

Hull on Estate and Succession Planning Podcast #4 **“Bullet-proofing” a Will**

Posted on April 18, 2006

Suzana Popovic-Montag: Hi, and welcome to Hull on Estate and Succession Planning. You are listening to episode #4 of our podcast on Tuesday, April 18th, 2006.

Welcome to Hull on Estate and Succession Planning, a series of podcasts hosted by Ian Hull and Suzana Popovic-Montag, that will provide information and insights into estate planning in Canada. From the offices of Hull Estate Mediation in Toronto, Ontario, Canada, here are Ian and Suzana.

Suzana Popovic-Montag: At the end of our last podcast, Ian, you suggested that we would consider the issue of how to bullet-proof your Will. In other words, how you could go about preparing a Will that's likely to be upheld. There really are a number of steps that someone can take when preparing a Will to reduce the likelihood of it being successfully challenged. In particular, of course, your Will needs to comply with all relevant laws. This means ensuring that when you prepared the Will, you had the necessary mental capacity to sign it, that you weren't unduly influenced by anyone while it was being prepared, and that the Will was properly executed. If your Will is successfully challenged, though, and you have a prior Will, your earlier Will then takes effect. If you don't have a prior Will, the intestacy rules that we discussed during our last podcast, in your particular jurisdiction, would then apply. I'd like to turn into a discussion, Ian, of some of the ways that you can go about bullet-proofing a Will. Do you have any suggestions as to how to go about doing this?

Ian Hull: Certainly, Suzana. I would start of, I guess, my number 1 step to take would be to make sure that you have proof of your mental capacity to sign a Will and I don't want to get overly legalistic about this issue itself, but a fundamental legal concept is that a Will is invalid if you don't have the necessary mental capacity to sign it when it is made. And this issue becomes sort of the corner stone of part of the litigation if a beneficiary who is unhappy with the Will, or someone who has been left out entirely or something like that, attacks the Will on that basis that you did not know and understand the nature and effect of the terms of your Will, a court challenge can ensue and expensive litigation can prevail. And certainly there are ways to protect yourself from this sort of core challenge by taking the necessary steps to make sure that you can prove to someone later on that you have mental capacity to sign the Will itself. So, Suzana, I mean, if you have any concerns that your Will may be challenged on this basis, what are some steps that you typically tell your clients to take?

Suzana Popovic-Montag: I would normally tell my clients that they should consult a lawyer and to have that lawyer take pretty detailed notes about the instructions that they want to give and about that individual's ability to make and to understand those instructions. That way, the lawyer who is drafting the Will has got a paper trail so to say

in terms of your capacity to make the Will that you want to make. You'd also want to ask your doctor to maybe prepare detailed notes as to your mental capacity as well.

Ian Hull: Well, that's a good point. I mean, a medical practitioner plays such an important role in the process. You know, in our previous podcasts, we touched briefly on this concept of capacity and mental capacity and the ability to understand what you are doing. But, and again, I don't want to get overly legalistic about it, except to say that when a court does look at this issue, what it will do is look at three core parts of the evidence. The first is your lawyer's evidence, what the lawyer says was the circumstances of your capacity at the time you drew the Will. Secondly, they'll want to look at medical records and medical practitioner's evidence. And thirdly, it's going to be the sort of group of people around you that know you, friends, relatives, priests, ministers and the like, who will be able to say, sure, I knew Bill and Bill and I would have a coffee once a week, and boy he sure knew his Blue Jays, and he sure knew his Maple Leaf players, and boy, he loved the stock market and he would follow it like no one's business. And that kind of evidence is all a very important part of the puzzles, but you know, again, I think if your focus is to get good solid professionals around you, that are going to do a comprehensive job and push your professionals on this, especially the lawyers. Say, I might, I am worried about the fact that there may be a challenge to my Will and I want you to do what you have to do at your end to protect it as best as you can. So, these are just some of the, sort of, ideas and you know, I don't want to underestimate the importance of mental capacity in that sense. I, you know, was just wondering, though, Suzana, when would you, and just to finish up this point on capacity before we get into some of these undue influences and some of these other claims. What would you do, what should you avoid when you are preparing the Will, in terms of capacity?

Suzana Popovic-Montag: I think you want to be careful, Ian, to think about avoiding preparing a Will during a period of time when you've got perhaps a temporary physical ailment, or mental frailty or illness. If at all possible, it really does seem to be better to wait until you have recovered from the illness before you think about preparing a new Will, because this will really reduce the likelihood, I think, from my experience anyways, of a successful Will challenge.

