

Hull on Estate and Succession Planning Podcast #40

The Family Conference Continued

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Suzana Popovic-Montag: Hi, and welcome to Hull on Estate and Succession Planning. You are listening to Episode #40 of our podcast on Tuesday, December 26th, 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: So we have, when this is posted, we will have got through the first part of the Christmas season and have had a busy time. So we thought, we didn't want to miss our podcast, and we wanted to make sure for a couple of reasons. One, we want to make sure that everybody gets a chance to listen to us weekly and we haven't missed that since we started this in March. But secondly, it's time to really sort of round off the family meeting discussion, hopefully finish that off in this podcast or the next and start turning to other aspects of what might be seen as branches of the family conference, and talk a little bit about what's happening in the U.S. about family offices and the like. So why don't we just spend a few more minutes just to finish our thought from our last podcast, when we were dealing with family members who don't approve of the plan and what we do with it. And the benefits that we talked about the idea that at the end of the day, we have created a record, we have also created another opportunity for someone to maybe revisit the idea of coming to the table, by sending them copies of everything that was discussed, and obviously the constitution. And let's just wrap up this part of the whole family conference project.

Suzana Popovic-Montag: Ian I think just to come full circle, we should probably just talk a little bit about what happens when people who attend don't actually agree to the proposed plan. So, if they have concerns and we haven't been able to, sort of, close the deal, so to speak, what would we do in those kinds of cases?

Ian Hull: Well if that occurs, you may want to amend your estate plan at that time to satisfy some of the concerns of the unhappy family members as best as possible.

Suzana Popovic-Montag: But you want to make sure I think, that you're not sacrificing your personal goals just to do the deal, so to speak. I think you want to make sure that, you know, you go back to your objectives and that those are still met. So that when you make these compromises, you're not giving up something that in retrospect you're going to regret.

Ian Hull: And I think that's a big part of the job of a good mediator in this situation and that is, is that you never lose your focus. You stay on the agenda and that's why we were so careful about creating an agenda, creating a plan, keeping it businesslike. So that if it starts to go down a road that the heads of the family don't want it to go down, we can always try as mediators bringing and reining it back in.

Suzana Popovic-Montag: And I think it also probably makes sense to be able to provide that individual who's not necessarily agreeing at this time with a copy of the family constitution, that the rest of the people will agree to even if he or she won't.

Ian Hull: So in that regard, you also have other, sort of, legal remedies that you'll want to talk through with your lawyer, because you know the theory of the family conference is not to go with this sort of dictatorial top down estate planning, but to take the input from those who are going to receive the benefits of your hard work and your estate, and take that input and create a more, I guess, cooperative plan, but that doesn't mean that you walk away from your plan.

Suzana Popovic-Montag: In terms of the Will itself Ian, if you can get to a point where you've determined what those terms of the Will are going to be. Is there anything that you think can be done to prevent a situation where someone who's participated in a family conference but not necessarily agreed to the terms of the family constitution? What you can do in that kind of situation to protect your estate?

Ian Hull: Well you'll want to talk to your lawyer about it, but there are ways to draft clauses in the Will itself, to add another layer of protection and we call them *in terrorem* clauses.

Suzana Popovic-Montag: And that's a clause, as I understand it Ian, where you provide that if someone were to challenge the terms of your Will, then that individual would lose his or her entitlement under the provisions of the Will.

Ian Hull: That's correct. So in terms of the Will itself, that's one way to deal with it. The other aspect of protecting the process is again, which we talked about a bit at the last podcast, was this documentation part of it. Documenting the process is, of course, fundamentally done through the constitution, but there are other ways to internally document it and we won't get into it in this podcast. Sort of an overly legalistic analysis of what we would do with that second part, the non-will documentation, because there are in each jurisdiction, different ways that those documents would be admitted into evidence in a trial. But the documenting of it from the Will itself is one of the strongest steps you can take.

Suzana Popovic-Montag: And at the end of the day, I mean, there just is no perfect way to bullet-proof any estate plan. All you can do is your best and by keeping this documentation, by trying to create a family constitution, that really is the best you can do,

you just can't prevent someone from ultimately starting a Will challenge, no matter how hard you try.

Ian Hull: Alright. So let's talk just for a few minutes now just about the steps to take after the conference.

Suzana Popovic-Montag: Once the family conference is finished, you still do have some work to do, so its not like, you know, you finished your plan, you've created everything and your done. What you actually have to do is implement that estate plan.

Ian Hull: And really the constitution, the family constitution that you've hopefully signed, is only a sort of a broad brush of the plan, it's thirty thousand feet, so to speak, of your estate plan. So after the conference itself, you need to get good professionals on the drafting and on the minutia of the plan itself.

