

## **Hull on Estate and Succession Planning Podcast #20**

### Claims against the Estate

Suzana Popovic-Montag: Hi, and welcome to Hull on Estate and Succession Planning. You are listening to Episode #20 of our podcast on Tuesday, August 8<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 there, Ian.

Ian Hull: I was thinking that what we could talk about today was sort of a wrap up session of the causes of estate litigation. We've certainly tried to highlight what could be the signals for a train wreck coming down the pipes, so to speak, for an estate litigation matter arising after your death. We've talked about, I think you even got us up to the 10 most frequent causes. And in our last podcast, we focused on some specifics regarding claims against the estate through Family Law entitlement, dependent relief claims and the like. Why don't we wrap up this aspect of the analysis by talking a little bit about what are, I guess, a legalistic term, but a breach of contract.

Suzana Popovic-Montag: Ian, you can make a claim for breach of contract or for *quantum meruit* against an estate if you've provided work or services to the deceased while that person was actually alive.

Ian Hull: So if the deceased promised to pay you a certain amount of money for your services, but never did, you could make a claim for what we call breach of contract.

Suzana Popovic-Montag: And that's even if no specific amount of money has been agreed upon. You can still make, you know, what we call a *quantum meruit* claim, which is a claim for a reasonable amount for your work and services.

Ian Hull: So before we come to some examples of this, I always remind my clients you can also make a claim for breach of contract against the estate, if the deceased simply promised you money.

Suzana Popovic-Montag: For whatever reason, I guess, just money that's supposed to be paid on his or her death, you know, one of those typical breach of contract claims that you would see in normal commercial matters.

Ian Hull: And these cases are so difficult to identify because often in a situation where the child may or may not know that the parent has entered into some sort of assurances or contracts. You know, this isn't just the typical situation where someone might enter into

a long-term contract for your satellite dish. This is a situation where you might have promised the gardener a little more than just being paid the amount of their services but they'll actually come back and claim that your Mom or Dad promised that he could have the riding lawnmower, plus, oh, by the way, the adjoining property.

[laughter]

Suzana Popovic-Montag: Let's dream large.

Ian Hull: That's right, because I think, and certainly I just had a client the other day where we met with, and you know, they were very alarmed by these kinds of claims but when push came to shove on this, they honestly believed their parents had a great independent life, and they weren't sure of what kind of obligations they had entered into.

Suzana Popovic-Montag: And that's where all the evidential considerations really play a big part in these types of claims. To establish this kind of, you know, the *quantum meruit* claim for instance, or even the breach of contract, or a contract that is not a written one, but a verbal one. Very, very difficult in some cases to actually establish those kinds of claims.

Ian Hull: In the courts, at least, we are comforted and I tell my clients that the *quantum meruit* claim is the work and services claim. I mean it's a situation where, back in the 1940's, there was a famous British case where actually a gentleman, a gardener, who I know you are familiar with, came to work for a nice elderly person and performed services for many years on the promise to pay. The elderly person didn't have money from a cash flow standpoint, to pay and the promise was, don't worry, you'll be looked after under the Will. Low and behold, the person dies and the person is not looked after under the Will. And then, in that situation, judges are not going to, and in that case, the judge didn't, simply let this person, who had acted to his detriment, sort of be punished and not receive what he felt that he should receive. The difficulty in those cases, though, are two-fold: one is, as you say, the evidentiary one, the question of what the courts will say is typical, look give me some supporting evidence. We call it corroborative evidence, give me something more than just a handshake or a promise to pay. Show me a little bit more. And then the courts will, second of all, say o.k., fine, if there was, if I believe you, that there was an obligation to pay, then let's talk about how much you are going to be paid and quantify it and particularize it. And again, that will come back to what's her hourly wage and what's a reasonable hourly wage. And I note with children anyway, the courts are not anxious to pay out wages to children who provide work and services for their parents. It's sort of, that's their lot in life, they have to do that because it is a parent, but I'm not saying they won't, but it's difficult. So these kinds of promises can really create big problems.

