

Hall v McLaughlin - Hull on Estate and Succession Planning Podcast #71

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Suzana Popovic-Montag: Hi, and welcome to Hull on Estate and Succession Planning. You are listening to Episode #71 of our podcast on Tuesday, July 31st, 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: How are you today?

Ian Hull: I'm just great.

Suzana Popovic-Montag: That's good.

Ian Hull: I was thinking that we might follow-up just one more comment from our last podcast. After that, we were talking and we came up with one other case we thought that might be interesting to put some real life illustration to the situation. And it's a recent case and the case is called ***Hall vs McLaughlin Estate***. And in that case, it again, we're trying to avoid getting too legalistic about it. But it was an interesting case because it illustrates how these second marriage situations can really become tangible law suits. So often you get in a situation where there is a first marriage, Wills are made, which we call Mirror Wills, everything to each other and the like. And then what happens is that one of the spouses dies and the next spouse goes on to live a longer live and more fruitful life in that sense, in terms of time. And sure enough goes and changes his or her Will. And the ***Hall vs McLaughlin*** case talked about whether or not when you did that Mutual Will, when you talked that first time you did that Will, is that a binding Will? That you, when you were doing that Mirror Will, did that mean that you were stuck with it? Could you go and change things?

Suzana Popovic-Montag: Ian when you talk about Mirror or Mutual Wills, what are you actually referring to?

Ian Hull: Well I think it's mostly just a situation where you've got gifts to each other and that you mirror it to each other. So I give all my assets to my wife and she gives all her assets to me. And should we both die together, they go to our children. And that's sort of the classic Mirror Will. But if someone ends up in a second marriage relationship, or not even a second marriage but a second relationship after one of the spouses has died,

that whole theory of giving to the children of the first relationship may get undermined by virtue of a new friendship, a new relationship, new second marriage or second relationship kids.

And the *Hall vs McLaughlin* case explored this idea that maybe we're kind of locked into it when we do these Mirror Wills and maybe we don't have the flexibility once the first relationship ends to go and just outright change the estate plan. And again, you know, it was just sort of an interesting illustration of the importance of getting an understanding with your two spouses, with the two spouses; when you sit down to do your Will. Is this a Will that means that should you pass away before the other, that you expect the other person to then give to the first marriage children for sure? Or is it something that you're saying look, I have total confidence in you, you use the money as you see fit and you decide whether or not you think your estate should go to the second, I mean, to the first marriage children or the second marriage children depending on what you believe at the time. And I don't think many couples have that discussion. And so I don't want to get too hung up on the *Hall* decision just because, you know, it's special and it's got its own facts. But it does raise the whole question as to whether or not we are committing, which is a classic scenario, and a mirror will scenario, first relationship scenario. Are we committing to that estate plan essentially being held together for the rest of your life, including subsequent relationships?

So anyway, I think it's just incumbent upon us. Again, we talk about communication. Well that's a first line of communication, when a happy couple and they're maybe in their twenties, just got married, go to do a Will. Does that will mean that you're stuck with it for the rest of your life? And I think this *Hall* decision starts to ask that question and whether or not subsequent marriages, of course, will have impacts on it at law. It might revoke the prior Will, but does it revoke the prior estate plan? Those are good questions that arise out of it. But anyway, it was a good, I mean it was an interesting decision and I think a good illustration.

Suzana Popovic-Montag: It also reminds us, Ian that, you know, we do have to regularly check our estate plan or update our estate plan because you can plan as best as you can in the circumstances. But once things change, that plan might somehow be affected. And this just sort of is one of those illustrations of the situations where you have to go back and make sure that things are still as you'd want them ultimately to be.

Ian Hull: So having talked about a few cases in this podcast and in the last one, I thought we might just recap and maybe highlight a couple of causes of estate litigation or causes of fiduciary litigation that we keep running into. And the classic scenario, of course, is, it's not the money - it's the principle. And that is an important sort of reality that we have to face. What's another sort of easy to identify scenario where we're going to see these kinds of cases coming to life?

Suzana Popovic-Montag: I think one of the easiest examples that comes to mind, Ian, is when someone has died without a Will. When they haven't planned for their estate and

suddenly they're passed away and there's chaos in terms of what's going to ultimately happen and how the estate is going to be distributed.

