Wills Variation Act Planning

I. OVERVIEW

While there is a general common-law principle that a testator should be free to arrange for the distribution of his or her assets upon death, there are various limitations to testamentary freedom, such as testamentary incapacity. Additionally, the dependants' relief provisions of the *Wills Variation Act* ("*WVA*") are a significant statutory exception to the principle of testamentary freedom. Dependants' relief legislation exists in each of the common-law provinces, as well as in many common law jurisdictions outside Canada. Originally intended to ensure that dependent spouses and children were not left destitute when the family's breadwinner died without making adequate testamentary provision for them, the scope of the *WVA*, certainly in British Columbia, has been broadly interpreted by the courts.

The essential thrust of the *WVA* is that when a person dies without making adequate provision for the maintenance and support of his or her surviving spouse and/or children, such spouse and/or children may bring an application to have the court order the provision that it thinks "adequate, just and equitable in the circumstances" (*WVA*, s. 2).

The jurisprudence relating to the *WVA* is voluminous. The most significant of these decisions remains that of the Supreme Court of Canada in *Tataryn v. Tataryn Estate* (1994), 93 B.C.L.R. (2d) 145 (S.C.C.).

The significance of *Tataryn* is not so much in the result as in the extended historical discussion of "dependant's relief legislation" in various Commonwealth jurisdictions, and in the outlining of certain over-reaching principles for application. Prior to *Tataryn*, there was a long-standing controversy as to whether the language of the *WVA* ought to be interpreted narrowly to provide for minimum financial needs or more expansively to import greater moral obligations on a testator. In *Tataryn*, the court rejected a narrower needs-based test in favour of a broader definition of moral duty. Madam Justice McLachlin (as she then was), in rendering the court's decision, held that the *WVA* must be read in light of modern values and expectations:

> The language of the Act confers a broad discretion to the Court. The generosity of the language suggests that the legislature was attempting to craft a formula which would permit the Courts to make orders which are just in the specific circumstances and in light of contemporary standards…Courts are not necessarily bound by the views and awards made in earlier times. The search is for contemporary justice.

In considering the need for a variation, the court held that obligations imposed by law while the testator was alive ought to be given priority. Thereafter, but certainly not unimportantly, moral obligations require consideration and are to be determined according to "society's reasonable

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expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards".

II. WILLS VARIATION ACT ISSUES AND CONSIDERATIONS

A. Applications by Spouses

Until November 1, 2000, an application under the *WVA* could only be made by or on behalf of "the testator's wife, husband or children" under s. 2 of the *WVA*. Effective November 1, 2000, the *WVA* was amended to include persons of the same sex or opposite sex living in a marriage-like relationship (generally referred to as "common-law spouses"). All references to "wife" and "husband" under the *WVA* now have been replaced by "spouse", which is defined to include a person who:

> is living and cohabiting with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender, and has lived and cohabited in that relationship for a period of at least 2 years.

Where there is no formal marriage, the question becomes "what is a 'marriage-like relationship'?" While each case will be determined on its own facts, the courts have identified various factors which suggest that a relationship is "marriage-like". Such factors include the marital status indicated on tax returns and other government documents by the deceased; whether the couple shares legal rights to their living accommodations or other property and finances; and whether there is a common intention to make a home together and share responsibilities for the home (*Harris v. Riche*, 2001 BCSC 143).

B. Applications by Children

For a child to have a right of action under the *WVA*, he or she must be either the natural child or the adopted child of the deceased. The *WVA* does not extend to stepchildren (*McCrea v. Bain Estate*, 2004 BCSC 208).

Additionally, the Supreme Court has recently addressed a case where a child is born to a woman who is married to a man who is not the biological father, but that man identifies himself as the father in the birth records and to immigration authorities. Nonetheless, the court held that the child does not have standing to bring a claim under the *WVA* (*Peri v. McCutcheon*, 2011 BCSC 273).

