

Hull on Estate and Succession Planning Podcast #36

The Family Conference - Family Business Issues

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Suzana Popovic-Montag: Hi, and welcome to Hull on Estate and Succession Planning. You are listening to Episode #36 of our podcast on Tuesday, November 28th, 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 let's continue working through what is, something that you and I don't find difficult to do and that is talking (laughter).

Suzana Popovic-Montag: What are you saying Ian?

Ian Hull: (Laughter) We, but talking in this environment and that is talking at the family conference. We've spent some time talking about how important it is to have the conference, how important dialogue is within the family, but we thought that we wanted to make sure that people understood how to talk in that environment, not just keeping it businesslike and measured and keep the emotions out of it, but how to talk and a good way to learn about how to talk in one of these meetings is to send the message through some of the examples that are difficult issues. Topics that are tough to talk about because it's easy to sit at the table at a family conference and talk about how your weekend was with a family member who you may not have seen or how your kids are for awhile, and a sibling might have come in from out of town or something for the family meeting but, trying to get into the meat of these meetings and where we have to spend a lot of our time in terms of guiding these things is to teach people and to show people how to deal with difficult issues and we've talked about really difficult issues like extra-marital relationships, how you talk about that, unequal treatment of children. The last one we talked about was the family law concerns and spendthrift beneficiaries.

Suzana Popovic-Montag: And traditionally Ian, this has been sort of the crux of the problem, so to speak, with the whole estate planning and the fact that it was always top down planning where Mom and Dad would you know issue an edict sort of from above and determine how the estate would be dealt with. And then on their death, you know, the kids had to live with the consequences once they learned what that plan was. This whole family conference solution is about communication, and it is about talking about what the plan is during the lifetime and as part and parcel of that, these really tough issues can arise in these conferences.

Ian Hull: So the topic we were preparing for this, we were sort of bantering around and I think the topic is, one of the difficult topics is how to talk about family business issues. And we've committed to spending some serious time in some future podcasts of really breaking that down when you have an active business operation and how we deal with transition issues and so on. But that's not the real purpose of today's podcast. Today's podcast is to talk about the dealing with difficult family business issues in a more general global sense, and your idea, Suzana was that, was what topic can we sort of move into to illustrate how best to tackle this difficult discussion point.

Suzana Popovic-Montag: I think Ian, the family cottage issue is one issue that is really a prevalent one, certainly in our experience, and I think one that really deserves a little bit of extra mention over and above, you know, as you said, the family business and those kinds of issues. The family cottage is one that arises quite often.

Ian Hull: And it really is a for most of us, the real world, that most families don't have the family business to worry about, but lots of families have cottages or recreational properties or unique pieces of real estate and they may be modest or grand that are really, that's the family business, it's not the family home, it's something that attaches with it special emotions and, you know, the illustration that always reminds me of how important the family cottage is, is that years ago, back in 1999 the Ontario government changed our rules to deal with investments, and it dealt with the prudent investor rule. And just gave us some guideposts as to how we are supposed to manage property when we are dealing with estates and trusts. But one of the things they said was you have to be prudent, you have to be careful, but they isolated and they separated the one area and that was recreational property or property with special interests can be invested in a unique, in a non-traditional investment category, and they said look, you look at a property, if you're a trustee and the cottage may be in a trust or in an estate, you don't have to necessarily look at it in a business like way, you can use that, you can hold on to that property whether it makes good business sense or not. And I think that's a really good illustration of just the importance that certainly, and this exclusion continues through the United States and in most of the Canadian provinces, it's a good illustration of how important our society treats special properties and not just cottages, but special properties.

Suzana Popovic-Montag: That's really, really interesting Ian, and I think you know you sort of get that, you can sort of understand the rationale for that because, you know, big or small, you know, new or old, family cottages are going to have a lot of emotional or personal attachments to it by family members that you can't quantify, you can't necessarily even, you know, understand, but it is a part of, you know, these peoples' lives while they're growing up and it's certainly, it's very intuitive I think on the government's behalf to sort of recognize that and to, as you say, build it into the prudent investor rules.

Ian Hull: So as a family business issue, how do we talk about it? Well, first of all, like every good family conference, you come well prepared. And you determine just what your landing spot is, if for example, your landing spot is that one of their three children should ultimately own the cottage, then you have to deal with fairness issues.

Suzana Popovic-Montag: And the truth is, as we keep saying, you know, fair doesn't necessarily mean equal and that when you add the layer of a family cottage and the personal issues attached to that, it just makes it all the more compounded in terms of being difficult to necessarily deal with.

Ian Hull: So one of the things that we want to, when we have our pre-meeting with our, with the heads of the families, is we like to say okay, if that's the case, you want to favour one over the other and lots of times people do and lots of times people say look, Johnny wants the cottage but Betty doesn't use it and she's going to be fine with that, but we like to ask the next question is, now okay, well how are you going to try to equalize the gifting with Betty? Because the cottage will typically attract significant tax at the date of death, have you accounted for that? Who's going to fund that tax? Is it going to come out of the cottage by way of a mortgage later or all sorts of issues like that. But the fairness issue is the first thing we like to make sure that everybody understands on the table.

