

## **Hull on Estate and Succession Planning Podcast #7**

### The Role of an Executor continued

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Suzana Popovic-Montag: Hi, and welcome to Hull on Estate and Succession Planning. You are listening to episode #7 of our podcast on Tuesday, May 9<sup>th</sup>, 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.*

Ian Hull: O.k. Why don't we turn to our analysis and our discussion on the role of the executor, Suzana. And I know that you and I are trying to work through what can be an onerous job, and that is the role of an executor, in fairly small parts so that we can make sure that we try to cover off as much as we can. I want to give just a little plug, but shameless self-promotion at one level, but on another level, you can also help the listeners to understand some of the analysis that we are proceeding with. And this is coming from, we are working with "Advising Families on Succession Planning - The High Price of Not Talking", it's a book that I published last year, and I just thought the listeners should know that it's a resource that can give them some access to some of the things that we're talking about in writing, so that they can get at it. It's published by Lexus Nexus Butterworths. Alright, so where we left off at the last podcast, Suzana, was we were talking about applying for probate and the need, and I think I even said, that you might want to talk to a lawyer. I just think I want to emphasize that you really do need to talk to a lawyer about whether or not you do apply for probate, because the issue of what tax you pay or don't pay on death in regard to probate tax is so important, and it can be a big number in a lot of estates. So I would want to make sure that I'm clear that I think it's something you necessarily should talk to a lawyer. But we've talked about the question of whether or not we should apply for probate or not. But let's talk about the next, sort of, contact or next step in the application for probate.

Suzana Popovic-Montag: The executor, Ian, should first contact the deceased's financial institution to determine if a Will requires Letters Probate before releasing the estate's assets. And so that's sort of in conjunction with the lawyer, in terms of the big picture and whether or not you need to apply, but when you are dealing with the specific assets themselves, the financial institutions may or may not require probate. So a lawyer may ask you, you know, at what institutions are the funds held, and that might help in his determination or her determination as well. And if the amount involved is small, financial institutions will generally only require a notarial copy of the Will to release the funds. However, each bank, of course, and sometimes each branch, has its own rules and it may depend on whether the branch manager was familiar with the deceased or not.

Ian Hull: Alright, so it really is a bit of a hit and miss and the financial institutions can often control whether or not you are going to have to get probate just by virtue of their own internal rules.

Suzana Popovic-Montag: And you'll often also require Letters Probate to transfer ownership of real property. That's pretty much a given it seems these days.

Ian Hull: And in Ontario, of course, there are some specific rules about first, when a property comes out of Registry into Land Titles, you do get essentially to pass over the necessity for probate on a first registration situation. But that's a fairly particularized situation. Generally speaking, real property is going to rely, you're going to have to rely on probate. I think it's important that, you know, people don't forget that the probate is essentially notice to the world that this individual, the executor, has authority to act. And so when a financial institution or a government institution or some third party says I want probate, it's not such an unreasonable request because if you're going to act on the basis that that is truly the last Will of the deceased, then you've got to make sure that you, as a third party, you've got the right document to work from. So let's turn now to timing of distribution, Suzana.

Suzana Popovic-Montag: Beneficiaries often believe that the executor is taking too long to distribute the estate, that seems to be sort of a common theme that I've found anyways. And there is a general rule that an executor has one year from the date of death to distribute the property of the deceased. However, of course, not all estates are immediately distributable, and sometimes the Will itself creates trusts in which assets are held, or there are circumstances where it's just not financially prudent to immediately distribute certain assets. As an example, you know, there might be a term deposit that would have a penalty associated with redeeming it before its termination date.

Ian Hull: And another reason for a delay in the distribution of the estate assets is the estate may also be delayed if the executor is required to investigate and possibly defend the estate against potential claims. What should an executor do?

Suzana Popovic-Montag: Well, an executor needs to explain to the beneficiary the anticipated timing of the distribution of the estate, so that they don't have any unrealistic expectations of the particularly early distribution.

Ian Hull: I think that's a good point because it underlines an important theme that we always tell our clients and that is that if you're going to be appointed executor, make it a transparent process. Be upfront with the beneficiaries, write to the beneficiaries, disclose to the beneficiaries, make them fully in the loop, so that they don't, it takes away a lot of their steam when they say, gee, I do know what's going on, I know why that stock hasn't been transferred because the transfer agent is causing trouble, or I know that the court is delaying probate, or something like that. But I always tell my executors to, even informally, just send update e-mails, you can use your lawyer to do it as well, but if you keep the communication line open, it can change the whole dynamic of what we're going to talk about at a later podcast, and that is attacks on the executor for their conduct.

Suzana Popovic-Montag: It's a really good suggestion Ian, and by removing that cloak or the aura of suspicion or non-disclosure, you just really take the wind out of the sails of any allegations at the end of the day that things weren't done properly or with knowledge of the beneficiaries.

