

The Dog Days of Summer: Planning for the Transfer of the Family Cottage - Hull on Estates Podcast #67

Posted on July 10th, 2007 by [Hull & Hull LLP](#)

Justin de Vries: Hello and welcome to Hull on Estates. You're listening to Episode #67 of our podcast on Tuesday, July 10th, 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 & Hull, the podcast will touch on some key considerations when planning estates and Wills. Now, here are today's hosts.

Justin de Vries: Today Megan and I thought we'd talk about the family cottage. The weather is fine, it's July, and it's hot and humid. Many people are out of the city. It seems quieter than usual, as is the typical case at this time of year. And people are making their way to the family cottage. We've heard lots in the last few years about the increasing value of recreational properties, or second properties, as boomers begin to retire. And also as Mark Twain said, they're not selling waterfront properties anymore. So that's why as Ontario gets busier, people obviously are looking to cottages. So what does a testator do with the family cottage?

Megan Connelly: Well I guess there are two times you want to look at the family cottage. The first is at the planning stage. Does the testator want to say something specific in the Will about how the cottage should be dealt with? The second is at the administration stage. So if you have multiple beneficiaries and real property that's part of the residue of the estate, how will that real property get distributed?

Justin de Vries: In many ways, the easiest thing with the family cottage, in my view, is for the estate to simply sell it. Because you're going to have so many people competing for an interest in the cottage. So unless the testator has really sat down with his family or her family and said, what are we going to do with the cottage? How do we sort it out? I don't want to see people fighting about it when I die. Then unless that's done, as I said, the best thing really may be just to sell it.

Megan Connelly: Well I guess it depends on how complex the estate is. If you have a mother die, leaving two children and the two children get along well, and this cottage has been in the family for years, they may be content to share it.

Justin de Vries: Famous last words though, a family getting along well. For example, two sisters share it but one sister starts using it more. Or one sister says, I think we need a new couch in the cottage, and the other one says, I don't think we should get a new couch, I think it's perfectly acceptable. So does the Will, for example, go to that detail? Or does a beneficiary simply say, I'm giving it to my two daughters. They can figure out how to deal with it going forward.

Megan Connelly: I guess it also depends on what the other assets of the estate are. Now if the estate has a high cash value, or there is significant investments, then it may be the case that one beneficiary can take the real property while the other beneficiaries' interest is satisfied by cash or investments. So if you have a \$500,000 cottage and \$500,000 worth of cash and investments then, as long as the beneficiaries agree, which, as you said is famous last words, there may not be a problem.

Justin de Vries: And then one of the beneficiaries can go out and buy their own cottage and create their own memories. But as we said, I think first you have to decide as a testator. If I'm going to give the cottage to my children, do I give it to them all? Or do I give it to one? And if I only give it to one, as you said, how do I compensate the other for that? And if it's a valuable estate, it shouldn't be an issue because there's money there. Or one of the things that I think you can say in a Will is that it's to be sold, with the right of first refusal on the children. So that someone can buy it out. And maybe the children won't want to get in a bidding war, but one of them can ultimately buy it out. Or maybe surprise, surprise, they actually agree that they'll both buy it and own it jointly. And then maybe with that incentive, they'd be more likely to agree. Taxes are always an issue, though, when you are gifting a cottage. So we should talk a little bit about that.

Megan Connelly: Another issue that arises is, what happens with the taxes on this cottage? Now for a lot of people, especially people who have owned the cottage for years and in an area that's since become more developed, the capital gains on the cottage may be massive. And the estate is going to have to end up paying the taxes usually. Or if it's transferred while the testator is still living, that may also create capital gains taxes. Because if the cottage is transferred while the testator is living, unless it's transferred to a spouse, then it's a deemed disposition, which will trigger the capital gain. Additionally, if the testator doesn't devise it while still alive and it forms part of the estate at death, then at the date of death, the cottage will be deemed to have been disposed. And again, the capital gains tax will be triggered.

