

## **Hull on Estate and Succession Planning Podcast #15**

### **Powers of Attorney for Property and Personal Care**

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Suzana Popovic-Montag: Hi, and welcome to Hull on Estate and Succession Planning. You are listening to Episode #15 of our podcast on Tuesday, July 4<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: Hi Suzana.

Suzana Popovic-Montag: Hi Ian.

Ian Hull: Well last week we were working through the thorny issue of Powers of Attorney and the sort of impact it may have on you personally and on your family. We talked a little bit about the choice of executors and the like. Today I want to turn to just working through that sort of final phase of a non-contentious Power of Attorney situation. Talk a little bit about challenges to a Power of Attorney for property and talk a little bit about Powers of Attorney for Personal Care. And if we have time, maybe we can get into some of the other causes of estate litigation. So, Suzana, in terms of the appointment, again we've talked about the suggestion that it's always a good idea to consider appointing a neutral person or a financial institution to act as your attorney in order to reduce the family tension and to limit the likelihood of potential court challenges. But what are the problems with that?

Suzana Popovic-Montag: Well many people are unwilling to consider necessarily appointing a neutral party for two, you know, primary reasons. The first is the family control issue. There's often a lot of comfort in leaving financial decision-making in the hands of family members.

Ian Hull: However, many people rely on heavily on their own professional advisors such as financial planners, lawyers and accountants to either run or assist in the running of their financial affairs while they have capacity to make their own decisions.

Suzana Popovic-Montag: That's true, and one of those people would be equally capable of acting during incapacity. In addition, we've got financial institutions, they're not the only neutral parties, there are experienced people who are in the fiduciary administration process who can satisfy the obligations of an attorney equally well.

Ian Hull: So the second issue is, of course, costs.

Suzana Popovic-Montag: Many people are worried, Ian, that appointing a neutral party is going to unnecessarily be costly.

Ian Hull: So in most jurisdictions an attorney is entitled to receive compensation of approximately sort of five or six per cent of the assets that the attorney administers.

Suzana Popovic-Montag: But you can, of course, negotiate a different rate, right?

Ian Hull: For sure, and most of the individuals and trust companies that are involved with this are prepared to discuss more modest rates, in my experience anyway.

Suzana Popovic-Montag: And many family members volunteer to act as an attorney without compensation, so they think that appointing a neutral party appears far less attractive from their perspective.

Ian Hull: However though, in my experience, there's a tremendous amount of work that's involved in properly acting as attorney.

Suzana Popovic-Montag: So the fee then should be paid to anyone who's prepared to take on the job even if that person is a family member.

Ian Hull: I agree, and your adult children may initially be opposed to the appointment of a neutral third party as an attorney.

Suzana Popovic-Montag: Though, once they fully understand the obligations that arise from acting as an attorney, and in particular, the amount of time (laughter) that the jobs going to take, they do generally welcome the opportunity to give the job to (laughter) someone else including a professional.

Ian Hull: And I think that's a big part of the process of choosing an attorney, and we owe it to our family to make sure that we've gone through and spent either ourselves or we've had our own professionals spend the time to explain just what is involved so that they can really understand why they don't want the job.

Suzana Popovic-Montag: Oh that's for sure. I mean we've heard it said many times that it's a very thankless job at the end of the day.

Ian Hull: So Suzana, let's turn to challenges to a Power of Attorney for Property and the more contentious environment that can exist here.

Suzana Popovic-Montag: Right. There are a number of grounds, Ian, on which family members can challenge a Power of Attorney for Property, and if they're unhappy with the choice of the attorney, you know (laughter) it's not going to be difficult for them to find those grounds.

Ian Hull: For example, for sure, if a Power of Attorney was prepared shortly before the finding of incapacity, the family members may claim that you lacked capacity when you appointed the attorney and that you were somehow pressured to do so.

Suzana Popovic-Montag: Alternatively, family members can challenge the accounts of an attorney or scrutinize his or her every action, so that it really becomes difficult for the attorney to affectively administer the assets at all.

Ian Hull: So family members have a legitimate interest in ensuring that the attorney behaves appropriately.

Suzana Popovic-Montag: Oh for sure, they want to make certain that the person granting the Power of Attorney has enough money to live comfortably during his or her lifetime and that the attorney doesn't somehow erode the assets so that the family members will get what they're entitled to or expect at the end of the day under the Will.

Ian Hull: However though, family dynamics and hurt feelings can exacerbate the legitimate concerns of the family members and really make the attorney's role extremely complicated.

Suzana Popovic-Montag: For example, one problem that often arises stems from the right of an attorney to look at the Will.

Ian Hull: Attorneys are entitled in Ontario to view the Will so that in administering the estate they're aware of the ultimate dispositions.

Suzana Popovic-Montag: And while this information, Ian, can be very useful to an attorney who's developing an investment plan, it also can create a lot of family tension.

