The *Wills Variation Act*: How It Can Impact You and Your Will

What is the *Wills Variation Act*?

A general principle of law is that a person making a Will (a "Testator") has the "testamentary freedom" to dispose of his or her property as he or she wishes. Like most general principles, there are exceptions. An important exception in British Columbia is set forth in the *Wills Variation Act* (the "*WVA*"), parts of which provide:

> *Despite any law or statute to the contrary, if a testator dies leaving a will that does not, in the courts opinion, make adequate provision for the proper maintenance and support of the testator's spouse or children, the court may, in its discretion, in an action by or on behalf of the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the testator's estate for the spouse or children.*

The courts have given the *WVA* a broad interpretation and will also look at the Testator's moral obligations in order to ensure contemporary justice.

Who may apply to vary a Will under the *WVA* and when may they do so?

Only the Testator's spouse or children may apply to vary the Testator's Will under the *WVA*.

"Children" include the Testator's biological children and adopted children. The *WVA* does not apply to step-children. There are no restrictions on which children may apply under the *WVA*, whether they be minors or adults, dependent or self-sufficient.

A "spouse" is either a person who is married to the Testator or a common-law spouse of the Testator. A "common-law" spouse is one who is living and cohabiting with the Testator in a marriage-like relationship for a period of two years before death. This definition includes same-sex relationships.

The *WVA* does not say what is a "marriage-like relationship." The courts will look at a variety of factors, including how the couple publicly present themselves, how they file their income taxes and complete other documents, how they share their property and finances, whether they have a sexual relationship and whether they are committed to looking after the other in ill health and numerous other such factors.

If a spouse or child wishes to apply to vary the Will, they must do so by commencing an Action within six months from the date probate of the Will is granted.

What are the Testator's legal and moral obligations when drafting a Will?

A Testator has a legal and a moral obligation to give fair consideration to his or her spouse and children when preparing a Will.

Testators have a duty to satisfy the legal obligations imposed on them by law during their lifetime. Legal obligations such as contractual obligations take priority over moral obligations.

The moral obligations of Testators are highly dependent on the circumstances of each case. The courts look to society's reasonable expectations of what a judicious person would do in the circumstances with reference to contemporary community standards. Obviously, this is a very flexible test.

What will the court consider when deciding whether or not to vary a Will?

If the courts believe that the Testator has not made adequate provision for the proper maintenance and support of a spouse or child, it has the discretion to vary the provisions of the Will and make an order that the estate make provision for the spouse or child that is adequate, just and equitable in the circumstances.

In determining what would be adequate, just and equitable, the courts will consider a large number of factors, some of which include the Testator's intentions and whether or not the reasons for those intentions were rational; the standard of living and needs of those involved; the size of the estate; the nature of the relationship between the Testator and the spouse or child; the health and mental capacity of all those involved; how the spouse or child cared for the Testator; gifts or assistance provided by the Testator to the spouse or child; the contribution of the spouse or child to building the Testator's estate; what promises, if any, the Testator made to the spouse or child; and any misconduct or estrangement by the spouse or children.

While generalities should be avoided, certainly it can be said that it is difficult for a Testator to effectively disinherit a child or spouse in British Columbia.

What property is included and excluded from the *WVA*?

Only assets that are part of a Testator's estate at the time of his or her death can be the subject matter of a claim under the *WVA*. For example, property owned in joint tenancy by the Testator with another, life insurance benefits, and RRSPs or RRIFs with designated beneficiaries do not form part of the Testator's estate.

Property transferred by the Testator during the life of the Testator by way of a gift to another person or into a trust that is not created by the Will is not subject to the *WVA*.

Assets located outside of British Columbia may be excluded from the *WVA* as well. For example, real estate located outside of British Columbia will not be subject to the *WVA*. Other assets such as investment assets located outside of British Columbia may not be included in various circumstances.

The above represents a brief summary of the Wills Variation Act and is not to be construed as providing an opinion. For further information and advice concerning the Act, please contact any member of Clark Wilson LLP's Estate & Trust Litigation Group:

Amy Mortimore
T. 604.643.3177
E. aam@cwilson.com

Mark Weintraub
T. 604.643.3113
E. msw@cwilson.com