Ian Hull: Absolutely, and I think, you know, there is a lot to the old adage that "if you don't have a Will, the government is going to decide where your money goes". And it does. I mean, the *Succession Law Reform Act* in Ontario and all other Canadian jurisdictions identify how an estate flows if you don't have a Will. So essentially the government is saying where your money is going to go. And it leaves everything in turmoil and it leaves lots of new problems. Another one is...that's probably the most prevalent example of the chaos that ensues. The next probably on the list would be where someone goes and tries to do a homemade Will or a handwritten Will in that sense, with maybe a Will kit or something like that. And they don't have the expertise to fill it in properly.

Suzana Popovic-Montag: And that, as you say Ian, a very common scenario that runs across our desks anyways. And it's just, you know, you always shake your head and wonder, you know, for the sake of a few hundred dollars or maybe even more to get a properly drawn Will, was it really worth it? I think just moving on to maybe another example of a situation that we see often giving rise to estate litigation, that being when, what we call a deathbed Will is actually created. That's when a Will is drawn up by someone who's sort of, you know, dying and has only limited time and effort available to him or her to put together an estate plan.

Ian Hull: And just as a follow-up to that, of course, is when someone is doing estate planning when their capacity, maybe not physically, but their mental capacity is failing or beginning to fail and puts you into a gray zone. And we call this sort of estate planning at five minutes to midnight. And whenever you do estate planning at five minutes to midnight, there's a hidden tax that every estate, almost every estate, has to pay for that. And that is the exposure to a fight.

Suzana Popovic-Montag: And the costs of litigation are just unbelievable. So, to the extent that you can plan early, plan properly, plan, you know, on a regular basis in terms of updating things. Really just critical.

Ian Hull: The old adage, "vote early and vote often".

Suzana Popovic-Montag: That's right. What would be another example, Ian, that sort of, you know, comes to your mind when we think about common scenarios that give rise to these kinds of fights?

Ian Hull: Well, I was mentioning in the last podcast that I had the privilege of being interviewed for a Globe article about the *Rose* decision and it was published in June of '07 here. And when I was talking to the reporter, you know, he asked me a question, I didn't get quoted on this, but he did ask me that question. And he said "you know, what is, what are common sort of failings?" And the thing that comes to mind to me the most and not just because of our practice, but just intuitively, is whenever someone decides to

treat a child unequally, that is going to...there's a consequence to that, the same kind of consequence that I talked about in planning at five to midnight. But with that unequal treatment, as long as you do it properly, you can still get around it. It's a little different than the five minutes to midnight estate planning.

Suzana Popovic-Montag: And that also sort of reminds me of the concept that, you know, fairness does not always equal equality. And maybe in the minds of children that, you know, isn't necessarily the way that it should have been, or should be.

Ian Hull: Also leads you to situations where, you know, in some families, there's maybe one child that has been estranged. Or, you know, we've run into situations where, you know, if there's say multiple children, one child is favoured for awhile and then has to...another has to come into the fray because either that one's exhausted or he or she's moved away. And then the new child sort of becomes more favoured and maybe gets treated differently and so forth. The ebb and flow of the human dynamic and the family environment is always something that has an impact. And ultimately, we don't know who's going to be the last person standing, so to speak.

Suzana Popovic-Montag: That's right, and certainly, you know, given our generation now with the easy mobility and the fact that people are taking different careers in different countries, different places. You know, the fact that one child may be closer to Mom and Dad, might be a real benefit to Mom and Dad during their lifetime. A benefit that perhaps the other siblings don't necessarily appreciate, one that gets reflected at the end of the day and can also cause a lot of problems.

Ian Hull: Well that's great. Well anyway, we've tried to bring to life some of the ideas that we talk about through illustrations with the cases. And hopefully again sort of rehashed a little bit. Worked backwards to look at some of the litigation flags and flashpoints, and I think, you know, what we do need to do is spend some more time maybe on the family cottage issue and how it's being dealt with. So I think we'll try to devote some time in a future podcast on that as well. So, thanks very much, Suzana.

Suzana Popovic-Montag: Thanks to you, Ian.

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