

## Drafting a Co-ownership Agreement - Hull on Estate and Succession Planning Podcast #78

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Suzana Popovic-Montag: Hi, and welcome to Hull on Estate and Succession Planning. You are listening to Episode #78 of our podcast on Tuesday, September 18<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: Just great, I'm suffering through my allergies a little bit in the fall season, but no complaints.

Suzana Popovic-Montag: That's good.

Ian Hull: Just before we start our podcast today, I thought I'd put a little plug in. I had a great opportunity to be interviewed last week by Donna Papacosta who is from Trafalgar Communications and many of us know her from her fantastic podcast, and she blogs as well. But her podcast called "trafcomnews.com". Donna is someone I met at Podcasters Across Borders in June of this year. We had a great time, shared a couple of beers and some laughs and we sort of talked about each other's podcasts. She is in the communications world and so since meeting her, I've been following her podcasts carefully and reading some of her blogs. She's a PR communications specialist and the last few of her series of her podcasts have been helping teaching podcasts. And she tied it into the theme, going back to school and has given some great tips on how to podcast. So Donna's a great friend from the social media world and I was honoured to be interviewed by her. And she was sort of curious about our world and what we were doing in our niche marketing and what we were doing from the podcasting standpoint. So it was a lot of fun.

Suzana Popovic-Montag: Well, that's great Ian. I guess we'll be looking for where that interview shows up. That's wonderful.

Ian Hull: Yeah, I'm not sure when it's coming in but she has to go back and, of course, edit everything I said and fix it up.

So why don't we, we've sort of got our own little mini-series going on here and that has been dealing with the cottage property or vacation properties. We just, in our last podcast, started to sort of talk about how we crafted the agreement. We talked a little bit

about some of the things that we would want to include in the agreement, and not necessarily we don't want to get into the drafting issues per se in the podcast, but some of the core concepts we may want to cover in the agreement itself.

Suzana Popovic-Montag: And just to sort of recap that, Ian, we were talking about, you know, creating a specific fund for maintenance and repairs or improvements that are going to be done to the property. We also talked about how we could go about implementing some terms perhaps for decision-making. And also the assignment of responsibilities within the context of that agreement.

Ian Hull: So let's talk a little bit about one of the spicy issues whenever you're sharing a recreational property, and that is, scheduling the use of the property itself.

Suzana Popovic-Montag: Ian, I think that the terms of this kind of arrangement, and particularly because it is the recreational property, should be set out as clearly as you possibly can, depending on whether or not you've got a trust or a co-ownership agreement.

Ian Hull: So, for example, before the beginning of each year, the various owners could draw straws for the use of the property at certain times. Or they could create a rotation so that each co-owner would be permitted exclusive use of the property for certain weeks.

Suzana Popovic-Montag: And I think the terms could even go so far as to provide that the rotation itself varies from year to year, over a cycle of years.

Ian Hull: So this drawing straws and rotation reminds me of the fact that us lowly Leaf fans here in Toronto get the chance every year, if we're lucky enough. I own a little part of season's tickets and we have the same rotation and draw system that is involved. And we've tried to turn that into, we try to play a little game of golf, have a couple of beers after and laugh and make it a fun event. I say that sort of half tongue-in-cheek but also half seriously, because what you want to do is, because this issue can be a sensitive issue, you want to try to keep it as friendly and personable as you can and so you might want to turn it into, you know, getting together for a dinner, going through some of these issues, not just the scheduling issue, but some of these other issues and make sure there's lots of wine and beer flowing.

Suzana Popovic-Montag: I'm sensing a theme Ian.

Ian Hull: Absolutely.

Suzana Popovic-Montag: Now, the terms of the agreement could also set out rules, I think, for others who might be using the properties. So, in addition to either the owners or the beneficiaries, if they want to consider an arrangement where other friends or other family members are either renting it or perhaps even using it for free.

Ian Hull: That's a really good idea. You sometimes overlook that possibility and then you're into the term of the agreement and you haven't raised that as a possibility, that maybe a friend would come up or you may want to use your property week or weeks to generate your own income. Those can be sort of side issues that can be particularly problematic for some because some owners may not want to rent or they may not want strangers on the property. And so you may want to do your best to canvass that at the scheduling of the use of property meeting.

Suzana Popovic-Montag: That's a good idea. I think a further thing that you'd want to consider when you're entering these kinds of arrangements is to actually speak to what would happen in the event that someone defaults on whatever that they're supposed to do pursuant to the agreement.