Suzana Popovic-Montag: And even once you get into that minutia Ian, in the planning, you might find that there are some minor issues that arise during the course of this process that you hadn't anticipated during the conference. And, depending on what those issues are, you might choose to resolve them yourself or maybe even consider holding a further family meeting.

Ian Hull: And a classic example of that is one that we were involved with recently, where we had the tax advisors at the meeting, but they said hey look, we're going to try this with this one building and this one corporation that the dad owned, but we're not a hundred percent sure today we can't give you a straight answer. And they went back, looked into it and actually it turned out that the plan which was really focused on this one transfer, one property before death, was going to be too painful from a tax standpoint and so we literally had to go back to the table with a new family meeting. It didn't take all day, but we wanted to make sure it was transparent, that everybody understood well look, we had hoped that Betty was going to get the building. It just didn't make sense now to do it, and, so we brought the advisors around the table. It was a different family meeting, it was almost a discussion meeting because we'd brought the advisors, we had the tax advisors there, they had sent out a pre-meeting memorandum. And they sat down at the table and they gave people an opportunity to ask well wait a minute, we went to all this effort, why can't we do it? And we managed to save the deal, in a sense, that we just re-worked it with good advice, but you know sometimes these things happen. And especially from a tax standpoint, you can't always predict with certainty the day of the meeting what's going to unfold.

Suzana Popovic-Montag: And I think that's one of the real benefits of the whole process is that flexibility and the fact that it's not necessarily, you know, cast in stone. You can go back and you can regroup and you can try to redo something with, as you say, the transparency that's so important to the process.

Ian Hull: And you know, it was funny in that situation, because as you recall, we were struck by the fact that really the change that we made couldn't have been made, it

wouldn't have worked if we had tried it outside of this process, because instantly everybody who was involved in the process got their back up. For example, the heads of the family started to question, saying well wait a minute, you know we spent all this money doing this family meeting and then you tell us it doesn't work. So, they were frustrated and the members of the family, the recipients, were very frustrated because they had spent a lot of emotional time and energy to do it. But at the end of the day, when we sat down with everybody in a calm environment, in a professional environment, explained it wasn't us, the tax advisors explained what they were doing and what the thinking was, it changed the whole dynamic around the table and it brought everyone back to this cooperative spirit. But we know that, you know, when we found out that that plan wasn't going to work, we had done two things. One was we had softened up everybody reminding them and we put it right in the constitution that this plan may not work. The tax advisors needed to go back and double-check a bunch of the consequences. And secondly, we said in the meeting we expect that if it doesn't, we'll know in a certain period of time. We put a deadline on it, and then we said and the family will agree to meet within a further deadline, and so we set a deadline for the tax advisors to get back to us, which was good, keep the pressure on them. And then we turned around and said the family has to come back within, and I think we tied it into about a four to six week window. So it was transparent, it was current and it was communicated in what I think was a very effective way at the end of the day.

Suzana Popovic-Montag: I agree Ian. I remember that the feedback that we had from the individuals who had actually participated, they were very interested in the fact that they had the opportunity to ask those questions and to ask them within the whole group dynamic, so that they could have their concerns addressed and discussed with everyone participating.

Ian Hull: And another interesting tool that we used at that time was that we asked the tax advisors to send out something in advance of the meeting. In the sense that we didn't want some sixteen page nice print memorandum on tax law. But what they did was they did two things. One was they gave sort of a general summary, when I called them I told them to call it an executive summary because there were two people in the group who were business people and they could understand that terminology and recognize what that's getting at. And so they provided an executive summary in plain English as to what the problem was and what the solution was. And then they attached a complicated, relatively complicated, but a complex legal document, in the sense, a legal memorandum explaining it. Two of the family members actually went and got their own tax advisors to look at it. So that when we came back to the meeting and there was a lot of money at stake here. We had a lot of family emotion at stake, we came back to the meeting, everybody had a chance to have done their homework so we were able to, within a couple of hours, walk through the issue in a cooperative way, reallocate that asset, and the family was much happier for it. But that's part of the whole homework and the legwork you have to do if you get into glitches like these unknown uncertainties. Alright, so we've got one more podcast that we're going to do before the, well actually it will probably, we'll be launching it just in the new year of 07. But it's going to be our final podcast on the book and the idea of the family meeting, and we're going to dovetail that into talking

about the family office. Because we've spent a lot of time, I think, helpful time and which we'll come back to from time to time, on the whole question of and the way we document it in our book "Advising Families on Succession Planning - The High Price of Not Talking". So we'll spend a bit more time just finalizing that, spend some time on the family office and look forward to a new year of podcasting.

Suzana Popovic-Montag: Thanks very much Ian.

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