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Wills Variation Act and Fraudulent Conveyances

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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 identified himself as the father in the birth records and to immigration authorities when moving to Canada. Nonetheless, the court held that the child does not have standing to bring a claim under the *WVA* (*Peri v. McCutcheon*, 2011 BCSC 273) because she was neither the biological child of the deceased, nor was she formally adopted by him.

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.

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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 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, 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;

(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.)).

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.

Recently, 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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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 "Act"), 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 Act 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 Act and when may they do so?

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

"Children" include the Testator's biological children and adopted children. The Act has not yet been interpreted to apply to step-children or to a Testator's biological children who may be adopted by someone else. There are no restrictions on which children may apply under the Act, 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. This definition will include same-sex relationships.

The Act 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 and somewhat unpredictable 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 extremely difficult for a Testator to effectively disinherit a child or spouse in British Columbia. Minimal gifts in the Will rarely satisfy a Testator's legal and moral obligations to a spouse or child.

What property is included and excluded from the Act?

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 Act. 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 Act.

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

What can you do to ensure your wishes in your Will do not infringe the Act?

The most common method of avoiding the impact of the Act is to ensure that the Testator prepares a Will in compliance with the legal and moral obligations imposed by the Act to the fullest extent possible.

Another method of avoiding the impact of the Act is to ensure there are few assets in the estate that are subject to the Act. Consider the use of various types of trusts, including *alter ego* trusts and spousal trusts. If gifting property during your lifetime, ensure a deed of gift is drafted to evidence the gift.

The Act allows you to make a written statement explaining your intentions in drafting your Will and its rationale. This is usually done as a Memorandum to the Will. It must be accurate, factual, and reasonable.

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:

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Avoiding Wills Variation Claims: How Far is Too Far?

The Wills Variation Act's restrictions on testamentary autonomy

Under the *Wills Variation Act* (*WVA*), a spouse or child of a deceased person who has left a will can petition the court to vary the terms of the will in their favour on the basis that the testator has not made adequate provision for their proper maintenance and support.

The *WVA* represents a significant encroachment on testamentary autonomy – the right to determine the distribution of one's estate in accordance with one's own wishes. It also creates a great deal of uncertainty, as it is difficult to predict whether any potential claimant will actually bring a *WVA* claim against the estate and, if so, what degree of success they might have in court or on the settlement of the claim. Accordingly, individuals who foresee potential *WVA* claims usually wish to take any available steps to reduce that uncertainty.

Because the only remedy available under the *WVA* involves the court ordering a change to the terms of the will, planning to avoid these claims almost always involves reducing the estate that passes under the will. Gifting property during one's lifetime, transfers into joint tenancy, making insurance and retirement plan designations, and settling property onto trusts created during one's lifetime are all common ways to decrease the estate that is governed by the will. The *WVA* contains no specific anti-avoidance rules addressing such transfers and, accordingly, transfers made to avoid *WVA* claims are generally effective in achieving that purpose, except where they are voided as fraudulent conveyances.

What is a fraudulent conveyance?

The *Fraudulent Conveyance Act* (*FCA*) deems a disposition of property to be void and of no effect if it was "made to delay, hinder or defraud creditors and others of their just and lawful remedies", unless the disposition was for good consideration to a third party who had no notice or knowledge of the fraud.

The wording of the *FCA* also appears to require a dishonest intention on the part of the transferor if a transaction is to be voided by the Act. However, the recent decision of the Court of Appeal in *Abakhan & Associates v. Braydon Investments Ltd.*, 2009 BCCA 521 seems to have removed that additional requirement. The case involved a businessman, Mr. Botham, who, upon causing a company of his to enter into a new business partnership, transferred out of the company certain non-related assets. The admitted purpose of the transfers was to place the assets out of the reach of the creditors of the partnership, but all parties agreed that in doing so, Mr. Botham had no fraudulent or other dishonest intent. The Court of Appeal held that although the transfers were made honestly, without moral blameworthiness, and for other legitimate business purposes, they were still caught by the *FCA*. The *Braydon* decision makes it clear that the *FCA* can have the effect of voiding conveyances that involve no fraudulent intent.

