

Hull on Estates Podcast #40

New Year's Resolutions for Succession Planning

January 2, 2007

Sean Graham: Hello and welcome to Hull on Estates. You're listening to Episode #40 of our podcast on January 2nd, 2007.

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.

Sean Graham: My name is Sean Graham. I'm here with Paul Trudelle. Hi Paul.

Paul Trudelle: Hi Sean, Happy New Year.

Sean Graham: Happy New Year to you as well.

Paul Trudelle: And because this is the first podcast of 2007 after the new year, we thought we'd spend a bit of time talking about new year's resolutions and resolutions we should all make in order to make our life a little better, or easier, or more rewarding, at least with respect to our estate planning in 2007.

Sean Graham: Yeah, and I've found a lot of the resolutions I tend to make myself have to do with sort of financial matters, and want to accomplish this, accomplish that. So it kind of does dovetail into estate planning, if you see it as a sort of global plan. And so it does make some sense to think about estate matters as part of global financial individual planning.

Paul Trudelle: I certainly agree, and I think it's important to spend this time in the new year to turn our minds to ways to make our lives a little better from a health standpoint, financially and I think estate planning falls into both of those categories. It helps us plan our finances after we pass and I think that lends us a certain peace of mind that should help us with respect to our health and well being while we are alive.

Sean Graham: For sure. Now a lot of these resolutions like a lot of resolutions are pretty obvious I think, and it's not brain surgery. But I find that estate planning in particular is kind of a lot like insurance, where everybody knows they should have it but often it's the first thing to be forgotten because it doesn't need to be done right now because nobody thinks that the estate plan hopefully is going to be implemented any time soon. But nonetheless, if it gets left for 6 months, a year, two years, five years, eventually you know you may find that your family at least really wishes that there had been an estate plan in place.

Paul Trudelle: That's right. And I hope that these resolutions are taken to heart and people make a fresh start in 2007 and actually do something about them, and not put them off like the gym membership they always plan to get around to, to making and actually going to.

Sean Graham: And if they do, they'll probably reduce our workload on the litigation side, but we're prepared to live with that in order that less families have to go through the real agony of an estate litigation fight.

Paul Trudelle: Certainly, we can live with those consequences, I think there's enough litigation out there that if we can avoid a few, that would help us and everyone.

Sean Graham: So the first one we'd like to throw out is number one, make a Will. Pretty obvious obviously, but it is something that again is easy to forget and once the decision has been made to make a Will, then the steps to make a Will also come into play.

Paul Trudelle: Yeah, and I think making a Will is clearly and obviously an important one but people put that off for a number of reasons, superstition, procrastination, laziness, not wanting to think about that date in the future. But it's something that we always need to keep in mind and, well not always keep in mind but something we need to turn our minds to in any event, and I hope that now is the time we can do it.

Sean Graham: And once you've decided to make a Will, I don't think any estate litigator is going to recommend that you decide to become an amateur lawyer and write it out yourself. I think the second resolution then needs to be to find a lawyer that you trust who drafts Wills and set up an appointment with that lawyer to draft it for you.

Paul Trudelle: Yeah, I don't think we can underscore the importance of that. We see a lot of homemade Wills or will kit Wills in our practice and that's unfortunate. A lot of people feel that they're saving time or money by doing that, however it just leads to, in my experience, a far higher proportion of litigation as opposed to lawyer-drafted Wills. We're not saying that a lawyer-drafted Will is going to be completely bullet-proof or without litigation, but I think that it avoids a lot of unnecessary challenges if you can go to a lawyer. I think the lawyer can help protect against drafting errors, raise with you considerations that have to be made when making a Will that you might not otherwise turn your mind to if you were sitting down to do it yourself.

Sean Graham: And one thing I'd mention on this is that we find, and Paul and I do the litigation side so we can sort of take a step back, but I find certainly that the clients, once they've decided to make a Will and once they've decided to go see a lawyer, the marketplace is so competitive that a lot of clients believe that a Will that a lawyer will do for you for \$250 is just as good as the, you know, \$2,500 Will. My experience or my sort of thought is that that's necessarily the case. To some extent, you get what you pay for. If it's worth getting a Will done by a lawyer, often it's worth giving the lawyer the financial flexibility to take the time. Every lawyer should work hard regardless of what

they're getting paid, but practically speaking, to some extent in some cases you do get what you pay for. And that's worth thinking about as well.

Paul Trudelle: I think that's particularly so in the more complex estates that people might have to put into place.

