



TOP BOUTIQUES

FAMILY DYNAMICS

As families become more complex, so, too, does the work for the wills, trusts and estates boutiques

By Aidan Macnab

Happy families are all alike, but unhappy families are all unhappy in their own way, wrote Tolstoy in *Anna Karenina*. When negotiating, arranging and implementing wills, trusts and estates, the unique dramas accompanying a family — and the evolving cultural and economic context in which they exist — are growing in intricacy, especially compared to the simple days of primogeniture, where an estate was transferred to the child lucky enough to be born first.

Margaret O’Sullivan, managing partner of O’Sullivan Estate Lawyers LLP, says her practice is becoming increasingly complex with the wide variety of families, their different philosophies and where and how they are organized, in 2018.

“It’s not the simple, nuclear-family situation of everybody living here and having two kids and a spouse,” she says. “We’re now into situations of multiple marriages, obligations to prior spouses, children from different marriages, chil-

dren living in different countries, assets being owned outside the country, whether it is holiday homes or else challenging situations involving some of the beneficiaries including children, whether it be because of a mental or a physical challenge. And in some cases, we have every single one of those combined into one plan.”

Her practice is also globalized, with Canadians having roots and connections to every region on earth. O’Sullivan says understanding and catering to differing orientations toward family is essential for her firm. Some clients see the roles of mom, dad, son and daughter differently, with different duties and expectations attached to each. The sense of family also exists along a spectrum of a heavily individualistic west to an east that is often less so. These cultural facts are embedded in O’Sullivan’s clients’ succession plans.

“It’s not just a straight Ontario born and bred, we have people from every country in the world, we have different religions and different cultural values, which are now forming part of people’s planning issues that we have to be very attuned to and very sensitive to,” she says.

More recently, O’Sullivan says, her bar is contending with the Superior Court of Ontario’s decision in *Milne Estate (Re)*, from September 2018. The ruling could nullify wills across the province by invalidating the basket clause, which has been used for 20 years by estate planners.



The ruling said that wills cannot assign the distribution of assets to the discretion of trustees. To save money on probate fees, it has been common practice to create two wills, allocating assets that require probate to the first and those that do not to the second. The basket clause allows the trustees to assign the assets to either will, which was the problem for Justice Sean Dunphy, because the executor then does not set out certainty in where the assets go.

Apart from O'Sullivan Estate Lawyers LLP also voted as Canada's top boutiques in wills, trusts and estates were Bales Beall LLP, de Vries Litigation LLP, The Estate House, Goddard Gamage LLP, Hull & Hull LLP, Legacy Tax + Trust Lawyers, Schnurr Kirsh Oelbaum Tator LLP, Underwood Gilholme Estate Lawyers and Whaley Estate Litigation Partners.

The winning firms that *Canadian Lawyer* interviewed said it is a particularly busy era for estates lawyers, as the baby boomers age and pass on their wealth to the next generation.

"There is a huge transfer of wealth as the population ages. And I guess there tends to be, I'll say unfortunately, a fair amount of litigation arising from that transfer of wealth," says Sender Tator, a partner at Schnurr Kirsh Oelbaum Tator LLP.

On top of a busy decade, for Calgary's Underwood Gilholme Estate Lawyers, the busy season came early this year, blown into action with an unfortunately not-so-uncharacteristic September blizzard.

Canadians tend to spend the winter indoors, boxing themselves in with germs and viruses and facilitating a more intimate access to flu and other contagion. What this means, says Terry Gilholme, is more people die and estates lawyers have more work to do.

Their boutique has been operating since 2004, when the big firms stopped handling wills, trusts and estate planning to focus on more profitable areas. At that time, criminal, family, real estate and other personal services were moved out of the focus for these firms, says Jonathan Ng, a partner at Underwood Gilholme.

"In the '90s in Calgary, the big firms downtown realized that wills and estates lawyers don't make as much as the corporate and tax and litigators. They moved us all out. And we formed boutiques," Gilholme says.

But now the ripple effects of the economic downturn are eliminating files for lawyers in all practice areas and Gilholme and Ng say they see an increasing number of young lawyers filling their plates with wills, trusts and estate work.

"But Calgary is in a very bad financial situation. And a lot of lawyers are going into wills and estates; a lot of the young ones coming up are moving into this area," Gilholme says.

When Suzana Popovic-Montag moved into the area, she says, Hull & Hull LLP co-founder Rodney Hull told her, "You don't get to the big house very often" in wills, trusts and estates. But counter to that forewarning, the firm just recently won in the Supreme Court in *Sweet v. Moore*, a case concerning unjust enrichment.

In that case, after the death of Lawrence Moore, the conflict arose over who was entitled to the payout of an insurance policy, his former wife Michelle Moore, who paid the premiums and had an oral agreement, or Risa Sweet, the common-law partner whom Lawrence Moore had subsequently designated as the beneficiary. Hull & Hull acted for Moore.

The application judge ruled in Michelle Moore's favour, but a split Court of Appeal overturned the decision, ruling that the lower court had incorrectly found the oral contract between the Moores amounted to an equitable assignment. The Court of Appeal found there was no

unjust enrichment as Sweet's claim to the proceeds was due to her designation as an "irrevocable beneficiary."

"The Supreme Court ultimately granted us leave and reversed that decision and said the woman, who was paying the premiums pursuant to an oral contract with the deceased, was entitled to them when he passed away, notwithstanding, the fact that they were irrevocably designated to the other woman," says Popovic-Montag.

Based on the commentary arising out of the decision, Popovic-Montag says many are "fussed" about how it affects "what everyone understood to be a clear protection in terms of an irrevocable beneficiary," she says.

The late Rodney Hull began the firm with his son Ian Hull in 1998. The younger Hull has authored four books on the practice and is a certified legal specialist in estates and trusts law and civil litigation. Popovic-Montag is managing partner.

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