Justin de Vries: So one of the things that people often do when it comes to taxes is that they take out life insurance to cover taxes payable on death. So if you're dealing with a fairly young testator, it may be worthwhile to look into buying life insurance to pay for the transfer of the cottage on death, such that the estate isn't saddled with, as you said Megan, a high debt or high taxes that are simply almost impossible to sell. In some instances, the cottage may have to be sold in order to even satisfy the debt, which would be the irony. Sometimes as well, if a testator transfers it while alive and has to pay capital gains and a specific beneficiary is the one who receives the cottage while the testator is living, it may be possible to put in your Will that taxes will be paid out of the inheritance of the beneficiary who received the cottage, so that while the testator pays it initially, ultimately it comes out of the person who receives the benefit of the cottage. But along with taxes, of course, there's different ways of transferring a cottage. And one way that people use is a trust.

Megan Connelly: Right. Now one of the benefits to this is that if the testator wants somebody to have the cottage while living, but to eventually go to someone else, this is

possible. So an example would be if the testator has a spouse, wants the spouse to continually use the cottage, but wants the cottage ultimately to go to the children, then it's possible to do that in a Will.

Justin de Vries: Another possibility, of course, is the testator can own it along with the wife or the husband for as long as both are alive. So it just doesn't have to be a spouse. Another thing to think about, though, there's more dangers, I think, involved with this is that you can become joint owners of a property with your children, for example, so that when you die and your spouse dies, the right of survivorship takes over so that the cottage passes on to the new generation. The difficulty sometimes with joint ownership is that the asset can be attacked by one of the creditors of the joint owner. So if you have a child who declares bankruptcy, or has a business that goes south, there is a possibility that the cottage then can come in play in order to satisfy the debts. So obviously very important to consider the tax, not only the tax consequences as we discussed, but also the ownership structure to make sure that it doesn't get, the cottage doesn't go to someone you didn't expect. I've also seen issues where a corporation actually owns real estate in order, and then there's a board of directors and, you know, it can get complicated. So in some ways, it's only creativity which limits how to transfer a cottage, but nevertheless important to think through in order to avoid those fights, because there's nothing worse than an emotional battle about a cottage at the end of someone's life, because everybody has an emotional attachment to the cottage.

Megan Connelly: Right. And often people who the testator thinks will get along, end up not getting along at all.

Justin de Vries: So a couple of practice tips, I think, to just sum up. As we said, I think it's important for clients really to talk to clients. So if you're advising a client, it's really to say go and talk to your children, talk about the structure. I think we've talked about in the past about having family meetings to deal with some of the assets of an estate, even if it's twenty years down the road. With the value of recreational properties, especially in regions like the Muskoka's or southern Georgian Bay, it's worth sitting down and having a plan that everybody signs off on.

Megan Connelly: And once the plan is made, it is important that it's committed to writing. I'm in the middle of a nasty file right now where the father repeatedly told one of the kids that he wanted the cottage to stay in the family. Well he didn't mention the cottage in the Will. The other five kids, who have no attachment to the cottage, want it to be sold because it's a major asset. With the other kids, they kept saying well, it's supposed to stay in the family for all our benefit.

Justin de Vries: Yeah, there's nothing, as we keep saying, nothing like a good estate plan to make sure you get things right. When you actually decide to buy a cottage too, that's also a good time to think about some of the tax consequences down the road and maybe there's ways to reduce taxes payable going forward. So don't start at the end of the piece, but start at the beginning when you're getting that cottage. And I think people have to realize that there's that emotional attachment. I think when many people are

dealing with their estate and deciding what to do with assets in a Will, they forget that the beneficiaries will attach a great deal of weight to certain assets including things like jewellery or sentimental items...

Megan Connelly: Right,

Justin de Vries: ...but then also bigger pieces like cottages, where a family has grown up.

Megan Connelly: I guess we've said it several times already, but it's worth saying it once more. Is never assume people that get along right now are going to get along when you're dead. And if you don't plan properly, the cottage may have to be sold to pay for the legal fees involved in sorting everything out.

Justin de Vries: And we know that in spades because that's what we do for a living.

Megan Connelly: That it is, all day long.

Justin de Vries: Thank you.

Megan Connelly: Thank you Justin.

This has been Hull on Estates with the lawyers of Hull & 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 DJ AKid and is courtesy of the Podsafe Music Network.

/mem