Ian Hull: And I go so far as to tell the executors if they have a bunch of beneficiaries, that it's not a bad idea to also just send the monthly statements to the beneficiaries. They come out, it's an easy document to circulate, and if you've got e-mail you scan it in and send it around. And again, it shows, alright, some legal fees are coming out of the bank, they'll know the kind of legal fees that are being incurred, if there are reasons for delays for other reasons. It can be shown just by that statement alone and then maybe even do a short summary report. But I just, I don't think we can ever underestimate the need for an executor to be transparent.

Suzana Popovic-Montag: I think you also might want to keep in mind that you give your executor sufficient power and flexibility so that they can properly manage your assets during the period of time before the estate is actually distributed. For example, your executor should be given the authority to change perhaps the estate's investment strategy, to respond to changes in the economy or in the stock market, so that they are able to maximize the return for the beneficiaries in the meantime.

Ian Hull: That's so true, and I think that's important to make sure that you check with your lawyer when you do the Will that those kinds of powers and the kind of flexibility that you want your executor to have exists in the Will.

Suzana Popovic-Montag: I was going to say, Ian, that now we've gone through, you know, collecting and distributing assets and we've talked about sort of, you know, what happens in the meantime. There's also a bunch of other duties that executors perform and I was just wondering if we could maybe turn to a discussion of some of those.

Ian Hull: Sure, because this idea that an executor's job is done just by looking into the minimal stuff is not enough. What about, for example, making the funeral arrangements. One of the executor's first duties is to arrange the funeral, but what's an important, some of the important aspects of this?

Suzana Popovic-Montag: Well if you have specific instructions on how you want your funeral to be conducted, you should let your executor know, and you should let them know during your lifetime. And also, you know, as a secondary thing, include those instructions in your Will because we know, certainly I've seen many examples where, you know, the funeral has already been conducted before they've actually been able to locate the Will. And if you just put your instructions in the Will document and you don't tell someone during your lifetime, your wishes may not necessarily be upheld.

Ian Hull: And I think, just to get a little bit legalistic on this, one can't forget that a Will speaks from death and if you are indeed the named executor, that's your job and you're

going to be held responsible for the funeral at a certain level. Now, most of the time, the family will take over and if you're not part of the family, they will, you will be guided by them but it's not something you want to forget from a legal standpoint. Another little twist is, of course, that you get your fees paid, the funeral expenses are always something that is sort of a troubling starting point and one of the things that you want to, most banks will do is that they will be amenable to have the funeral expenses paid right out of the individual's account at death. But you want to make sure that you can either have those arrangements organized, or you can consider the executors have got enough savvy to get that organized.

Suzana Popovic-Montag: And that leads into the second point or something that is sort of tied to that, and that is that the executor needs to ensure that he or she is acting under the authority of the deceased's most current Will. And when you said, you know, these arrangements that you can make with the bank, the bank, of course, is going to require a copy of the Will in order to be able to have, you know, to realize that the executor is the person with authority and to make the payments to the funeral home or what have you in those circumstances.

Ian Hull: So I guess the executor's got to search the deceased's home and the papers to determine whether or not the Will under which he or she is acting has been amended, revoked or anything has changed, and I guess that's their job.

Suzana Popovic-Montag: That's right, for sure. The executor also, Ian, is responsible for filing a final tax return, for both the deceased and the estate. And to ensure that any outstanding income tax has been paid. And I know that we talked about possibly doing a further podcast to, you know, discuss the executor's filing and accounting obligations in more detail maybe at a later time.

Ian Hull: I think that's worthwhile because they are a bit detailed and we're coming near to the end of our podcast for today, so why don't we talk about I guess not the final job of the executor, but just the last point before we wind up our podcast.

Suzana Popovic-Montag: And I think that one, Ian, sort of ties into what you had said a little bit earlier in terms of providing information to beneficiaries. Because the executor really is responsible to provide all the information about the estate to the beneficiaries and those who aren't kept informed about an estate's accounts, those are the kinds of beneficiaries that become frustrated with the executor and are then more likely to consider litigation.

Ian Hull: Well that's great. Well that's a good point to wind up our podcast for today. Next podcast, I want to turn to executor's fees and also just some detail on how the executor gets paid and how the professionals around in the process, the accountants and the lawyers, get paid and then we'll talk briefly about situations where it can be a bit contentious and how you deal with that. And then I think if we can, we'll move into some of the income tax and accounting obligations of the executor, so we get a good

handle on that, to wind up hopefully the sort of summary review of the executor's duties and obligations.

Suzana Popovic-Montag: That sounds great, Ian. I just wanted to say before we signed off that if anyone has any e-mail or any information that they'd like to send to us, make any comments on our podcasts, to please feel free to send us an e-mail and they can do that through [www.hullestatemediation.com](http://www.hullestatemediation.com).

Ian Hull: That's great. Well thanks so much.

Suzana Popovic-Montag: Thank you.

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