Sean Graham: Yeah, no question, sort of numbers I throw out. I really don't draft Wills so I don't even really know exactly what Wills are likely to cost, depending on the complexity, but having said that, it is worth making an investment in the Will. If you think about life insurance, it's something you buy, you pay for it, in many cases, for the rest of your life. If you add up everything you're going to pay for insurance over the course of your lifetime, you come up with some fairly considerable figures. Whereas a Will is a sort of one-time expense, at least the Will you're doing. You may want to re-do it every few years, but that particular Will is a one-time expense and can save you just as much money as a lot of life insurance policies might pay out.

Paul Trudelle: That's certainly true. And with respect to the one-time event, that leads us to our second resolution and that is, if you have a Will, you should review your Will.

Sean Graham: Yeah. Anytime, you know, as people grow and age, there are changes in their lives. They have more children, they get married, they get divorced, their children become self-sufficient, some children succeed better than others, some children become estranged. All those factors are worth considering when reviewing your Will periodically.

Paul Trudelle: Certainly. And you know, your assets themselves may change. You may have more assets than you had when you first made your Will. You may have fewer assets than when you first made your Will. There is also a number of other events that can impact on the validity of your Will, such as a marriage or a divorce.

Sean Graham: Yeah, and it's any major change in your life, whether it be financial or family oriented, or, I mean, there's other changes as well. They have the potential to cause you to want to re-look at your estate plan, re-look at your Will and decide if the change warrants a further change in your estate plan.

Paul Trudelle: Yeah, and I think the new year is a good time for us to pull out the Will, blow the dust off it and take a look at it to make sure it still says what you feel it should be saying, and makes the provisions that you want to make.

Sean Graham: I agree, and the next resolution is when you are taking all these steps, is to make sure that you're providing for whatever dependents you may have in your estate plan.

Paul Trudelle: Yeah. A lot of the work that we get in, or that I get in personally is dependents support claim work and that arises simply because the deceased did not provide for a dependent that he or she should have and the *Succession Law Reform Act*

that we've talked about at a number of podcasts sets out what a dependent can do if not adequately provided for in a Will, and what the dependent can do is apply to court for proper support and the legislation leaves it to a court to set out what that proper provision is. Now you can short circuit that type of an application if you were to consider your dependents and make proper provision for them.

Sean Graham: Or on the other side of the ledger, you may have dependents that you don't know about. If you are supporting your children financially on a regular basis, and you suddenly pass away, then your estate trustee may find that the court will impose a continuation of that support. And in a way, the legislation, strange though it may seem, punishes generosity. So that if you are supporting your children right up until your death, then they may have the right to have that support continued. And if you're not supporting them, then it will be much harder for them to gain support from your estate once you're gone.

Paul Trudelle: I think that particular twist throws a lot of people for a loop and surprises a number of estates that face dependent support claims, so that's something that should be considered when you make your Will with your lawyer.

Sean Graham: Yeah, and there may be sort of other documentation aside from the Will, declarations about, you know, stopping support or continuing support. Those obviously are wrinkles that in every particular case you'll need to discuss in particular with your lawyer when you get the chance.

Paul Trudelle: Now in making the Will, one of the primary things you do is name an executor to carry out your wishes and administer your estate after your death. And I think our next resolution which is to speak to your named executor, is a very important one.

Sean Graham: Yes. It's not a pleasant surprise for most executors to find out that they're named in a Will and often if they haven't been told, they are a little bit shocked and they tend to feel that they ought to have been told. It's certainly a good step to take.

Paul Trudelle: And a lot of people simply don't want the job, but that's a good thing to find out before the role is thrust upon that person. Many people are honoured by being named an executor and it is seen as an appointment of honour in certain circumstances. But it's a difficult job as well, and a lot of people simply aren't up to the job physically, emotionally or mentally. Or they are too busy with their own lives and may not want to take on that very important or difficult task of being an estate trustee.

Sean Graham: No doubt. And your first choice is someone you should speak to, because if not, if you don't speak to them and they decide not to act, then you lose control over who the second person is and so on. So much better to speak with them, make sure that they're willing to accept the job, although they are not bound to accept the job. But at least if they're willing, there's a higher chance that they will. And only then would I sort of tell the lawyer that that's the person to appoint.

Paul Trudelle: Yeah, I think it's important for both the testator or the person making the Will to be comfortable with their choice, and also the person who is chosen to be comfortable with that role as well.

