

# Estate litigation 'Top 10'

Suzana Popovic-Montag considers the top ten causes of estate litigation in Canada



#### ABOUT THE AUTHOR

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During our lifetimes, many of us strive to make a 'Top 10' list of one sort or another – whether it be for fame, for fortune or simply for recognition amongst our family and friends. What most of us do not aspire to, however, is to become a victim of a poorly-drafted (or, dare I suggest, non-existent) estate plan.

For the most part, the main forms of estate litigation arise out of contested will proceedings, court interpretations, claims for support and accountings prepared by executors and trustees. The removal or replacement of executors and trustees, however, as well as the variation of trusts or tax-related litigation, cannot be ignored. These types of proceedings are also often the precursors to some of the most emotional and expensive forms of litigation.

In my experience, and in the experience of my colleagues, the following are what I would classify as the ten most frequent causes of estate litigation.

## 1. Failing to prepare an estate plan

A basic estate plan will often include a continuing power of attorney for property, a power of attorney for personal care and at least one will. In this way, a testator can plan for their incapacity and direct how their assets are to be administered during their lifetime, and they can thereafter direct how the remaining assets will be distributed on their demise. In other words, 'all bases are covered'.

Notwithstanding the abundance of information that is disseminated on a

regular basis, and despite the fact that this information is readily available to all, the fact remains that more people die without having created an estate plan than one would expect. When we consider how much time we devote to building our estate and to managing our personal and financial affairs on a day-to-day basis, it really seems remarkable that this is the case – that people would let the legal and legislative systems determine the distribution of their life-long legacy. When this happens, however, it is always to the financial (and often emotional) detriment of the testator's estate and their beneficiaries, those very persons one would otherwise expect the testator would want to provide for. Not surprisingly, therefore, those same individuals may then be motivated to take steps to correct this purported 'wrong'.

## 2. Failing to maintain a current or updated estate plan

Although the creation of an estate plan is, in itself, very desirable, it is not a one-time event. We cannot underestimate the importance of properly updating powers of attorney and wills, particularly in the face of changed personal circumstances and after the passage of significant periods of time. Too often we see situations where principal beneficiaries predecease a testator, where there has been a sale of a significant asset (often a private

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business or family cottage), or a dramatic change in the value of the estate. Tax or other related legislative changes can also affect estate plans, as can marriage, common law relationships and divorce. Much estate litigation arises as a result of one's views of what the testator 'would have wanted' to occur in these situations.

## 3. Failing to recognise the need for professional assistance

The promulgation of 'Do-it-Yourself' will and power of attorney kits has contributed significantly to the file loads of estate litigators. It is often amazing to see the lengths to which people will go to avoid hiring professional advisors to deal with their financial legacy. Although we can understand and certainly sympathise with this reluctance, these situations are often prime examples of where you can either 'pay now, or pay later'.

## 4. Failing to obtain adequate professional advice

As an estate litigator, I have seen first-hand the costs (both emotional and financial) of an estate-plan-gone-bad. It still surprises me though to hear clients object to lawyers' and accountants' fees, and to use this as an excuse to delay or short-circuit the planning process. After all, when you spend a life-time amassing an estate, you would expect that you would want to have a say in how your legacy ultimately unfolds and to see that desire eventually come to fruition. Reliance upon skilled and experienced practitioners is key to creating estate plans that will implement and uphold testamentary intentions. And presumably the larger the estate, the more complicated the matter, the better the trusted advisors should be. We have all heard the old adage 'you get what you paid for' – this really is not the time to 'cut corners'.

