

## Telling a Story and Probate Planning - Hull on Estate and Succession Planning Podcast #68

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Suzana Popovic-Montag: Hi, and welcome to Hull on Estate and Succession Planning. You are listening to Episode #68 of our podcast on Tuesday, July 10<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.*

Ian Hull: Hi Suzana.

Suzana Popovic-Montag: Hi there Ian, how are you?

Ian Hull: I'm great thanks.

Suzana Popovic-Montag: That's good.

Ian Hull: One of the things I wanted to try to add to our podcasts, at our weekly podcasts as best as we can, some weeks we'll probably do it better than others, is to tell a story and to look at real life examples of events and circumstances. We try to do that and dovetail it in our examples. But I want to start with it as best we can in our podcast. So today I want to start with a story that I got out of Jordan Atin's book, "*The Family War*". And this is a story that is based on a case, it's a public story in the sense that this family did end up having a dispute and airing their problem in court. But it was one of those cases that struck me as we're going to try to start our podcast with these sort of stories, before we get into our specific topic. And let me just tell you about it. What basically happened was this: it was a situation where there was a second marriage. It seems like we harp on second marriages but this is another example of a problem. A nice family, they were husband and wife, they had one child, lived a happy and prosperous life. Unfortunately Mom died relatively early and so Dad was left as a widow. He has his daughter, his daughter was thirty-five at the time that he died. They had a tremendous relationship. And they had a great relationship while Mom was alive but, you know, when Dad was alone, the daughter was particularly attentive and helpful. Then, as time went on, the father ended up remarrying and wanted to have a companion for the rest of his life, which was well, you know, supported by, sorry I'm thinking it's a daughter, but in this case it was actually a son. But anyway, well supported by the son. The son was getting busier, he had a career he was building. And so he wasn't going to be able to spend as much time with his Dad, but he was happy that his Dad had entered into a second marriage situation because sure enough it was making him, gave him a companion for life. Dad unfortunately started to lose his capacity, and in the book as Jordan describes it in "*The Family War*", he talks about the circumstances where the son calls up, and this was in the case. The son calls up a lawyer and this happened in Alberta. And asks the lawyer, you

know, what can I do here? And the lawyer said the same things that we've been saying in all our podcasts and so forth. Well look, you've got choices here. You can do, you can litigate, you can fight the second wife because the son obviously thought the second wife was sort of taking over things and looking at taking the money away from Dad and not administering it properly. And he was concerned. So he could fight, get a new guardianship, fight for the job back in that sense or you can do nothing. And in Jordan's book as he describes the case, because then it went on, Dad eventually died and then there was litigation and that's what the case brought about. But this telling point and that was that where the son talked to the Dad and said to the lawyer "I will not sue my father. I know he's not capable, but I am not going to live with that legacy." There's some element of capacity that he still has. And the son knew that his father was really not well mentally. But he said "I will not leave that legacy, I will not have him spend the last whatever years of his life in a lawsuit with me. If that costs me at the other end of the day it costs me. But I'm not going to take that step." And that was important. I mean, obviously, we see lots of people who take that step. But it really pointed out the human element of what we are, what we see every day, and that these rules aren't hard and fast and the contentious stuff is driven so much by emotions.

Suzana Popovic-Montag: That's a really telling story Ian, and it's very true. I mean many, many times we see, you know, thousands of dollars wasted on, you know, the fight. And at the end of the day, it's not always motivated by principle or the law, but many times, as you've pointed out, by emotions, by feelings, by, you know, senses of betrayal or hurt and it's just, its unbelievable.

Ian Hull: So anyway, we're going to try to, we'll use, we'll work from Jordan's book and my book because I think both of them have great stories from, again, public record. We're not drawing from our own active files right now or anything like that. We're just drawing from what our events and circumstances that we learn from in our daily practice. But we're going to try to open up with a story so that we can really identify things with some real pointed stories.

But let's come back to the cool topic of probate fees. And in our last podcast, we talked about the different options. One option was common form probate. One option was proof and solemn form, the more belt and suspenders probate, so to speak. But we'd opened up in that discussion about the option of no probate at all. So let's talk a little bit about that today.