In the past few years, several cases have considered the moral duty of a parent to provide for adult, non-dependent children. As these cases are fact-driven, it is not surprising that the court has found both for and against the plaintiff children in different cases.

One aspect common to some of these cases is an estrangement between parent and child. The British Columbia Court of Appeal has held that the fact that the parents separated when the

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plaintiff child was young and there was very little contact between the deceased and the child, does not of itself negate any moral duty owed to the child (*Gray v. Nantel*, 2002 BCCA 94); accordingly, the court in *Gray* allowed a variation of the will. On the other hand, the Court of Appeal refused to vary a will in which a parent effectively disinherited the child based on the conduct of the child (*Berger v. Clark*, 2002 BCCA 316). In *Berger*, the court found that disinheriting the child was "not disproportionate to her offence and well within the discretion of a judicious parent in the circumstances".

One further possible relationship to consider is whether a child who has been formally adopted by another person retains standing under the *WVA* to make a claim on his or her natural parent's estate. While the courts have not considered this question in relation to the *WVA*, s. 37(1)(c) of the *Adoption Act* provides that "the birth parents cease to have any parental rights or obligations with respect to the child". It is my view, therefore, that the child would not have standing to make a claim against the biological parents.

C. How Are Claims of Spouses and Children Weighed Against One Another?

Claims based on legal obligations such as those owed to spouses and minor children will take precedence over moral obligations when the size of the estate requires the court to prioritize claims. Generally, the legal and moral obligations owed to a spouse deserve greater weight and will be satisfied in priority to the obligations owed to adult independent children (*Bridger v. Bridger*, 2005 BCSC 269, affirmed 2006 BCCA 230).

The size of the estate and the living arrangements between a spouse and the deceased can be critical factors in determining whether a will ought to be varied. In *Picketts v. Hall Estate*, 2009 BCCA 329, leave to appeal refused [2009] S.C.C.A. No. 389 (QL), the applicant spouse was in a spouse-like relationship with the testator for 21 years prior to his death. Of note was the testator's refusal to legally marry the applicant, which the sons from the testator's first marriage argued ought to be given considerable weight. The Court of Appeal found that this fact was "substantially overtaken by other factors" in the case, including the size of the estate (in excess of $18 million). Ultimately, the Court of Appeal found that the moral obligations imposed by the *WVA* would be satisfied by a lump sum payment to the applicant of $5 million, in addition to the family home and some other property. The court held that such variation would satisfy the testator's obligations to the applicant, while still respecting the deceased's wishes.

Similarly, testamentary autonomy was an important factor in *Waldman v. Blumes*, 2009 BCSC 1012. There, the testator died at age 91, leaving four children, two of them minors at the time of death. The mother of the minor children was left the entire estate, with a net value of approximately $1.2 million. She was also gifted the family home prior to his death. The two adult children from the testator's first marriage challenged the will, and sought $250,000 and $450,000 based on moral obligations that they alleged their father owed to them. The widow argued that, given the age difference between herself and her husband, when the decision to have children was made, the couple planned that the husband's entire estate would be available to provide for her and the dependent children. The court considered the unique factors of the case, and found that as a result of the reliance of the widow on these plans made and lifestyle adopted,

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the testator owed his widow a legal obligation of "the highest order". Ultimately, the court made only a minor variation of the will, $75,000 to each adult child, while noting that neither daughter had received any inheritance upon the death of their mother.

A lack of inheritance from a pre-deceased parent was also an important factor in *Saugestad v. Saugestad*, 2008 BCCA 38. There, in balancing the claims between a second spouse and the children of the first marriage, the court held that the adult independent children were owed a moral claim by their father because their mother had made a significant contribution to his estate, and the children had not received any inheritance from her.

In *Ward v. Ward Estate*, 2006 BCSC 448, the court held that a marriage agreement does not act as an automatic bar to the spouse applying under the *WVA*. Instead, the court held that such an agreement will be a factor to be considered when weighing the moral obligations of the deceased to the spouse.