Ian Hull: Yes, it's a really good point. One of the things that you, the reality is is that doctors and caregivers who are dealing with your medical issues at the time of any physical or mental frailty, are most often dealing with physical symptoms and physical issues, and they don't always focus their notes or their attention on mental frailty issues. So, I think that, you know, if you can at all possible during a period of time where you've got sort of some physical, certainly physical weaknesses, do your best to either be prepared and have done all your estate planning before then, or see if you are able to work through that before you move on to the next. Now, speaking of number two, in terms of protections, and I think, Suzana, you'd come up with, I think, 8 in total of sort of core steps, but let's work through these as best we can. Let's turn to protecting against claims of what is legally known as undue influence. Can you give us some thoughts on that, Suzana?

Suzana Popovic-Montag: Sure, Ian. Your Will can also be challenged on the basis that someone has forced you to sign the document that doesn't really reflect your real intentions. And as an example of that, if you've got an elderly widower who leaves all of his estate to his housekeeper and nothing to his children, you can imagine that the children are going to try to claim that the housekeeper somehow coerced their father into leaving everything to her. And when this type of claim is made, the court will consider the personal circumstances that actually surround the making of the Will. And for the claim to succeed, you are going to have to have evidence of real coercion.

Ian Hull: Well, that's right, and coercion is, you know, typically is sort of, a non-legal way of describing it is arm-twisting, the classic arm-twisting that can be there. And again, you know coming back to this point, is that you get yourself into the hands of a good lawyer and that lawyer, you say to that lawyer, look I know that, for example, my son or daughter is paying, one of them is paying more attention to me than the other, and I know that it may be reflected in the Will. And I want you, Mr. or Mrs. Lawyer, I want you to make sure that you cover off in your own notes and your own analysis this issue, so that one day someone who may challenge this by virtue of this fact that they may think that my son is arm-twisting me into doing this, that we've got some real professional protection to that. But, it's one of these issues that lawyers often even don't pay as much attention to as they should, and so again, you know it's all about getting a good solid Will and estate plan that prevails after your death, so there is nothing wrong with looking across the table to your lawyer and saying, now you listen to me, I'm not being pressed to do this, and I want you to make sure you've got a note of that, so that someday if someone comes back and asks me. You may want to be a bit forceful on this issue.

Suzana Popovic-Montag: That's a really good suggestion, Ian. I completely agree. I think that, especially when you've got someone who is elderly, unhealthy, frail or really dependent on a particular individual, those are those kinds of circumstances where you really want to be careful that you do impress on the lawyer the fact that this is what you want to do. And that you know what you are doing, because in those circumstances, the court is going to be sort of leery, you know, at the starting point. And so it will need just that little extra to be convinced that this is, in fact, what you wanted to do.

Ian Hull: Well, let's go to number three then. And that is, you know and again, a lot of these protections are, I always say to my clients, you know, this is first and foremost your Will and it's your primary obligation and desire to protect it. I'm your lawyer, I'll do the best I can to help that process. But there is sort of a partial role of the client itself in this, and when you are doing this Will, again you want to be interactive and proactive with your professional. And another one that, Suzana, you and I have seen many times of problems, is that where the Will is not properly executed. And again, this may be seen to be something that is a lawyer's job, but there is no harm in, as a client, insisting that you make sure that this is done properly. And every jurisdiction has sort of a similar rule to execution, and maybe we should talk a little bit about this and what we can do ourselves in addition to what our lawyers can do, to make sure the Will is properly executed as step number three.

Suzana Popovic-Montag: That's a good point for sure. And we know that, for instance, in Ontario, we've got specific requirements as to how the signing of a Will is actually done, and I'm sure other jurisdictions have similar legislation as well. But you also want to keep in mind when you are preparing a Will, you've got a Will, that's great. But there are subsequent changes that happen during the course of your lifetime when you should turn your mind to considering whether or not maybe you need to update or refresh your Will, so to speak. And even at those times, again, you want to make sure of the course, that all the formalities are followed, that you've done what you've done through points one and two that we just talked about, in terms of making sure you've got the capacity, that there is no undue influence. And you also want to make sure that subsequent changes like Codicils or even further Wills are similarly properly executed.

Ian Hull: O.k. Well, I think we've worked through sort of three of the eight important points to consider when you are trying to bullet-proof your Will, and I think we'll save for our next podcast the last group. But we will talk about properly documenting any gifts you make during your lifetime as an important step. Another step is carefully considering any unequal treatment of your beneficiaries. And Suzana, what would be the last three steps that we will want to talk about next time that you think we should cover?

Suzana Popovic-Montag: I think we should cover the Will drafting itself, and the possibility that you could build into this the possibility that a gift is lost, if one of your beneficiaries challenges the Will. And we'd also look at contracts not to contest a Will, which is another way that you can sort of set up a system where the beneficiaries would be precluded from trying to set aside your Will. And then lastly, caution people not to make casual Will-like dispositions, just something to keep in mind.

Ian Hull: Now that's a great idea, and I think we'll work through an example on that last one, because that one is fuel for a lot of unfortunate litigation. So looking forward to that podcast, and thanks very much, Suzana.

Suzana Popovic-Montag: Thank you, Ian.

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