

David Smith: Good morning, Bianca.

Bianca La Neve: Hi David.

David Smith: Now, Bianca, today we're going to be talking about Will challenges and more specifically, we are going to get into a discussion about how beneficiaries, competing beneficiaries if you will, join forces to challenge a Will when they don't have identical interests.

Bianca La Neve: That's right. We recently did a case, you and I, David, where this situation came up and we got a really good result for the beneficiaries because they decided to work together.

David Smith: And, you know, certainly if you are going to challenge a Will, you want to consider and you have to consider the interests of anyone who has a financial interest in the estate. And we know, Bianca, that when a disgruntled beneficiary wants to challenge a Will, anyone who has an interest under a prior Will or prior Wills will be given notice of the proceeding.

Bianca La Neve: That's right. Some people believe that all you have to do is give notice to the beneficiaries named in the two Wills, let's say the first Will that is being propounded and challenged, and then possibly the Will right before that, which is the one that the challengers would like to see upheld instead. But really what you should do is try to find out every Will that the testator or testatrix made and named the beneficiaries, and give them all notice of the Will challenge.

David Smith: And of course, this can create some really kind of confusing scenarios. If you have a situation where someone's cut out of the last Will but receives a big entitlement under a prior Will but then is cut out under the Will preceding that Will, it creates all kinds of interesting tactical issues from a negotiating point of view. If we look at the merits of a Will challenge and consider the production of medical records and solicitors' notes and all of the evidence that goes into evaluating the strength of a claim,

clearly the interests of the different beneficiaries under the different Wills will not always be the same.

Bianca La Neve: That's right. I think they all have perhaps an initial interest in getting the documentary disclosure and seeing what kind of case they have, but then obviously if they each have different entitlements under different Wills, then some evidence may be helpful to a set of beneficiaries, while harmful to another set of beneficiaries.

David Smith: O.k. So Bianca, in practice, how does this work. We have an Order giving directions, which is the initial step where the court sets out the issues in dispute.

Everyone is given notice. How do you decide as a beneficiary whether you need your own lawyer, or whether you can join forces with someone else?

Bianca La Neve: Well, I think it will depend on the circumstances of that particular case. In the case we recently dealt with, most of the beneficiaries actually didn't have notice of the Will challenge until after the motion for an Order for directions was brought and heard. And so in that case, the beneficiaries, certain beneficiaries contacted our firm and asked us to represent them because they weren't exactly sure of what was going to happen in the litigation, what sort of rights they had. In other situations, you may see one lawyer listing all the beneficiaries and deciding to contact them all and perhaps getting a joint retainer with all the beneficiaries representing all of them to challenge or propound the Will.

David Smith: I think it's also important to consider whether those beneficiaries have the same entitlement in any other prior Wills, because that will reflect upon whether or not they have an identical financial interest. When we are talking about shares of an estate that the beneficiaries share in, the fact that one beneficiary may be entitled to say 20% of the residue of the estate, and another will be entitled to say 5% of the residue of the estate, intuitively you think that that means that they cannot be represented by the same lawyer, but in point of fact, if you do arrive at any kind of settlement, it would be a logical reason to just have each of them share on a pro rata basis in any settlement. And in that sense, you can see how the argument could be made that they could share the same lawyer.

Bianca La Neve: That's right. I think that's the easy case where you have a prior Will where you have a group of beneficiaries all perhaps with different shares under the Will that they all share some part of the estate versus the more recent Will, where, let's say, a complete stranger to the beneficiaries is named as the sole residual beneficiary. And so, the group of beneficiaries from the first Will do not take at all under the terms of the second Will. And so even though they have different shares under the first Will, they have an interest in working together to have this Will declared the valid one.

David Smith: And so in practice, when you receive the medical records as lawyer for a beneficiary and the solicitor's notes, and go through the process of examination, I know in the case that you and I are familiar with, Bianca, you attended on examination and you were not the only lawyer there. I mean, you were joined by the lawyer who initiated the

Will challenge and by a second lawyer as well, who was acting for persons with similar interests to your clients and I suppose that really leads into the negotiating strategy that has to be considered when you mediate a case such as this.

