CLARK WILSON LLP
BC's Law Firm for Business™

Wills, Women and Multiculturalism

by

Mark S. Weintraub
Clark Wilson LLP
tel. 604.643.3113
msw@cwilson.com

TABLE OF CONTENTS

I. INTRODUCTION **1**

II. RELEVANT TESTAMENTARY PRINCIPLES - TESTAMENTARY FREEDOM VS. MORAL OBLIGATION **2**

A. Mental Capacity 3
B. Wills Variation Act 3
C. Supreme Court of Canada - Tataryn v. Tataryn 4

III. JUDICIAL CONSIDERATION OF GENDER DISCRIMINATION **5**

IV. GENDER EQUALITY VS. MULTICULTURALISM **7**

© 1998 - 2011 Clark Wilson LLP
Mark S. Weintraub, T. 604.643.3113

Wills, Women and Multiculturalism

I. Introduction

The recent film, *Sense and Sensibility* brought to the screen Jane Austen's powerful critique of early 19th century English values and social customs. The film opens with the patriarch of the family on his death bed, pleading with his son to posthumously take care of his step-mother and step-sisters since, as testator, he was required to leave everything to his male heir. Later in the film, one of the daughters remarks to her suitor that men in England had the opportunity of inheriting wealth; women could neither earn it nor inherit it. While the film was not entirely accurate with respect to inheritance rights of women, it communicated well the essential patriarchy of that society.

Over the last century or so Canadian law, largely based on English common law, has developed such that equality between the sexes is the supreme law of the land. Yet, it was a scant 25 years ago that our modern family relations legislation was implemented in the various provinces which finally gave significant financial recognition to female contributions to a marriage. It was only 15 years ago that the principle of equality was constitutionally enshrined in the Charter of Rights. As a practical matter, equality of women is far from achieved in various facets of our society. Nonetheless, notwithstanding the progress that is still required, it would, I submit, be repugnant to the great majority of Canadians if it were suggested that the law of the land required a father/husband to leave a greater share of his estate to his sons.

The interesting fact is that while such a bequest would no doubt be offensive to most Canadians, there is no specific law which either prohibits or requires male-biased gifts under a will. In British Columbia there is no reported case that deals directly with this issue. Perhaps the reason is that this kind of discrimination just does not happen anymore. If, therefore, discrimination against women under wills has not been a burning issue over the last decades, is there then any basis for a concern about a throw-back in time particularly when we see increasing efforts at eliminating gender bias in many aspects of our society?

The concern is justified and two-fold. Firstly, there must always be continued vigilance against a potential backlash. The pendulum can always swing in the other direction and while it is unlikely that patriarchal views of property disposition will gain currency, history seems to continually reflect the dynamic of reaction and counter-reaction. While I think the better view is that the struggle for female equality emanates from the same well spring which has inspired the struggle against institutional dominance of any sort, recently acquired gains can simply not be taken for granted.

The second concern arises by reason of those who come from other cultures, be they European, Asian or African, whose views toward women are nurtured in a climate of patriarchal values which our society has rejected, albeit not so long ago. As we experience greater heterogeneity in

our population, there is a greater likelihood that the legal profession will be compelled increasingly to deal with those who insist that their own customs, traditions or religion mandate that wealth be transmitted through the male line thereby excluding to a large or partial degree, the wife and female children from a will.

This paper then is an attempt to explore the potential conflict between those who would permit a patriarchal structure of wealth transmission and the principle of gender equality. Before going further, I need to underscore several points. Firstly, I do not wish my analysis to be seen as necessarily the positing of an inherently superior Anglo-Canadian system of values versus more traditional cultures. I purposely began this paper reminding all of us here that it was but a few short years ago that our own society was a patriarchy. Furthermore, newly arrived Canadians whose origins can be traced to such Commonwealth countries as Australia or certain European countries come from patriarchal based environments. Indeed, one of the few cases that I have been able to find in British Columbia which touches on this issue, deals with a testator who excluded his wife and favored his brother in part because of what the judge referred to as his "European" attitudes toward women.