Alright, so the other area where it seems that there are, I guess, ghosts, to use the analogy, that come out of the woodwork, is what we call constructive trusts.

Suzana Popovic-Montag: And with a constructive trust situation, it will arise when you can claim that the deceased was holding assets in trust for you and that, you know, one half of the estate should be distributed to you, notwithstanding the provisions of your Will.

Ian Hull: So this concept is known as a constructive trust claim.

Suzana Popovic-Montag: And it's been popular, Ian, as you know, among common-law couples who aren't entitled under our laws anyways to make equalization claims under provincial family laws.

Ian Hull: So we talked about in our previous podcast how you calculate the family law entitlements and what they mean, but what the courts did, and this started in the early 1970's in Canada with the Supreme Court of Canada decisions. *Murdoch and Murdoch* was a famous one, and *Rathwell* was another famous decision. Where the court was struggling with the fact that common-law spouses were spending marriage-like relationships with individuals, long-term relationships and when the individual died and didn't leave them in the Will, they were left out with nothing. So the court said, that's not going to happen, the courts may take the view if a couple lives together for a long period of time and jointly accumulate the assets.

Suzana Popovic-Montag: And those assets, you know, the court may say should actually be equally split between the parties, regardless of which partner actually brought them into their relationship.

Ian Hull: And again, I know you and I met with a client just recently where it was a farm property and was a common-law relationship. There wasn't even I would call malice, or anything on the part of the spouse who died. He was in his early 50's and wasn't, I guess no one is expected, to die but he wasn't expected to die, hadn't got, as many people do, not got his life in order and so there was almost estate chaos because what happened was he was common-law, he had done a Will when he was in his 20's that gave everything to his brother and on the face of it legally the common-law spouse was out. And she was looking at having to leave the farm, which of course had to be maintained everyday and the like. And but for the ability to make a constructive trust claim, she would have been in very serious trouble.

Suzana Popovic-Montag: And it's in those exact kinds of situations, Ian, where we as lawyers are looking for creative ways to be able to help clients, and, you know, we are thinking outside the box, outside the parameters of the Will and we are looking at things just like we talked about, you know, breach of contract, constructive trust, is there, you know, a support claim in the circumstances and, you know, if they're married, of course, there's a bunch of *Family Law Act* claims that they could possibly pursue.

Ian Hull: So, in summary, it seems to me that it's almost, and while the 10 frequent causes that you've identified are not always present in every case that we see, it's almost 2 or 3 of them exist. I mean, in the case where that poor woman had really had a real

financial mess, or an estate plan mess, that was a question where the estate plan wasn't current. And that was also a question where the, quite frankly, both of them, because she quickly realized that her estate planning advice was inadequate, the inadequacy of the estate planning advice was there, and the reluctance to seek advice was there. Just to give you the sort of examples of where these causes come to life when you're dealing with this. So, I mean, I guess while you can't plan for everything, you certainly can try to reduce the risks of litigation and by identifying some of these causes, you go a long way to resolving that problem.

Suzana Popovic-Montag: I agree, Ian, I mean identification or sort of expecting these things, it's when you've got the heads-up, that you can sort of see that train wreck coming, to use your analogy again.

Ian Hull: For sure. Well I think in the next in these couple of podcasts we'll turn to really just sort of a review of the legal process, not just the Ontario perspective, but a typical legal process that one can anticipate and, quite frankly, some of the costs associated with it, because, you know, I think it can't hurt to know a little bit about what could happen, because although after listening to these causes, I have hopefully got my estate plan organized to deflect any estate litigation. Either you get unlucky and one of the problems does creep in and you just simply couldn't plan for it, or if you are in the process of going down that route of a legal dispute, it can't hurt to know a little bit about what the process is about and its costs.

Suzana Popovic-Montag: Well, thanks very much, Ian.

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