

## Family Cottage Cases of Ownership Transfers - Hull on Estate and Succession Planning Podcast #75

Posted on August 28<sup>th</sup>, 2007 by [Hull & Hull LLP](#)

Suzana Popovic-Montag: Hi, and welcome to Hull on Estate and Succession Planning. You are listening to Episode #75 of our podcast on Tuesday, August 28<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.

Ian Hull: So, you know, having some fun with this whole cottage issue and talking a little bit about solutions instead of just about problems. You know one thing that arose recently on a file that I thought was interesting and something that we've talked a little bit about this, but a real life example of what's happened was we were in a situation where it was a relatively friendly transition of the family cottage. And lo and behold, what happened was, as we were going to deal with it, the actual title documents hadn't been looked at for a long time. The father had died. I'm sorry, the mother had died about thirty years ago and the father had lived in the cottage and shared it with his kids and grandkids and enjoyed it. And then the children and the grandkids came up with a solution as to how to deal with the cottage before the father died. And father was happy with the solution. And then they went to deal with it and this was a property that was north of North Bay and it was particularly problematic in terms of the title holding. And it hadn't been dealt with for thirty years prior and had never been dealt with. So interesting enough, and that's fine, the lawyers stepped in and they figured out, smart real estate lawyers figured out how to, you know, transfer the one property and part of it had be severed. And there was a whole bunch of interesting legal issues. But what happened was, in the interim, when the kids, they had gelled with the solution, and then the delay which was partially the process in the system, in between the delay which took about eighteen months to clear up some of the title problems, two new kids were born into the loop. And one of the kids had gone offside on the deal.

So we had to go back and rework the deal, revisit almost all of the issues that we thought we'd resolved. And then ultimately, we came up with a solution. But, I just thought it was an interesting point to make in the sense that when you go into these things, often people roll their eyes when the lawyers say, well let me see what's involved, per se. Do you own all of the property you're owning? Or who owns it and does your great-grandfather still have some estate that we have to deal with to transfer it in? Because when you go to move on these things, it's like anything in a business deal or on any transactions. They, no matter what, life is transaction based. And when you've got a

deal, you wanna crystallize the deal, move forward. And then when you hit a stumbling block like this and you can't give people the tangible result that they thought they had achieved, things loosen up.

And in this case, things loosened up to the point where it wasn't destructive, but it was harmful. Because again, some of the hard feelings and things were raised again. We were just reinventing the wheel in some level. So I've, you know, I wasn't involved in the early part but we learned a good lesson that it's really important to get a handle on the true ownership interests of, in this example, the cottage property, what properties exist where, what slices of land are appropriately to go where and who owns them and what's the history behind them. And you can do that by working concurrent with the plan. When we get the family together and we want to work through the transition, we often will say, well let's start from ground zero here, make sure we're at the right spot, the starting spot, leave that to the lawyers and we'll deal with that concurrent with our efforts to work with you in terms of the solution.

Suzana Popovic-Montag: Ian, that's a great story and it sort of brings to mind a story that I've encountered as well in the past where the ownership is not by the individuals but by corporations and private corporations owned by the individuals. And, you know, we know with family companies, people sometimes get lazy with the formalities that are required in these kinds of situations. So directors, you know, they're not always in place, the by-laws are not always up-to-date and the resolutions aren't necessarily in place. So that, at the end of the day, when some form of transfer of ownership has to take place, it really can become a nightmare procedurally and at law, where by, you know, like you say, the possibility of actually losing an otherwise simple, deal can really become a reality.

Ian Hull: And one interesting thing on this, just to follow up on that too was, in the situation that I was involved with, was one of the brothers actually owned a sliver of the land and that brother had died without kids. So it added a whole twist on it and it was, everyone knew he was dead and everybody knew he had no kids. But what we had, it added a whole twist in terms of regularizing things. And again, it just comes back to doing your homework, if you're gonna start the process, start early. And one of the things that I often will say to my clients, if they're in the business of wanting to transfer, whatever it is, say it's the cottage, the family business or whatever, start the succession plan the day you buy the business or the day you start the business or the day you buy the cottage. And start thinking through that, if that's the goal, one of your goals, even if it's a modest property, you never know. I mean, people who bought cottages in Ontario and Northern Ontario in the early '60s and late '60s, early '70s, had no idea what these cottages would be worth today. And so you want to factor in that possibility of a transition. Because if you buy the cottage now and you set it up in some elaborate trust arrangement for tax driven reasons, that may not be what you want to do ultimately in the sense that maybe you'll save some tax, but you may not achieve your goal of succession.