Ian Hull: That's such a good point because when you have these arrangements, they are typically at a family friendly situation. And many of us don't want to face the fact that what are the consequences of default and what sort of impact should there be felt by those who don't follow the agreement, notwithstanding that some of them or more of them are family members.

Suzana Popovic-Montag: And just to give an example, I mean it would be something like if a co-owner is required to pay certain expenses to maintain the property and then suddenly they don't do that, you want to speak to what happens in those circumstances when someone is not holding up their end of the bargain.

Ian Hull: So under a co-ownership agreement which we've talked about in the past podcasts, there are more options for dealing with these kinds of contract defaults and more flexibility available.

Suzana Popovic-Montag: The terms could give the other co-owners, for example, the right to purchase the interest of the person who's actually defaulting on his or her obligations.

Ian Hull: And that's a good idea, because we recently were involved with a case where just that happened. And it wasn't an unfriendly buy-out so to speak; it just turned out to be a situation that made the most sense for actually both parties. One, who was feeling the burden of ownership, needed the money for other reasons, and the other family member who really wanted to sort of consolidate the ownership group.

Suzana Popovic-Montag: And if you're going to have that kind of provision in it, you want to make sure that the terms of your agreement perhaps even include some kind of formula that will somehow appraise the value of the person who's actually defaulting his or her interest in the property, and whether or not, you know, you want to consider if there should be some kind of minority interest discount or something as well. So just yet another thing to sort of keep in mind when you're drafting these kinds of agreements.

Ian Hull: Well, that minority discount is a good point and one that is often overlooked because, and again, because these are typically friendly and family situations. But in a business environment, if four people owned a recreational property and if one of them wanted to be bought out in a business environment, say you were a one-quarter shareholder of a corporation, typically the Courts would have found that you have a minority interest and therefore it is to be discounted to a certain extent, because by selling it, you're only giving up...you're not giving up control and so forth. In a situation where it's a family friendly situation, if you don't consider the minority discount issue at the outset, it can come as a big surprise if there's three or four owners and Betty decides that she wants to buy out Bill. And Bill gets a big surprise that, because Betty, who is of course a merchant banker and knows all these things and says well, you know, of course, we haven't talked about this Bill, but your third interest is well, it's not quite worth a third. We've got a valuation, fine; I can live with that valuation. But it's a minority interest and therefore it's reduced to that extent. And you can really, you know, you can highlight this issue before and avoid the problems. Either agree that there will be no minority discount because it's a special property, or agree what kind of formula you want to get into should a minority discount issue arise.

Suzana Popovic-Montag: And clearly, I think incorporating these kinds of consequences of a default in an agreement are so much more easier when you're dealing with the co-ownership agreement, as opposed to a trust situation.

Ian Hull: Well, that's right because, you know, the trustees in a trust situation, it adds a complication. And although we've talked about the different approaches to the co-ownership agreement or the trust agreement, trustees are considered fiduciaries. And the Courts are more willing to intervene in the operation of a trust than a co-ownership agreement. So that sort of fundamental premise needs to be kept in mind so that you either have flexibility or you don't have flexibility, depending on the circumstances that you're involved with.

Suzana Popovic-Montag: And if someone defaulted in the payment of expenses, this might actually be deemed to be a loan that's owing by that person to the other co-owners or even the trustees.

Ian Hull: And the terms, again, you might want to provide that if the loan has not been repaid and other obligations of the defaulting person have not been brought into good standing within a certain period of time, make it time specific, again you want to consider certain remedies. What will be available to the trustees or if it's a situation where it's a co-ownership agreement, what's going to be available to the co-owners? And again, you know, we're always hesitant to do that because default in that means taking steps against typically a friendly situation, like a brother or a sister.

Suzana Popovic-Montag: Well, there certainly is a lot of flexibility and a lot of issues, I think, to keep in mind in these kinds of situations. And the fact that you at least can identify some of these issues can only help when it comes time to putting something, pen to paper essentially.

Ian Hull: Absolutely. Well I think that wraps up some more of our thoughts today anyway on the co-ownership agreements. And we've got a few more comments on that, that we may want to wrap up our podcast series with in the next podcast or two.

Suzana Popovic-Montag: That's great. Thank you very much Ian, I'm going to go look for that interview of yours.

Ian Hull: Thanks Suzana.

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