Ian Hull: That's for sure, and the attorney is not supposed to disclose and is in fact prohibited to disclose the provisions of the Will to anyone else unless absolutely necessary.

Suzana Popovic-Montag: Often times, though, we know that details do leak out and, of course, then problems arise.

Ian Hull: So this situation can be prevented if you hold possibly a family conference in which you discuss the terms of your Will with your family members so that they're not surprised by its contents.

Suzana Popovic-Montag: That's a good suggestion for sure.

Ian Hull: And in terms of the contentious situations and the environment that you may find yourself in, I really think it's something that, like a Will situation, a Power of Attorney, a good careful review with your family members about your plans and your choices is essential.

Suzana Popovic-Montag: That's for sure, and even families that spend a lot of time together or a lot of time at the family conference process in connection with the Will, many times they just focus exclusively on that and fail to actually consider the Power of Attorney.

Ian Hull: For sure, because the expansive role of the attorney and the effect of his or her decisions on the estate plan, it really is essential to have this full discussion with your family members about the plans you've made if you become incapacitated, so you'll want to make sure it's a two-step process at the family meeting.

Suzana Popovic-Montag: Oh I agree. Could we maybe take a few minutes, Ian, and turn to a Power of Attorney for Personal Care?

Ian Hull: I think it's a great idea because that's the second part of the equation, and while the Power of Attorney for Personal Care doesn't run the money so to speak, they certainly run the emotional issues and are in charge of a very, very important part of your care if you should become incapable.

Suzana Popovic-Montag: And in some families, we know, (laughter) that emotional aspect can certainly overpower any financial considerations at the time.

Ian Hull: That's right. So a Power of Attorney for Personal Care allows you to appoint an attorney to make decisions about your personal health care if you become incapable to make those decisions.

Suzana Popovic-Montag: And I mean this document is sometimes called the Living Will or an Advanced Health Care Directive and what it is, is your attorney is allowed to make decisions on your behalf about your medical and health care, your nutrition, your shelter, clothing, hygiene and safety, those kinds of issues.

Ian Hull: You can also include specific instructions to your attorney as to how the decisions that they will make on your behalf.

Suzana Popovic-Montag: Can you give an example of that Ian?

Ian Hull: Well, for example, the classic one is refusing unnecessary measures to prolong your life if you have a terminal illness.

Suzana Popovic-Montag: I see, and if you become incapacitated, medical professionals have to consult with your attorney to obtain instructions on your care.

Ian Hull: And so in selecting an attorney for personal care, you really need to choose, I always tell me clients you need to choose someone who understands your personal wishes and who will convey those wishes to the professionals involved.

Suzana Popovic-Montag: It really brings that Terry Shiavo case right up to the forefront when we talk about these issues, doesn't it, Ian?

Ian Hull: It does, and if you desire it, you can always appoint joint Powers of Attorney who must make decisions together about your personal care.

Suzana Popovic-Montag: I wonder if that would've worked in that case for example.

Ian Hull: Well it may or may not have, and it's one of those situations that you'd hope that you can canvass carefully before you get into this situation of incapacity, but for sure that is a big question mark.

Suzana Popovic-Montag: Oh that's for sure. Now although a person must have the mental capacity to give a Power of Attorney for Personal Care, the level of capacity interestingly enough that's required is much lower than that which is required to do a Power of Attorney for Property.

Ian Hull: That's right and we've talked about this in past podcasts but the question of capacity is really set up in a food chain like situation. You've got the highest level of capacity being the capacity to make a Will, the next level is the capacity to do a Power of Attorney for Property, and then the following level below that in terms of your abilities and your cognitive strength is the Power of Attorney for Personal Care, finishing off with the classic fact that you can, your lowest level of capacity is to marry.

Suzana Popovic-Montag: (Laughter) we've got that going for us.

Ian Hull: That's right (laughter) I'm not going to touch that one in this podcast.

Suzana Popovic-Montag: I think that's the right call Ian. In terms of what you need to understand in order to be able to prepare a Power of Attorney for Personal Care, you have to have the ability to understand whether the proposed attorney, who you're choosing, has a genuine concern for your personal welfare.

Ian Hull: And of course, you have to be able to appreciate that you may need to have the proposed attorney make decisions for you.

Suzana Popovic-Montag: Because your attorney for personal care doesn't handle any of your money or your financial affairs, your family members are less likely, I think, to challenge your choice than they are to challenge the choice you've made for your attorney for property.

Ian Hull: You're absolutely right Suzana, but still it's a good idea to discuss your choice of attorney with your family members at a family conference to ensure that the whole family is aware of any specific instructions you've given that attorney.

Suzana Popovic-Montag: That's right. Thanks very much Ian. I think that, that brings us to the end of this podcast and so we'll save your suggested discussion about challenges to estate plans and what it costs to a later podcast.

Ian Hull: Thank you.

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