If a conflict exists between moral claims, as when numerous adult children bring an action under the *WVA*, the court must weigh the strength of each claim. If parents have disinherited adult children or treated some adult children better than others in a will, courts may look to the quality of the relationship to determine whether there are valid and rational reasons for the disinheritance or unequal treatment (*Doucette v. Doucette Estate*, 2007 BCSC 1021, varied 2009 BCCA 393). Additionally, the courts may review the way in which the estate of the testator had been acquired, and the overall effect of the will's distribution (*Haegedorn v. Haegedorn*, 2010 BCSC 836).

In *MacKinlay v. MacKinlay Estate*, 2008 BCSC 994, the testator's brother had transferred $350,000 to the testator and expressed a desire that he distribute it to the testator's children to help with education costs. The brother indicated that "it is up to [the testator] to do what's best (or booze it away if you wish)". The plaintiffs (the testator's adult children) did not advance a claim in trust, but proceeded with a *WVA* claim. The court found that there was a gift to the testator of the funds, and there was no moral obligation on him to distribute it to anyone. However, the court held that, given the size of the estate and the fact that the gift was made to the testator to do with it as he wished, the legal obligations to the wife must prevail, and no variation was ordered.

D. What Does the Court Consider When Determining if Provisions Are "Just and Equitable"?

In *Clucas v. Clucas Estate* (1999), 25 E.T.R. (2d) 175 (B.C.S.C.), Santanove J. summarized the overriding principles the courts will consider in a claim pursuant to the *WVA*:

1. The main aim of the *WVA* is the adequate, just, and equitable provision for the spouses and children of testators.

2. The other interest protected by the *WVA* is testamentary autonomy. In the absence of other evidence, a will should be seen as reflecting the means chosen by the testator to

meet his legitimate concerns and provide for an ordered administration and distribution of his estate in the best interests of the persons and institutions closest to him. It is the exercise by the testator of his freedom to dispose of his property and is to be interfered with not lightly but only insofar as the statute requires.

3. The test of what is "adequate and proper maintenance and support" is an objective test.

4. The words "adequate" and "proper" as used in s. 2 can mean two different things depending on the size of the estate. A small gift may be adequate, but not proper if the estate is large.

5. Firstly, the court must consider any legal obligations of the testatrix to her spouse or children and secondly, the moral obligation to her spouse or children.

6. The moral claim of independent adult children is more tenuous than the moral claim of spouses or dependent adult children. But if the size of the estate permits, and in the absence of circumstances negating the existence of such an obligation, some provision for adult independent children should be made.

7. Examples of circumstances which bring forth a moral duty on the part of a testator to recognize in his will the claims of adult children are: a disability on the part of an adult child; an assured expectation on the part of an adult child, or an implied expectation on the part of an adult child, arising from the abundance of the estate or from the adult child's treatment during the testator's life time; the present financial circumstances of the child; the probable future difficulties of the child; the size of the estate; and other legitimate claims.

8. Circumstances that will negate the moral obligation of a testatrix are "valid and rational" reasons for disinheritance. To constitute "valid and rational" reasons justifying disinheritance, the reason must be based on true facts and the reason must be logically connected to the act of disinheritance.

9. Although a needs/maintenance test is no longer the sole factor governing such claims, a consideration of needs is still relevant.

Additionally, in *McBride v. Voth*, 2010 BCSC 443, Ballance J. added six further considerations:

(a) Contribution and expectation: generally speaking, the moral claim is strengthened where the claimant has contributed to the testator's estate or provided care to him or her. Additionally, where the first spouse contributed to the estate, the moral claim of an adult child of that marriage may be strengthened;

(b) Misconduct and poor character: the *WVA* specifically permits a court to refuse to vary a will based on the plaintiff's character or conduct towards the deceased, as measured at the date of death. This conduct must be "relatively severe" for a court to refuse the claim for variation;

