

## **Hull on Estate and Succession Planning Podcast #39**

### Participation at the Family Conference

**December 19<sup>th</sup>, 2006**

Suzana Popovic-Montag: Hi, and welcome to Hull on Estate and Succession Planning. You are listening to Episode #39 of our podcast on Tuesday, December 19<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, how are you?

Ian Hull: Just great. We're now really close to the end of the year and looking back we're approaching the end of our first calendar year, we haven't podcasted for a year yet that will come in March, but it's certainly been an exciting ride.

Suzana Popovic-Montag: Time sure flies when you're having fun.

Laughter

Ian Hull: Well we hope everyone's having fun. (Laughter) Because we've been spending a lot of time at this and we really hope that at the end of the day this has been useful for everyone. We've spent some time, as we're coming to and we'll probably only have a few more podcasts where we want to focus on the family meeting and then we're going to move on to some other estate planning topics. But we've spent some time in the last few podcasts talking about the conference process. We wound up our last podcast just continuing with the identifying the course of the conference and some of the things that go on during the conference itself. We told everyone that what we were going to do in this podcast was start to talk about the contingency and that is, is that if family members will not approve your plan, what do you do? And this is a crucial issue from our standpoint as litigators. We'll talk a little bit about some of the things that come out of the family meeting process. We've spent a lot of time talking about the positives within the family. But if someone isn't going to show up, there's also a really important positive and that is, really what can come out of the meeting and the process itself, from and we're putting on our litigator's hats, from our perspective. And maybe Suzana, why don't we talk a little bit about the general concepts of what the benefit of the family meeting brings from a litigator's standpoint.

Suzana Popovic-Montag: I think, Ian, from that perspective, the most important thing that comes out of this meeting is the notes that are made by the people who are participating, as well as a plan for a family conference agreement or the constitution as

we call it. To the extent that it's possible, we try to create that during the course of a family meeting and when a meeting comes to an end and there hasn't been a unanimous agreement on it, then there's really two choices. And one is that you can adjourn the meeting and try to get everyone to come back with cooler heads and hoping they'll prevail and that a different approach can be taken. Or it just may not come to fruition at all, and you'll have to just give up the whole process. And I think in those situations, the fact that, you know, files are being created, notes are being made by the participants, by the lawyers who are involved, the people who are, you know, for us as mediators, we're creating a plan, or trying to create something. And all of that is something that we can bring back to the table if and when we can try to hold the meeting once again.

Ian Hull: Okay, now let's talk about though, and we'll be a bit negative on this analysis. Presuming for the moment that the family meeting either is incomplete but more importantly someone, one of the members won't show up. And that's a classic scenario that we run into, it's just one family member or a group of the family members simply feel so disengaged they will not come to the meeting. Why is it important from a lawyer's standpoint to have all of this documentation?

Suzana Popovic-Montag: Well I think the importance of it is the fact that you're probably going to proceed anyways. And you're going to have this meeting notwithstanding the fact that this one person has chosen not to participate. And as lawyers, we can then say, at the end of the day, if we do have a constitution for instance, and someone tries to challenge that, you know, we've got the benefit of being able to say, look, an opportunity was presented and you chose not to participate.

Ian Hull: So, but who are we saying this to, though, at the end of the day? Like say the parents have passed away, what is this file, how is it helpful?

Suzana Popovic-Montag: Well you've probably got a Will challenge. In which case, you're going to have people who are going to say that this plan was not what Mom and Dad wanted or that Mom and Dad didn't have capacity when they did this, that they were unduly influenced or any of those traditional grounds that Wills or estate plans are challenged on.

Ian Hull: Okay, but so it's just thinking back, we're sort of stepping back in the process because we don't, you know, a Will challenge. I'm not sure, you and I both live and breathe that concept, but what is a Will challenge and what is the court look for in a Will challenge and what does the family meeting process sort of give us?

Suzana Popovic-Montag: I think the key to the family meeting process is the fact that it let's us know what it is that was fundamentally the intention of the person who is creating the estate plan.

Ian Hull: So, what's a Will challenge? When you say Will challenge, what does that mean?

Suzana Popovic-Montag: Well it's a challenge to the Will that's ultimately left by the parent or whomever that is being challenged. And that means that you're saying that's not what they intended, that's not what they wanted and that's not what should happen.