So, as I proceed with my critique, I must continually remind you to remember that it has been a short 20 or 30 years since we, in the most affluent and democratically committed of societies have begun to encourage gender equality.

II. Relevant Testamentary Principles - <u>Testamentary Freedom vs. Moral Obligation</u>

To understand the context in which I wish to place my analysis, it is important, first of all to understand a few basic principles of estate law. In British Columbia, as in other common-law jurisdictions, there is no law which requires the testator to leave his property in any particular way. Only in the event of an intestacy, ie. no will, is there a statutorily mandated percentage to be left to heirs. Because of this apparent open-ended permission to members of our society to leave their property according to their own desires, it has become an accepted axiom to refer to this regime as one of "testamentary freedom". This concept, however, is somewhat over-blown. The starting point of the legal regime in England was that the estate passed to one's heirs - and i.e., once again as illustrated so popularly in *Sense and Sensibility* - to male heirs. So much for testamentary freedom! However, in the 19th century with *laissez faire* economics, the law liberalized and it was really only by mid-19th century that the concept of testamentary freedom was put on a pedestal. But even at this time, it was recognized that freedom of testation could not in any way be absolute. The law developed in several areas which reflects the tension between testamentary freedom and society's interest in ensuring that certain other collective values are adhered to.

© 1998 - 2011 Clark Wilson LLP

A. Mental Capacity

One of the most significant checks on testamentary freedom was the requirement for the mental capacity of the testator. In the still applicable case of *Banks v. Goodfellow* decided in 1870, Chief Justice Cockburn observed that:

> "The law of every civilized people concedes to the owner of property the right of determining by his last will ... to whom the effects which he leaves behind him shall pass. Yet it is clear that ... a moral responsibility of no ordinary importance attaches ... of the right thus given. The instincts and affections of mankind, in the vast majority of instances, will lead men to make provision for those who are the nearest to them in kindred and who in life have been the objects of their affection ...
>
> It is obvious that to the due exercise of a power involving moral responsibility, the possession of the intellectual and moral faculties common to our nature should be insisted on as an indispensable condition."

Having established therefore the theoretical necessity for mental capacity, the difficult challenge for the law in this area was not to identify the "raving mad-man" which was easy enough but, to set down rules for the twilight cases. One of the principles laid down in the *Banks v. Goodfellow* case was that "no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of his natural facilities - that no insane delusion shall influence his will in disposing of his property and bring about a disposal of it which, if the mind had been sound, would not have been made".

Without canvassing the many fascinating cases which have vexed the Courts in this area, the bottom line is that today it may be as difficult as it was 100 years ago to challenge a will based upon incapacity.

B. Wills Variation Act

The second main restraint on absolute testamentary freedom in British Columbia is by way of relying upon the *Wills Variation Act* which is a provincial statute allowing for the variation of a will if the testator has not made an "adequate provision for the proper maintenance and support of a surviving spouse and children". This legislation allows the Court to make an order that it considers "**adequate, just and equitable**" to ensure that a testator discharges his or her moral duty - such moral duty as defined by our Courts and which must reflect contemporary societal values.

© 1998 - 2011 Clark Wilson LLP

C. Supreme Court of Canada - Tataryn v. Tataryn

The extent of these moral obligations has recently been tested in the Supreme Court of Canada in the decision of *Tataryn v. Tataryn estate* (1994), 93 B.C.L.R. (2nd) 145, such that the long-simmering controversy as to whether the legislation simply calls for a needs-based financial test or whether it was intended to take into account the broader definition of moral obligation has now been settled. Our highest Court rejected the narrow needs-based test. In the course of giving this judgment, Madam Justice McLaughlin had the opportunity to review the origins of the *Wills Variation Act* and made some germane observations:

> "The statute, adopted in 1920, was modeled on New Zealand legislation. When the Bill was introduced, the Attorney General J.P. De B. Farris, described it as 'one of the links in the government's chain of social welfare legislation'. The Bill was the result of lobbying by women's organizations with the final power given to them through women's enfranchisement in 1916--It is recorded in the journals of the Legislative Assembly of B.C. that on proclamation of the Act, the Lieutenant Governor said that it 'will tend toward the amelioration of social conditions with the province' ..."