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(c) Estrangement and neglect: recent case law indicates that where the estrangement is largely due to the acts of the testator, such estrangement will likely either have a neutral effect on the moral obligation, or in some circumstances, may strengthen it;

(d) Gifts and benefits made by the testator during his or her lifetime: gifts made outside of the will may diminish or extinguish the moral obligation to provide for the claimant;

(e) Unequal treatment of children: an unequal distribution amongst adult independent children will not necessarily establish a moral claim. The court will look to all of the circumstances before determining whether the will ought to be varied; and

(f) Testator's reasons for disinheritance/subordinate benefit: the court referenced an apparent "growing trend in the authorities…to favour rejection of objectively insufficient reasons on the pretence that they are simply not rational".

In *Viberg v. Viberg*, 2009 BCSC 27, the court addressed whether it should consider life insurance proceeds and CPP death benefits that passed to the defendant outside of the estate, when determining whether and how to vary the will. The court held that the receipt of the insurance proceeds could be considered "when assessing from the perspective of a judicious person whether Mr. Viberg met his moral obligations to his adult children".

This is consistent with the finding in *Inch v. Battie*, 2007 BCSC 1249, where the court held that assets that had been transferred during the deceased's lifetime and by right of survivorship could be considered when determining whether the will ought to be varied.

E. Time Limits

The *WVA* imposes a time limitation on commencing an action. An action to vary a will must be commenced within six months of the date of grant of probate. An applicant will not necessarily be time-barred when the applicant should have been provided with notice of the grant of probate and a copy of the will, but was not provided with either (*Shaw v. Reinhart*, 2004 BCSC 588; *Somodi v. Kolvek Estate*, 2007 BCSC 857). In addition, a defendant may be estopped from relying on the six-month limitation period when the defendant's conduct has led a plaintiff to believe that the matter could be resolved without resorting to litigation (*Chan v. Lee Estate*, 2004 BCCA 644).

When there are two grants of probate (the first to one executor, and the second to the remaining two executors) the six-month limitation period will commence with the issuance of the first probate (*Etches v. Stephens* (1994), 99 B.C.L.R. (2d) 171 (S.C.)).

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F. Can a Testator Exclude Application of the Wills Variation Act?

If a testator purports to exclude a qualified applicant from the benefits of the *WVA*, the courts have jurisdiction to ignore such an attempt. While the intentions of the testator are significant factors to be considered by the court, they cannot override other important competing factors. In an application to vary a will, the court may receive the deceased's written rationale for the will's structure into evidence, but such an explanation is not binding on the court. To the extent that the deceased's memorandum is inaccurate, it will be disregarded by the court.

The court must find the rationale of the deceased to be valid, and valid within the context of modern Canadian society. For example, in *Prakash v. Singh*, 2006 BCSC 1545, the court found that the testatrix felt bound by a tradition of the Indo-Fijian culture that "sons and not daughters should inherit the bulk of their parents' estates". The court found further that this was the reason for an unequal distribution of the estate among the plaintiffs and defendants. The court held that in:

> modern Canada, where the rights of the individual and equality are protected by law, the norm is for daughters to have the same expectations as sons when it comes to sharing in their parents' estates.

The court, however, did respect the wishes of the testatrix to an extent: it varied the will to substantially increase the gifts to the plaintiff daughters, but did not ultimately order equal distribution.

In *Peden v. Peden Estate*, 2006 BCSC 1713, the deceased had three sons, the youngest of whom was homosexual. The gifts to the two elder sons were outright, whereas the gift to the youngest son was a life estate, with a gift over to the other sons. The court accepted the evidence of the solicitor who drew the will that upon learning that his youngest son was homosexual, the deceased instructed the solicitor to draw a new will with no provision for that son. The solicitor refused to do so. The deceased attended the solicitor sometime later, and gave the instructions to draft the will with the life estate. He advised the solicitor that the reason for so doing was to ensure that his estate would not go to someone other than a Peden.

