



CESTNICK

TAX MATTERS

Holiday family gatherings are a good opportunity to clearly communicate your estate plans

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My wife, Carolyn, and I have been talking recently about how the kids should share the cottage when we're gone. Not that I'm planning on going anywhere soon. In fact, Carolyn showed me an ad in our local newspaper for burial plots. I told her "that's the last thing I need." (She caught the irony.)

The cottage has been on our minds, and I think we've arrived at a good game plan. Not to mention, a recent court case has reminded us of the importance of good communication with the kids about our estate plans – particularly around the cottage. Since we'll all be home for Christmas, I'm going to call a family meeting to talk about it. (Here's a tip: Rounding up the kids for a group meeting is no easy task, so just turn off the house WiFi. That'll get them running.)

Let me share the story of the "B" family. It might just inspire you to have a conversation with your own family about your estate plans over the holidays.

The story

This is a story about four children, and their mother, Margaret. Margaret owned a cottage in Muskoka and gave her children generous access to the property during her lifetime. In fact, she lived in an apartment above the garage on the property as her permanent residence, so that the main cottage could be used by the children.

The kids met each spring to divide up the weeks they'd each spend at the cottage. Everyone agreed that sharing of time was done fairly. In 1995, Margaret secretly made a change to the ownership of the cottage. She put the property in the names of herself and two of her children, as "joint tenants." She also added the other two children as "additional transferees as to a life estate," meaning that the other two who were not owners would have a right to use the cottage for their lifetimes. Margaret did not tell any of her children about these plans. As an aside, the language that was used on the

registered transfer of title was ambiguous, which led to problems later.

In 2000, Margaret told one of her daughters (who was a joint owner) about the ownership change. She didn't say anything about the life interests provided to two of the children. Margaret then passed away in early 2007. In 2013, the two children who owned the cottage decided to sell it because one of them had moved to British Columbia, and the costs of maintaining the cottage had risen significantly.

Here's where things went sideways. One of the children (the plaintiff) who had a life interest in the cottage didn't want the property sold – so she took the two siblings who were joint owners to court. She took the position that she was an equal owner of the cottage and, alternatively, that she had a life interest in the cottage with “exclusive” rights to its “use, occupation and possession.”

The judge concluded that the plaintiff did have an “exclusive” life interest in the property. Having an exclusive life interest would mean that the plaintiff alone would be able to use the cottage, to the exclusion of the others. The decision was appealed. The judge at the Court of Appeal for Ontario overturned the earlier decision by stating the plaintiff did not have an “exclusive” right to the cottage. His reasoning was that this was not Margaret's intention based on the evidence, which pointed to the fact that Margaret intended for all of her children to share the cottage equally. So, the judge ordered that the plaintiff's interest was limited to a lifetime licence to occupy the cottage on a non-exclusive basis, along with the other children.

Winning the appeal did not give the two children who owned the cottage the practical ability to sell it. While one

brother who had a life interest in the property did give up his right to use the property, their sister – the plaintiff – still had a life interest and wanted to keep it. So, the owners would need her approval before they could sell the place.

The moral

This is a story about a cottage. But it could just as well have been about other assets or estate plans more generally. This litigation and family strife could have been avoided if Margaret had communicated her intentions to the kids during her lifetime. Secrecy can only lead to problems. So, this holiday, consider having a conversation with the family about your own estate plans.

Finally, the documentation around Margaret's transfer of her cottage failed to state how the life interests of the two siblings would co-exist with the ownership of the other two. The moral? If your plans are at all complex, pay the cost to have experienced legal counsel draft your estate documents.

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