The origins of the legislation therefore, are interesting. On the one hand this law was part of larger welfare legislation which was intended to ensure that scoundrel husbands and fathers would not leave their wives and children to be wards of the state. The debates in the New Zealand legislature which enacted the first legislation of this type in the 1890's made it clear that there was a social problem of sufficient magnitude that required state intervention. What is more intriguing however, is the observation that the Bill was the direct result of lobbying by women's organizations.

Later in her Judgment, Madam Justice McLaughlin makes the point that there was nothing to suggest that the women's groups who lobbied for legislation intended that it be restricted to financial need. At page 151 Her Ladyship states:

> "... The desire of the legislators who conceived and passed it was to 'ameliorate social conditions within the Province.' At a minimum, this meant preventing those left behind from becoming a charge on the state. But the debates may also be seen as foreshadowing more modem concepts of equality. The Act was passed at a time when men held most property. It was passed, we are told, as 'the direct result of lobbying by women's organizations with the final power given to them through women's and enfranchisement in 1916'. There is no reason to suppose that the concern of the women's groups who fought for this reform were confined to keeping people off the state dole. It is equally reasonable to suppose that they were concerned that women and children receive an 'adequate, just and equitable' share of the

> family wealth on the death of the person who held it, even in the absence of demonstrated need."

Madam Justice McLaughlin pointed out as well that the Act must be read in light of modern values and expectations:

> "Whatever the answers to the specific questions, this much seems clear. 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 ... What was thought to be adequate, just and equitable in the 1920's may be quite different from what is considered adequate, just and equitable in the 1990's. This narrows the inquiry. Courts are not necessarily bound by the views and awards made in earlier times. The search is for contemporary justice."

III. <u>Judicial Consideration of Gender Discrimination</u>

That then is the supreme law of the land as it relates to the interpretation of our *Wills Variation Act*. Let us now examine more specifically the scenario with which we are concerned. Take the following example from a 1978 decision (Re Serra estate, Unreported, February 2, 1978 X7 468-75), a decision of Judge Catliffe, who was a County Court judge at the time. In that case, the widow of the deceased applied for a variation of her husband's wife. Mr. Serra left to his wife the right to a life interest in his estate delivered to Mr. Serra's brothers in equal shares. Mrs. Serra was 47 when her husband passed away and they had been married 21 years. Part of the estate was farm property and in the will, Mr. Serra stated that:

> "The meaning of this my will, in plain words is that I leave all my personal possessions to Nan (Mrs. Serra). My land, home and buildings are for Nan to live on and in as long as she has need for them. Should Nan in her old age decide to live in some old age home - then- she is to sign a quit claim and the property will be yours (ie. his brothers') to do with as you wish.
>
> The reason for making this new will is that I do not want this property to be inherited by the Klempson family through Nan. I want it to remain in the Serra family."

Ultimately, the Court held that there was financial need which necessitated variation. Furthermore the Court held that Mrs. Serra had contributed to the building up of the estate. The Court also observed:

© 1998 - 2011 Clark Wilson LLP

> "The widow said that her husband had a 'European way of thinking' that women should not own property and had a strong sense of obligation to his family. In my view (i.e. the Court's view) this sense of obligation to his brothers, neither of whom have visited the property for over 30 years, must be overborne by the wife's claim."

This case is instructive for several reasons. Firstly, while the Court does not specifically hold that the testator's views were patriarchal and therefore could not be sustained under the legislation, he considers the observation to be of sufficient merit to note it and states that this sense of blood obligation, perhaps noble in one sense, could not override his obligation to his wife and his wife's equitable claims. Inherent in this decision is the articulation of a clear moral statement that a man's first duty is to his wife and not to his clan.

