

## **Hull on Estate and Succession Planning Podcast #47**

### **Succession Law**

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Suzana Popovic-Montag: Hi, and welcome to Hull on Estate and Succession Planning. You are listening to Episode #47 of our podcast on Tuesday, February 13<sup>th</sup> , 2007.

*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.*

Suzana Popovic-Montag: Hi there Ian.

Ian Hull: Hi Suzana.

Suzana Popovic-Montag: You already for Valentines Day?

Ian Hull: (Laughter) I better get ready today.

Suzana Popovic-Montag: (Laughter) That's for sure. As you may recall at the end of our last podcast, we were looking into family law issues that arise when you're doing your estate plan or your wealth plan and you're trying to decide how you want things to unfold during the course of your lifetime and then afterwards on your death. And we were identifying four of what we called flash points that we want to keep in mind when we're dealing with these kinds of issues. And maybe we could just for the benefit of our listeners recap those quickly, Ian.

Ian Hull: Sure, I mean the starting point is of course and one of the most compelling flash points and that is, a blended family situation where you have a second marriage and second set of children and the like.

Suzana Popovic-Montag: And the second situation that we considered as a possible flash point was when there is significantly more wealth that's being owned by one partner than the other.

Ian Hull: The third was where we have assets of significant emotional interest to one spouse over the other.

Suzana Popovic-Montag: And then the last was when you have significantly different spending patterns, which my husband can unfortunately attest too.

(Laughter)

Suzana Popovic-Montag: But then I thought maybe we could now move into some of the family law property or concepts that arise in these kinds of situations. And talk about things that we just want to keep in mind as things that may be common denominators even across different jurisdictions.

Ian Hull: As we pointed out too in the last podcast, it's very important to note that every, especially with family law issues, every jurisdiction has its own unique characteristics and it has its own unique rules and laws.

Suzana Popovic-Montag: And one of the things that I think most people find kind of surprising is that when you're dealing with assets that are acquired before you get married, the laws deal with it differently depending on which jurisdiction you're in. And one of the most important assets that you have during your lifetime, of course, is the marital home, your matrimonial home as it's known in family law, and in some cases that is actually going to be an asset that will remain with an individual who brings it into the marriage. And in other cases, it's something that's going to be shared notwithstanding the fact that only one partner owned it before they got married.

Ian Hull: As well when you're dealing with situations of inheritances, whether or not, you can't assume that an inherited wealth from your circumstances prior to marriage and after marriage and how that will be dealt with. Because as you say in some jurisdictions inheritance and gifts from third parties are exempt from the division of the property at the end of a marriage, and in some jurisdictions they are not exempt. So, we have to be very mindful of that when we're doing our estate planning, especially when we have multi-jurisdictional situations where some children might, maybe you're born and raised in Ontario, and then some children might live down in the US, grow up and want to live in the big city, in New York or something and earn their keep. And then all of a sudden the inheritance issues become inter-woven in the family law issues as well.

Suzana Popovic-Montag: And another thing that we see quite frequently in our practices, Ian, is family businesses. And so we want to keep in mind that in some places, if you have a family business that'll be something that'll be subject to division or subject to family law considerations at the end of the day as well.

Ian Hull: Right of possession of the family home can be a very spicy issue in the context of matters after death and so it certainly pays to consider that issue prior to death. We had a situation the other day where a couple was, had actually entered into a purchase and sale agreement and tragically the wife died just before closing. There was great emotional attachment to the property, there was a difficulty as to whether or not they were going to move into the property from a financial standpoint but then the right to occupy that as a personal home, and all those issues came up. So the right of possession can be more than just a financial right, and it can be something that you want to make sure you've thought through in your estate plan.

Suzana Popovic-Montag: And another issue that can arise with a family home like that Ian, is when the home is not actually owned by the spouses but perhaps by the parents of

one of the spouses. In those cases, the right to possession of the family home after the death of one of the spouses is really only personable to the spouses and so if an in-law for instance owns the home, there may not necessarily be that right to continue to remain in that property.

Ian Hull: One issue that many people don't think through is, of course, how debt will be treated, both in a marriage breakdown but then of course in a situation where one spouse pre-deceases the other.

Suzana Popovic-Montag: And I guess, Ian, there you're referring to the fact that as an estate planning technique, many people will, during their lifetime, decide how they want to incur debt and within what forum. For instance, if they've got a business, in that they can loan money or incur debt in that situation, those kinds of loans can be tax deductible and have tax advantages to them, whereas personal debt won't have the same kind of advantage.