The court found that the "real reason for the testator treating the plaintiff differently was the plaintiff's sexual orientation. There is … authority that homosexuality is not a factor in today's society justifying a judicious parent disinheriting or limiting benefits to his child". The court therefore varied the will to change the gift from a life estate to an immediate gift.

G. Can a Prospective Beneficiary Relinquish Wills Variation Act Rights?

Prospective beneficiaries cannot relinquish their rights under the *WVA*. For example, a spouse who acquiesces to the testator's decisions as to the division of his or her estate is still entitled to bring a claim under the *WVA* (*Allchorne v. Allchorne Estate*, 2005 BCSC 104). Cohabitation, marriage, and separation agreements that purport to preclude *WVA* claims by one or both parties do not necessarily operate as such. However, the fact that a party has agreed to forego a *WVA*

claim is a factor the court may take into consideration in determining the adequacy of the provisions of a will.

Similarly, an attempt by the testator to dissuade beneficiaries from bringing such claims through the use of a clause in a will purporting to disinherit a beneficiary who brings an action against the testator's estate may be disregarded by the court (*Bellinger v. Nuytten Estate*, 2003 BCSC 563).

III. THE FRAUDULENT CONVEYANCE ACT AND WILLS VARIATION ACTIONS

A *WVA* action is a claim against the testator's estate. Assets that do not form part of the deceased's estate at the time of death cannot be subject to a *WVA* action. For example, the following assets fall outside the testator's estate and therefore are not subject to *WVA* claims:

1. Property owned in joint tenancy, which passes by operation of law to the surviving joint tenant.

2. Life insurance policies and retirement plans such as RPPs, RRSPs, or RRIFs having valid designations in favour of named beneficiaries other than the testator's estate.

3. Property gifted outright to others during the testator's lifetime.

4. Property settled upon an irrevocable trust during the testator's lifetime.

Accordingly, testators who fear a claim under the *WVA* have taken steps to ensure their estate value on death is minimal.

In recent months, the issue of potential claims pursuant to the *Fraudulent Conveyance Act* has received heightened interest by members of the Estate and Trust bar. This interest was fuelled in part by the decision of *Mawdsley v. Meshen*, 2010 BCSC 1099. There, the plaintiff made a claim of fraudulent conveyance, in an attempt to void certain transfers made by his deceased common-law spouse during her lifetime. The court declined to decide whether the plaintiff had standing as a "creditor or other" under the *Fraudulent Conveyance Act* on these facts, and instead denied the claim on the basis of a determination that the deceased had no fraudulent intent of the kind required under the Act. The court's conclusion was based primarily on a finding of fact that Mrs. Meshen and Mr. Mawdsley had a clear, though unwritten, agreement to keep their property separate, and in fact, Mr. Mawdsley was generally present during the meetings with the professionals who effected the various transfers. However, the decision left the door open for such a determination to be made.

Mawdsley was not the first case in which a claim under the *Fraudulent Conveyance Act* was made to attack estate planning. In *Hossay v. Newman*, (1998), 22 E.T.R. (2d) 150 (B.C.S.C.) the court held that an adult child did not have standing in the circumstances to bring such a claim. This is because the child's only claim against the deceased would arise on death, under the *WVA*. The court therefore held that the child does not have the status of "creditor or other" under s. 1 of

the *Fraudulent Conveyance Act*, and thus, no standing. However, the court noted that if a beneficiary has a legal or equitable claim against the testator prior to the testator's death, a transfer of assets made to avoid that claim may be voidable as a fraudulent conveyance which would result in the assets being in part of the estate and exposed to a potential *WVA* claim after death.

Mordo v. Nitting, 2006 BCSC 1761, citing *Hossay v. Newman*, held that the claim of an independent adult child under the *WVA* on moral grounds is not a claim by "creditors or others" under the *Fraudulent Conveyance Act*. The *Mordo* decision, in its thorough analysis of alter ego trusts, testamentary transfers, and sham trusts, held that it is not illegal to arrange one's affairs to avoid possible claims under the *WVA*.

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