This is one of the few reported cases that touch on the issue of the exclusion of women and how the *Wills Variation Act* may be used to overcome patriarchal views. However, the decision in this case does not reflect any analysis, but rather, simply points to equitable considerations which the judge invoked in light of contemporary values. I suggest that there is a more detailed analysis which can justify the exclusion of patriarchal views on property transmission. Here I need to draw upon a case which, while not directly dealing with gender issues, does provide a relevant precedent. In the decision of *Boyd v. Boyd-Talpas* (1989), 35 E.T.R. 240, Mr. Justice Shaw of the B.C. Supreme Court held that a testator who held an erroneous view of her son as taking advantage of her must be stripped of her inaccurate views to then determine how she would leave her gift. That is, the testator in this particular case was operating under the mistaken belief that her son was, in her particular value system, disentitled to an inheritance. Accordingly, the Court "constructed" a mother/testator without these erroneous and therefore irrelevant views and held that in those circumstances, there would have been no justification for anything but the most generous treatment under the will. It is in this category of cases of "mistaken assumptions" and "irrelevant consideration" that I believe we find the basis for the excluding of patriarchal views from testamentary dispositions. My main points on this argument are as follows:

(a) the origin of the *Wills Variation Act* was a part of a social justice campaign in the Commonwealth which had as its ultimate purpose the overthrow of a legislative and social system which treated women as second-class citizens;

(b) the legislation which embodies our society's highest ideals and values, namely the Charter of Rights and various Human Rights legislation, insists on the absolute equality of women; and

(c) the Supreme Court of Canada has held that the statute must be interpreted in light of contemporary standards and that the search is for contemporary justice. The Court held this in the context of a case wherein it was observed that the very statute with which we are concerned was part of an attack on patriarchal systems of wealth distribution. It would be perverse, therefore, not to interpret a statute in a manner in which it was originally intended - namely, as a flexible but nonetheless powerful tool in leveling the playing field between male and female

© 1998 - 2011 Clark Wilson LLP

> heirs. In other words, the approach I have suggested is not only consistent with our standards of contemporary justice but is in conformity with the very rationale for the legislation in the first instance.

Accordingly, any testator who brings to bear an ideology or value system which holds that women are not as worthy as their male counterparts to inherit property simply because of their gender must be seen as operating under irrelevant considerations and such beliefs would therefore have no room in the consciousness of a just parent or spouse. The testator must therefore be notionally stripped of any patriarchal beliefs to determine the appropriate gift.

IV. Gender Equality vs. Multiculturalism

Now so far, I suspect that there could be little opposition to this analysis. What happens however, when a will is justified not only on the basis of clan, as was in the *Serra* case, but on the basis of religion, tradition or culture? Let us take, for example, a testator from any number of countries who had arrived in Canada with his family, whether it be from any of the Middle Eastern countries, from the Indian sub-continent or from certain parts of Southeast Asia. In these countries arranged marriages may not be uncommon and property in the mother country is transmitted through the male line. Women have certain rights in these countries but their position is little different than the vast majority of Canadian women in the 19th and first half of the 20th centuries.

In the event that a Court is met with an overt argument that a differentiation based upon gender can be justified or even mandated by the testator's culture, tradition or religion, the argument in favour of gender discrimination would go something as follows.

Canada is a country of immigrants. The modern state of Canada has always been a country of immigrants and the only thing that has changed is the source of immigration. While the first waves of immigration were from the British Isles and France, the balance may now have shifted. While at one time a Eurocentric ideology and value system dominated the country, there is nothing innately superior to this ideology and the Eurocentric value system should cease to dominate and be prepared to share the stage with other competing views.