Bianca La Neve: That's right. What happened was the initial Order giving directions was obtained by the lawyer for one set of beneficiaries and then the rest of the beneficiaries came on board to the Will challenge. And so what we decided to do collectively as a group is work together and basically use the strengths of each law firm to focus on one part of the Will challenge, and get up to speed on the evidence. So, let's say, one lawyer dealt with the medical evidence, had a relationship or was acquainted with the family doctor in the matter, and so was able to go out and interview this family doctor, get his notes and establish a rapport and get some more evidence. Whereas another lawyer may have focused on the financial documentation or evidence regarding past Wills.

David Smith: And what you've said really touches on the issue of costs, doesn't it. I mean, if you are going to be representing different parties, the argument that you are going to run into when negotiating with the executor under the last Will, he is going to look at you and say, fine, I'm going to throw some money at this to settle this case, but don't expect me to pay the legal fees of all the lawyers if there is any duplication involved. And it sounds, from what you are saying, Bianca, that if an appropriate strategy is employed, the work can be divided among the lawyers such that you can provide a convincing argument to defeat the suggestion that there is any duplication of effort.

Bianca La Neve: That's right. I think the executor or the lawyer for the executor will always argue that there is duplication of work. And to some extent, that is true in the sense that when you are preparing for examinations, you should get together with the other lawyers, if you are working together as a group, and discuss strategy and make sure that all points are covered off. So there may be some duplication there, but really what you should try to do is divide up the workload so that you can realistically challenge any arguments by the executor that there was duplication of work. And a point about the executor is your point about throwing money at the problem. What the executor can do in some situations is try to divide and conquer, and so offer up some money to the, let's say the beneficiaries who receive the most under the prior Will, and see if by doing that, he can sort of put a chink in the defenses or the solidarity of the group of beneficiaries.

David Smith: But that's a risky strategy, isn't it, I mean if he makes that offer and the offer is accepted, there still remains a challenge out there from some other beneficiaries and so, I think any strategy employed to negotiate separately with one of the beneficiaries is really a risky strategy to pursue if I'm acting for the executors who are defending the Will against a Will challenge.

Bianca La Neve: That's true, if you're defending an executor who is also the sole residual beneficiary, you should be thinking long-term and trying to deal with all the beneficiaries as a whole, so that the litigation is settled conclusively and your client can

walk away from the matter not thinking that a beneficiary is going to come out of the woodwork in a few months and raise another challenge.

David Smith: So, at the mediation that you attended on the file where we have encountered this issue, you were successful in settling the case and I guess the question that I have is, what difficulties did you encounter in trying to get three separate groups of people, each with three separate approaches and clearly some clients would have been more willing to settle than other clients, how do you arrive at a settlement, and you did arrive at a settlement, in that kind of situation when you have these different expectations and different risk tolerances in terms of proceeding further with the litigation had you not settled?

Bianca La Neve: There are various problems you encounter with this type of mediation. Logistically, you are trying to get all the beneficiaries to be available on one day to mediate. Then you've got to get them all in a room, you've got to have enough sort of break out rooms available so that each group of beneficiaries can go back and discuss strategy with their own lawyer, if that's what they want. But in this case, we were lucky in that all the beneficiaries had a connection to each other. There were long-standing ties among the beneficiaries and respect among the beneficiaries, and so they all recognized that there would be no benefit to any in-fighting among them, and what they were trying to do was get the best possible result for the group as a whole. And so that helped in the negotiation part of it for the beneficiaries as a whole.

David Smith: And so I think, looking at the time, we probably have to think about wrapping up but I think in closing what's useful, what you have mentioned is if the parties challenging the Will are family members, have some kind of emotional connection with the deceased and with the challenge, there is going to be different challenges than, for example, a case where those parties challenging the Will are let's say charities or some other beneficiary that has no emotional attachment to the case whatsoever, but views it purely as a business decision. And certainly in our, or in my experience, the cases where it's a business decision that has to be made, result in a resolution with a lot less rancor than what would otherwise be the case.

Bianca La Neve: That's right. I mean in our situation there was a lot of emotion involved because of everyone's ties to the deceased, but in the end, we all have to remind our clients that it is a business decision as well. And so this group of beneficiaries was able to rise above the emotion and make a business decision that ultimately resulted in a successful settlement.

David Smith: Alright. Well thanks so much, Bianca. It is an interesting topic and we look forward another opportunity to podcast together, perhaps in the not too distant future.

Bianca La Neve: Thanks David.

This has been Hull on Estates with the lawyers of Hull and Hull. The podcast you have been listening to has been provided as an information service. It is a summary of current legal issues in estates and estate planning. It is not legal advice and you are reminded to always talk with a legal professional regarding your specific circumstances.

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