Ian Hull: Okay so, in terms of what can happen after the parents die, you may, some of, one of the family members may go and hire a lawyer. And that lawyer may be able to say to them, look, there's a legal concept here and that is capacity or testamentary capacity, and/or undue influence that someone was pressured to do something and as a result of those legal concepts, you may be able to challenge the Will. And then the lawyer is going to say, alright, what, tell me about the story and tell me about what evidence you have to prove capacity or undue influence or those sorts of issues. And where does our family meeting evidence come into play then?

Suzana Popovic-Montag: Well I think it really comes in, in two different places Ian, because firstly, you've got the evidence of the family lawyer who participated during the family conference, who's going to have those notes and that file that I talked about earlier. And then you've also got a document that's come out of that whole process and you've got other people who've attended at the meeting who'll say, you know what, Mom was there and she did have capacity and she meant this to happen, and she actually signed a document that said that this is what she wanted to happen.

Ian Hull: And it's interesting if you look at our agreement, for example, in our book, "The High Price of Not Talking – Advising Families on Succession Planning". Right in that, we have the agreement and the agreement itself says, of course, the mediator can't be a witness and that's fine. Mediators aren't typically the best witnesses in this situation. But the allied professionals that are at the meeting are these third party independent witnesses that a judge is going to want to hear from and want to know things like capacity issues. Maybe not all of what was said, there's some restrictions right in the agreement. But as you say, the telling document really comes down to if we can't get behind that because we do want this confidential process to be preserved and the courts certainly across Canada and the United States are reluctant to get into the room, so to speak, and look for the evidence of what happened. But the constitution itself is a really powerful document. And that document, we find, is made more powerful by getting all of the participants who were there to agree that we can circulate it to everyone. Not just the people that were there, but the signed document to those who did not attend.

Suzana Popovic-Montag: And typically what we'll do is we'll invite that person or those persons who didn't attend to sign it and sometimes they do and most times they don't. But it does sort of provide some kind of indication of the fact in writing that this is what the person who had created the plan really wanted.

Ian Hull: Alright, so now that we, we've talked about the person who won't show up and that's fair enough. And you also talked about the idea that the meeting may bubble into emotional issues or get into log jams for some good reasons. We had one the other day that stopped just because we ran into a tax problem that we couldn't resolve at that moment and so we agreed that we would come back. It didn't help that we were actually

at a pretty emotional time in the meeting, but we couldn't do anything about it. I mean, sometimes they're just business realities that happen in these meeting and so we have reconvened or we will be reconvening, we have set a date for the reconvening. So in that situation, again, like you say, the well documented file and so on is helpful because then you can pick the ball back up and try to keep the momentum going. Alright, so just staying focused then on this idea that the likelihood and the most realistic scenario that we keep running into and that is, is the non-participating member. What about, in terms of the non-participating member. We've sent it to that non-participating member, we, like you say, many of them won't sign up, but what are some of the positive things that also come with the sending it to that non-participating member? And one of them that comes to my mind before I let you answer that is the idea that in fact it triggers an interest in being involved. No matter how hard we try to describe what's going to happen, this is a new concept in many families. And when you said, and you have a rigid family member and you sent a copy of the constitution, they start to see with real authority just what you are trying to do. I know in our book, we have a draft constitution, and we often will point to that when people are skeptical about getting involved in the process and just sending that document alone encourages involvement. But sometimes when you see that they've gone, that the family has gone to the trouble to have a meeting without you, they've gone to the trouble of producing this document, and they've gone to the trouble of signing it and sending it to you. That may trigger what is the ultimately a great result and that is getting some participation from a non-participating individual. And simply having a further meeting and not, it's not a new meeting, it's a further meeting, and we always like to spin it that way because we do find people are sometimes reluctant to step in for a lot of reasons that, you know, until they know more about the process, it's a bit daunting.

Suzana Popovic-Montag: And I think that Ian is one of the best features of the family conference meeting. This whole idea is the fact that it is a fluid process. Even though you can start with a plan, and you can create a plan and you can sign a document, that constitution at the end of the day is what we call a living document in the sense that it can be changed. And it can be changed in exactly the situation to incorporate suddenly someone who is buying into the process.

Ian Hull: Okay, well I think that covers off this area almost entirely. There's one last part of it where we'll talk about at our next podcast and then move into another final sort of part of the concluding process and that's the steps to take after the conference. But I want to touch on, when we have some more time, the idea of the family member objects to the proposed estate plan, what are some other steps that have been taken by lawyers in that situation, and there are specific legal steps that can be taken as well. Just to add some protection to the process. So thanks very much Suzana, and we look forward to our next podcast.

Suzana Popovic-Montag: Thanks to you too Ian.

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