The argument might continue along the lines that liberal immigration policy since W.W.II has seen a growing proportion of third world immigrants thereby changing the population composition. Bernardo Berdichewsky, in his work *Racism, Ethnicity, and Multiculturalism* (Future Publications 1996) observes (at pps. 51-52):

> "As a product of this overall liberal immigration process (even if it still favoured mostly Europeans) the second fundamental social fact has been evolving to shape this country's unique nature as a modern and independent nation. Subsequently, during the last four decades of this century particularly, a dramatic alteration of the ethnic composition of the immigration flow took place. As a result, Canada is becoming an increasingly pluralistic, polyethnic and

© 1998 - 2011 Clark Wilson LLP

> multicultural society. ...From a few original British colonies in the 19th Century that united under the Canadian Confederation, it has transformed itself into a totally independent, and quite different nation/state as the end of the 20th century approaches."

The enactment of both federal and provincial multiculturalism statutes acknowledges this reality. Further, these statutes must be seen as part of those few pieces of legislation which attempt to define and embody the collective values of our country. So, for example, the federal *Multiculturalism Act* notes that the Constitution recognizes the importance of preserving the multicultural heritage of Canadians. The federal *Multiculturalism Act* declares it to be the policy of the government of Canada to recognize and promote the understanding that multiculturalism reflects the cultural and racial diversity of Canadian society and acknowledges the freedom of all members of Canadian society to preserve, enhance and share their cultural heritage.

As such, the argument goes, it would be arrogant and unlawful for a Court to dictate to a Canadian of a traditional culture that, for example, property cannot be transmitted in a way which he, as part of a traditional culture, has determined is the ideal social structure. Respect for traditional cultures and religions demands that the Eurocentric views of social relationships be suspended. The argument would include that the search for contemporary justice does not mean without regard to other cultures' views of the place of women which may at first glance appear to be subordinate but with greater understanding will be seen as providing for their ultimate protection and the preservation of a minority traditional culture.

Ultimately, as a society we have to determine whether this line of reasoning will prevail. I say it should not and need not. There are universals which apply cross-culturally. There are universal declarations of human rights - not everything is subjected to cultural relativity and those who are most knowledgeable about multiculturalism in Canada do not say that multiculturalism is a license for the expression of every custom, whim and fancy of a particular person or group who has arrived in the country. Indeed, Berdichewsky has observed that multiculturalism stands for an ethos which promotes integration without the loss of identity. It does not mean the assimilation of "ethnics" into the mainstream, but it implies an adjustment on both sides whether it be with respect to values or social customs. Indeed, the purpose of multiculturalism is to foster the best of all cultures so that we create something here in Canada that is unique. Certainly, the proponents of multiculturalism envision the ideal of a common set of values which accord to each individual respect and dignity irrespective of race or gender while at the same time allowing for every ethnic group to pursue their unique cultural heritage provided such expression does not collide with the agreed upon universals. These universals include gender equality and cannot be breached by catering to anachronistic social custom.

To set up a clash between female equality and multiculturalism is therefore a false conflict.

In sum, it is my view that in the context of inheritance rights, any gift which distinguishes male from female, whether subtly disguised or overtly justified, must be seen for what it is - an erroneous and therefore irrelevant consideration that has no place in the mind and heart of the "just parent or spouse" and as such must be stripped away in the same fashion that our Courts have dealt with other cases of irrelevant considerations or mistaken assumptions.

© 1998 - 2011 Clark Wilson LLP

What is needed therefore in these cases is a strong message communicated by the legal profession in its capacity as advising solicitors, litigators who end up arguing these cases and judges who end up deciding them: that whether the exclusion of women is blatant or buried a little bit below the surface, such exclusion will not be sustained in a Court of law. That is, any testamentary gift which either blatantly or by subterfuge intends to defeat the just claims of members of the family for the sole reason that they are female must be roundly condemned at every stage of the legal system. Any attempt at justifying gender differentiation on the basis of culture violates fundamental principles of equity while discrediting the ideals of multiculturalism.

Mark S. Weintraub

Wills, Women and Multiculturalism
T. 604.643.3113 / msw@cwilson.com

CWA159056.1

© 1998 - 2011 Clark Wilson LLP
Mark S. Weintraub, T. 604.643.3113