Suzana Popovic-Montag: Well Ian, the idea there is that if you've got a Last Will and Testament that appoints an executor and provides for how to distribute that individual's estate, then there may not be a need to apply for probate. And what kind of circumstances would give rise to that kind of situation, you ask. And I think that that's really going to be quite fact specific. So if you have a situation where you've got a pretty modest estate and you don't expect there to be any problems, then you might be able to take that Will, take a copy of the Death Certificate and go to the banking institutions or whatever financial institutions there are, and try to, you know, basically administer the deceased's estate.

Ian Hull: Now in our experience, we find that the banks quite legitimately are cautious about ever releasing any money out of their accounts. Sort of the threshold that we've run into is around \$5,000. If there's less than \$5,000, they might agree. There's no guarantees without probate. So what has happened, certainly in our jurisdiction, is that a sort of unique estate planning has been created. And it allows for true, and this is the true example of no probate fee probate, and no probate situations. And that situation is where you do a separate Will for a distinct asset that you know you will not need probate for. And the easiest example that I can think of is a corporation, because a corporation, when it's transferred from a person who dies into the hands of the next generation, is something that doesn't need the seal of approval of anyone other than the board of directors of the corporation and the officers and directors. And those are typically the people that are friendly and they aren't distant people and they will know that this is truly the Last Will of the deceased.

Suzana Popovic-Montag: And you'd be talking, I guess, Ian, in those circumstances, of a privately held corporation then, like a small family company. It doesn't even have to be small, but a privately held family company where there are no outside shareholders, isn't that right?

Ian Hull: Yeah. And really, I mean why it came out of Ontario but it is relevant in many, many jurisdictions, is that in Ontario we have a probate tax. They call it a probate fee but it is a probate tax. On your death, any asset that flows through your estate is subject to a tax. It works out to about 1.5%, a little less, on average, of the whole estate. So it's not a big tax, but it can be significant if you have accumulated some significant assets. So one thing happened here was that we'd created these separate Wills. But it illustrates with the probate process, this other option and that is, is that you may be able to estate plan so that you don't need to show the Will to anybody with that seal on it. We've talked about the seal of approval, so to speak, before. And this is just an illustration. And we're going to get more into secondary Wills and so forth. It's just an illustration of how you can actually probate or get and administer an asset of an estate without the seal of approval.

Suzana Popovic-Montag: So then you can administer an estate without getting probate of a privately held corporation. Are there any other assets, Ian that, you know, most people would have that might also pass outside of the estate, so that you wouldn't have to include them in a Will?

Ian Hull: Well that's another whole topic, but yeah, that's another option too, the jointly held assets. And I just, on that one, we're going to have our own podcast on the joint asset discussion because it is its own topic, as are secondary Wills their own topic. But let's just, as a quick aside, I again recommend [www.jointasset.com](http://www.jointasset.com) as a great website to track down a terrific source for dealing with on your estate planning standpoint, dealing with joint assets. So the joint asset, you're right Suzana, is another good idea. Alright, so we've talked about now the idea that you can actually probate without probate, without the seal, so to speak. Let's step back now and spend some time talking about probate as a document and really how we can plan with it, how it's a useful document. And one of

the things like, for example, that I talked about was the probate fees in and of itself. That is an important thing and if you can avoid them, it is an important thing. But what's another important part about probate planning?

Suzana Popovic-Montag: Another thing that people are quite anxious to avoid is the delay between the time that someone passes away and having authority to deal with someone's estate. And so avoiding the delay of actually applying for probate, which in some jurisdictions, can take several weeks to actually get, is something that most people would want to avoid and are very cognizant of.

Ian Hull: Like, from a practical standpoint, and I think this is one of the most important reasons why you get probate. I think the fee is modest and the tax is modest, so it shouldn't be an overwhelming distraction, but it kick-starts the process. It makes people sit down, when I say people, the executors, sit down, determine the assets and liabilities of the estate, file documents with the court, organize the estate and get things moving forward to minimize the frustration. Because when you have a situation where there is no probate, then there doesn't seem to be the same fire under their feet. And I don't say that sort of as a legal concept. I just say it as a practical concept in terms of the probate process. But let's save for our next podcast some more discussion on the probate planning side of things. I think hopefully we've made it clear in terms of what probate is per se, some of the core options available to us on the probate side. And now we're going to start to fine tune the probate planning side.

Suzana Popovic-Montag: That's great Ian. Thanks very much.

Ian Hull: Thanks Suzana.

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