So talking about succession with family cottages, let's talk a little bit about some of the basic ideas of just what we can do, transferring the cottage on your death and what steps can be taken.

Suzana Popovic-Montag: Well Ian, during our last podcast, we talked about, you know, those situations and what you would do in the situations where you were really concerned about the tax consequences of the transfer. But if the tax issues aren't necessarily a concern for you or you've somehow already covered the tax liability through perhaps life insurance or some other arrangement, then you'll likely choose to transfer your cottage or your vacation property on your death.

Ian Hull: Yeah, and that's the likely scenario. I mean, you know, the elaborate schemes of doing things during lifetime and things like that that we talked about before are useful and they're worth considering. And even some of the creative schemes of passing on partial ownership and so on. But what 90% of estate planning is death-based in the sense that it's triggered on the death. And so let's start to flesh out some of what are the more conventional ways because there are so many ways that transfer options are available. Each with different potential benefits and really depending on your family's current situation and future situation and prospects. So let's start with, let's just talk through some of these options that are available upon death.

Suzana Popovic-Montag: Well, one of the ones that easiest comes to mind, Ian, and one that probably most people are familiar with is the concept of joint tenancy. And what joint tenancy means is that you can decide to hold your property jointly with someone else, for instance, your children or your grandchildren or some other family members who then are the joint beneficiaries of that property. And so then on your death, there's an automatic transfer of that property to the surviving joint tenant or tenants.

Ian Hull: Now once that's property transferred though, it passes directly to the other joint tenant on your death. And, of course, there's this benefit in Canada of the no capital gains are triggered necessarily depending if it goes to, for example, a spouse. If you have a joint tenancy with your cottage and it transfers to your spouse, then there's a rollover on the tax payable. If it goes to a joint tenancy with a child, then there is no rollover available and you will crystallize part of that gain at that time. But another nice benefit is the fact that you'll avoid probate fees likely when you pass through this joint tenancy process.

Suzana Popovic-Montag: Now if we put on our litigators' hat, though, Ian we certainly know that this option which is very frequently used, can however have some very complicated results or exceptions to it that often do lead to disputes.

Ian Hull: And we've certainly, on previous podcasts, talked about how the Supreme Court of Canada talked about joint accounts. Well, in some ways, this is a similar scenario. And that is, what comes right down to it when you get into these disputes, is the court wants to know who really owns the asset.

Suzana Popovic-Montag: And that fundamentally is based upon what was intended at the time that the property was transferred.

Ian Hull: And another, I guess, not to be naysayers, but another downside of joint tenancy arrangement is that if any of the joint tenants pre-decease you, their interest automatically, of course, passes to the other joint tenants. Which means that their children or other beneficiaries may not receive any of their interest in the vacation property. And the classic illustration is if you have three children and you put your cottage in the name of yourself and the three children and your spouse having died, say a couple of years earlier. Three healthy adults and yourself. they've got their own kids, you think this is gonna be a perfect estate plan. Well, if that person then tragically dies before you and you're looking at a situation where a whole string of their children may not take the cottage. And then you sit, you know, when you talk about these things, you say, oh gosh, nobody would do that to the grandchildren and to the nieces and nephews. But if it's been a long period of time and certainly, in my experience, is, is that not that they're estranged, but they're distant typically. And so, you know what, the linkage to them and the importance of preserving their Mom or Dad's, you know, inheritance that way on a gratuitous basis without being properly setup legally, it wanes.

Suzana Popovic-Montag: That's for sure, Ian and we certainly can attest to that. You can also choose to give away your vacation property or your cottage property in your Will by either an outright gift or even a trust.

Ian Hull: And in most cases, the beneficiary of the property will have to wait until the Will is probated and you pay probate tax and capital gains tax on the receipt of that gift.

Ian Hull: But there's exceptions to all of these taxes and you really need to sit down with a lawyer and determine if gifting by Will is the right answer. Alright, well, why don't we, we've got some other suggestions to talk about and we'll save them for our next podcast, that start to sort of flush out these options of transferring the cottage property on death.

Suzana Popovic-Montag: That's great, thanks Ian.

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