Sean Graham: You have to consider, in the context of the complexity of your estate, whether the executor is someone who has the capabilities. If the assets are complex and varied, then you need someone who can navigate that financial world. If the family members, if your family members or your beneficiaries have deep-seated antagonism towards each other, then you need someone you think can sort of deal with those potential personality conflicts. So a lot goes into this job and it's really worth thinking about who's got the skills, depending on your estate, to apply to each situation.

Paul Trudelle: That's certainly right. And on a more practical level, speaking to the estate trustee before you pass away is important, just so they know where your Will is. A Will that's locked away in a safety deposit is of little use to anyone and may not help in the time of need, and that's the last thing you'd want your family to do is having to scramble around, go off to banks, get their agreement to get into safety deposit boxes to find a Will. If you appoint an estate trustee, you should let that person know that they have the job and where they can find the Will so they can quickly access it when they need to.

Sean Graham: I was recently in court just the other day and we are now a year and a half after the date of death, and the day before going to court, the beneficiary or he says estate trustee on the other side of this case, discovered the Will. And we were proceeding on the basis of an intestacy but the person claimed at least that he'd been looking for this Will for months and months and months, finally found it the day before court. Highly coincidental but not shocking I suppose if the deceased doesn't take some care in letting someone know where the Will can be found.

Paul Trudelle: I had a very similar fact, it's funny you should mention that, where we thought we had an intestacy, the estate trustees without a Will were clearing up the apartment and found a Will taped to the underside of a coffee table, much to the surprise of them and to all of the beneficiaries. And that gave rise to a great deal of suspicion with respect to the Will and why it was found when it was found. So those sorts of problems can be avoided and a great deal of cost can be avoided if the estate trustee knows where the Will is.

Sean Graham: No question. Now another issue that people can kind of forget when they're thinking about the financial side of things, the beneficiaries, dependents, various claims, is something as simple as funeral or memorial instructions. If you don't give instructions on these issues, then someone's going to make that decision for you. If you don't care, then that's fine. But if you have strong beliefs and you want those beliefs respected, then it's certainly wise to set that out so that in fairness to the person making decisions, they will know your wishes.

Paul Trudelle: And down the road of setting things out before you pass away in order to help the estate trustee, it's important to make a list of your assets so the estate trustee can find them, locate them and distribute them and do his or her job. In addition to having problems finding the Will, we also often have estate trustees who have the difficult task of trying to find assets where the estate trustee knows that there are assets but just simply not where they are located.

Sean Graham: Yeah, and it's not just estate assets, it's also certainly worthwhile reviewing beneficiary designations, reviewing insurance policies, RRSPs, joint accounts, and all these assets could pass outside of the estate. But it's helpful for the executor to know about those assets as well. So those should be considered as well.

Paul Trudelle: That's right. And I think when reviewing your Will, you should also think about what assets pass outside of your estate, that would be part of your estate plan as well, and review who those beneficiaries are.

Sean Graham: Now another issue that comes up in the context of Will planning is Powers of Attorney for Property and Personal Care, and appointing someone that you trust to take care of your property and make personal care decisions, either immediately or under certain circumstances such as if you lose capacity to make those decisions yourself.

Paul Trudelle: Yeah, I think that's a very important resolution, probably should have been up there with number one - making a Will, and maybe even ahead of number one. The Power of Attorney is a very important document and something that everyone should have. And again, with respect to the considerations we talked about in discussing your affairs with your proposed estate trustee, you should also have that same discussion with your proposed guardian so that they know what your wishes are, they know what assets you have and what assets are to be administered if they were to become attorney and how they can go about finding those assets.

Sean Graham: No question. And the importance of those documents, I mean one sort of practical way to look at it is, those are the documents that are going to affect you while you're alive. Practically speaking, the Will only operates from death, and so it's the attorney who can help you or hurt you during your lifetime. Obviously, you want the executor to carry out that position with honesty but again, those Powers of Attorney have a greater likelihood of actually affecting you while you're alive.

Paul Trudelle: And again, the next resolution is to speak to your attorney to make sure that they know what your wishes are regarding, not only your property, but also your personal care, any end of life or non-resuscitation type decisions are decisions that you should discuss while capable with your proposed attorney.

Sean Graham: Yeah, and I think we can wrap it up there and the final resolution that certainly Paul and I are going to fulfill is to have a safe, happy new year, happy holidays and thanks so much to everyone for listening.

Paul Trudelle: Thanks very much and have a great new year.

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.

To listen to other podcasts, or to leave a question or comment, please visit our website at www.hullandhull.com.

Our theme music is Upper Structure by D. J. Aviad and is courtesy of the Podsafe Music Network.

/mem