Suzana Popovic-Montag: And I think it also, you've got to be aware of the fact that even though you presume that Betty may not want that cottage, may not necessarily be the case. And suddenly when that cottage is floated out there and there is this possibility of some kind of gain or some potential to have an interest in something, you know, peoples' mindset really can change and sort of on the fly at that.

Ian Hull: So true, you know, how many times have we been in situations where you don't ask that question, you presume that answer and the minute you start presuming how your children are going to behave is the minute that your gonna leave yourself exposed to problems later. And there's nothing like we've called the eyeball effect, well even if the child isn't going to be happy about it, if there is some bitterness about the fact that Johnny's getting the cottage, and it comes out in a family meeting, that's not the end of the world, we don't have to back down, it may still be that Johnny gets the cottage, but you have an opportunity to look across the table as the parent and say look, I want Johnny to have the cottage, this is why, I just hope you respect why and hopefully you are able to finish that sentence and say, and by the way, I'm treating you equal by doing x, y and z so there should be no hard feelings.

Suzana Popovic-Montag: So Ian, really what your doing there is your adding the in-law factor to the eyeball effect because, you know, you're just adding one extra layer of the possibility of having to deal with that, those emotions, those extra people sort of on the outside looking in and even though you may have during your lifetime never thought that those people would have an interest in it, they may add a different level to this that you've got to keep in mind and that sort of may come out during the course of the conference.

Ian Hull: And there are two other issues that I just want to talk about in terms of what can be flashpoints on these discussions. One is obviously that, as we said, is the idea that maybe your kids don't really know what you're thinking and you don't know what

they're thinking so you bring up the topic, you say Johnny is getting the cottage, I'm happy to hear about it, Betty your thoughts on that, but have that discussion in this open session. The second one is title, and when I say title, it's who owns the cottage? When you're coming into the family meeting, who does in fact own the cottage? Have you transferred it into joint tenancy at this point with one of your kids, with Johnny, have you not transferred into it, but there's an expectation on Johnny's part that you're going to. Deal with the legal issue as to who owns the cottage either before or after the family meeting.

Suzana Popovic-Montag: A very good point Ian, because that also raises the possibility of, you know, these are legal claims but constructive trust or resulting trust claims. If, for instance, Johnny has made a whole bunch of substantial improvements to the property during the lifetime of Mom and Dad while they were at that cottage, he might have a special claim that he may raise at that point in time that perhaps everyone's just taken for granted, because that's what Johnny always did. And those kinds of issues you sort of want to keep those in the back of your mind because you just never know where they might end up.

Ian Hull: And that brings us to the third point, and that is, improvements in the sense of what are the expectations as to whether or not, if there have been improvements to the cottage done, who did them? Did the parents do them? Did Johnny do them? Did Johnny borrow money from the parents to do them? What expectations arise out of the improvements and maintenance, because maintenance and improvements on a cottage are a big deal, whether or not you actually put a new wing on the cottage doesn't necessarily matter, if Johnny has come up every year, opened the cottage, raked the leaves, looked after things, that improvement in and of itself may be something that Johnny feels that's he got some money in the bank with and you need to understand from, at this meeting to walk through, is what are the expectations that arise out of the improvements that inevitably the active child will have made to the cottage.

Suzana Popovic-Montag: That's a good point Ian.

Ian Hull: And finally, the last part which ties into the improvements, is the grandkids effect and one of the things that we find is that a little bit of resentment gets created within the family and this is something you want to talk through with the person, the child whose actively using the cottage, because if that child actively uses the cottage (a) because they love it (b) because they want to bring their kids up and so you've got grandkids around the parents, they have gone to the trouble of making sure that the grandparents quite often want the kids there and they feel that they've created some money in the bank as well because they're going to say look Betty (a) never did anything for the cottage and (b) we came up weekend after weekend, you enjoyed the company of us but you also enjoyed and more importantly often is the case, the company of our grandkids, we feel like we've got some money in the bank so to speak because of that behavior as well. And you want to make sure you've had those discussions and you've aired those discussions so that Betty can turn around and say, yeah, but I didn't come up because you made it uncomfortable for me or you know Mom doesn't really like having

too many people around and you ended up filling the cottage before we could even get there. Or to have those kinds of discussions so that really what you want to do is get the parties clear as to what money they have in the bank on this issue and what they don't have in the bank on this issue.

Suzana Popovic-Montag: And I think that also opens up the conversation as to how Betty might otherwise be compensated, so that it is fair, even though it's not always equal.

Ian Hull: Terrific. Okay, well that's really talking about what we would call the more likely family business scenario, but as I say, we're gonna spend some time in some future podcasts really working through the conventional family business situation, where ownership issues, transition issues and the like are dealt with.

Suzana Popovic-Montag: Well thank you very much Ian, and I look forward to our next podcast.

Ian Hull: Thanks Suzana.

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