Ian Hull: And then of course on death of one or the other spouse, this issue can become very complex because of, depending on the shareholdings of the corporation, where that debt lies in the equalization of the assets, can get rather complex.

Suzana Popovic-Montag: Ian, I think another thing that we want to keep in mind and what we see more and more of is the existence of family or domestic contracts. Either contracts before people get married in terms of what'll happen once they get married, or if they are in a remarriage situation, they want to provide for perhaps their first family as well as their spouse.

Ian Hull: So there's a couple of issues then in the context of domestic contracts. And let's spend a few minutes just sort of thinking this through because there, look as a starting point, they are typically a good idea from a lawyer's standpoint. They can be, of course, not so well received in a happy marriage situation or remarriage situation when you impose that on one spouse or the other especially if there's unequal bargaining. So number one, we have to talk about and think through is is that what's the best way to make sure the domestic contract actually is enforceable and number two, what is the impact of a domestic contract at the time of death. So let's start with the enforceability issue.

Suzana Popovic-Montag: Well firstly, Ian, as you say, the contract is a good idea, it may or may not necessarily be legally binding for all purposes at the end of the day. But it may have a moral effect to it and so it may morally bind the individuals to the contract in a way that perhaps the law wouldn't have otherwise, but it could still be effective in that way.

Ian Hull: So, just as a starting point in terms of a thirty thousand feet analysis of domestic contracts, the law typically in most jurisdictions looks for two core components to it for a contract to be enforceable. Number one is, is that the parties must understand the nature and effect of the agreement that they entered into.

Suzana Popovic-Montag: And then secondly is that they have to fully disclose all of their significant assets, all of their liabilities, all of their debts. There has to be full disclosure.

Ian Hull: And so to make that happen, we want to obviously meet those two components but overlay that with good independent legal advice for all of the parties that are involved.

Suzana Popovic-Montag: That's right, because otherwise an argument could be made that one spouse didn't understand, as you say, the nature and consequences of the actual contract or look for other ways to upset the agreement between the parties.

Ian Hull: Alright, so in a married spouse situation, the other aspect of domestic contracts, and we'll have more to say about the impact of this in the context of dependent relief claims, but in Ontario and it's a good example because many jurisdictions have a similar kind of legislation. In Ontario, a domestic contract on death has only limited impact at law. So let's just spend a minute talking about that because I think some people think they've solved all their problems once they get a properly understood and fully disclosed with independent legal advice contract done up, and then on the death of one or the other spouses, they're surprised at what that contract actually means at law to the parties.

Suzana Popovic-Montag: And we see that, I think, Ian, most often in situations where the parties in a second marriage situation will enter into a domestic contract, agree that each will keep their own assets separate for the purposes of their own families and maintain their estate that way and their finances that way during the course of their marriage. Then on their death, one spouse turns around and says, I'm going to make a claim for support against my deceased spouse's estate because I don't have adequate provision or I haven't been provided for sufficiently at the end of the day. And in those cases, the court will look at the domestic contract, but surprisingly, even if it were to specifically say that that spouse would not be entitled to support, it's only one consideration that the court will take into effect and so it won't necessarily preclude that spouse from being entitled to support at the end of the day.

Ian Hull: So when you say support, there's two parts to that. One is the equalization, the chance that we talked about how they'll measure up the assets financially on the death of one or the other spouses, and two is this add-on claim essentially and that is that of dependent support. And the Ontario illustration is under the *Succession Law Reform Act* and the two provisions, they're Section 62 and 63. Interestingly, Section 62 expressly says that when a court considers the question of support, they're entitled to look at domestic contracts. The very next section though says the court also has the discretion to entirely ignore domestic contracts. And I think it's a good illustration from a statutory standpoint of the sort of the balancing act that the courts will and are entitled to take when considering the actual legal effect of a domestic contract on death.

Suzana Popovic-Montag: And that really, I think, is illustrated by the fact that the whole question and the quantum of support that a court is asked to determine at the end of a day

is a very difficult one and one that the court will struggle with because it's so factually based.

Ian Hull: And so entirely discretionary, and a bit of a roll of the dice. So before we turn to our next area where families, married couples have to sort of consider issues relating to their estate plan and that being tying into disability planning. Not necessarily disabled children, that's one aspect of it, but disability within the married context. So one of the other spouses becomes, where one of them becomes disabled in their lifetime and it's, they're a happily married couple but unfortunately one of them may become disabled. There are ways to plan for that, Powers of Attorney are obviously a starting point and other sort of important estate planning tools for a married couple to consider. So why don't we work through that at our next podcast.

Suzana Popovic-Montag: That's great, Ian, I look forward to that, thank you very much.

Ian Hull: Thank you.

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