The pre-existing claim principle

The BC Supreme Court in the case of *Hossay v. Newman* (1998), 22 E.T.R. (2d) 150, considered the question of whether the provisions of the *FCA* apply to dispositions made by a person during

his lifetime which may have the effect of defeating or hindering claims that may be made against his estate pursuant to the *WVA*.

In coming to its decision, the court laid down the pre-existing claim principle: a *WVA* claimant has standing to invoke the *FCA* only if he had a legal or equitable claim which predated the testator's death. Mr. Justice Mackenzie enunciated this principle as follows:

> In my view, s. 1 of the *Fraudulent Conveyance Act* in using the term "creditors and others" contemplates a situation where the person claiming, if not a creditor, at least has some legal or equitable claim against the debtor during the debtor's lifetime. I cannot interpret s. 1 as extending to claims that arise solely on the death of the debtor/testator.

The pre-existing claim principle articulated in *Hossay* has been upheld in a number of subsequent cases, a number of which will be discussed in Part 2 of this article. [checking with RTW regarding this?]

In summary then, the law in BC is that if you transfer property to avoid potential claims that may be made under the *WVA* after your death, the disappointed beneficiaries will not have standing to challenge the transfers as being fraudulent conveyances solely because of their claim under the *WVA*. However, if they have some legal or equitable claim against you during your lifetime, any transfer of property you make for the purpose of circumventing their claims may be voidable as a fraudulent conveyance.

Unfortunately, although *Hossay* seems to set down a clear rule, it leaves some tough questions about how it might be applied. Although a full review of the case law is beyond the scope of this article, the following sections of this article offer some general comments with respect to the application of the pre-existing claim principle in various circumstances.

Unjust enrichment claims

A spouse (married or common law) or child may be able to establish a pre-existing claim of constructive trust in respect of the deceased's assets, based on unjust enrichment (see our article in the July edition of *Work Place Post* on *Unjust Enrichment and Estate Claims*). A claim of unjust enrichment requires demonstrating that there was an enrichment to one party, a corresponding deprivation of the other, and that there was no juristic reason for the enrichment. Where unjust enrichment is claimed, the remedy usually sought is a declaration that the property in question is held on a constructive trust for the plaintiff.

Mawdsley v. Meshen, 2010 BCSC 1099 and *Chowdhury v. Argenti Estate*, 2007 BCSC 1207, both represent unsuccessful attempts to use an unjust enrichment/constructive trust claim as the basis to bring a claim against a common law spouse under the *FCA*.

Antrobus v. Antrobus, 2009 BCSC 1341 is an example of a successful claim of unjust enrichment/constructive trust and fraudulent conveyance brought by a child against her parents. The plaintiff was able to demonstrate that over a period of approximately 30 years she contributed a considerable amount of labour to her parents, disproportionate to that of her siblings. After a falling out with the plaintiff, the parents conveyed the property to the plaintiff's

siblings in joint tenancy with themselves, to her exclusion. The plaintiff was successful in voiding the transfers and obtaining damages equal to approximately one-quarter of the value of the property in question.

The unjust enrichment cases raise questions about the relevance of the *Hossay* principle in this context, however. If the plaintiff succeeds in maintaining a claim of constructive trust in respect of a property based on unjust enrichment, and in voiding a transfer as a fraudulent conveyance, in most cases it would not seem necessary to also bring an action to vary the will as the plaintiff would already have been awarded an interest in the property in question.

Spousal claims to family property

Under the *Family Relations Act* (*FRA*), a married spouse is entitled to an interest in all "family assets" upon the occurrence of one of certain triggering events which include the making of a separation agreement or a divorce. Common law spouses do not have the same rights to division of family property under the *FRA* on the breakdown of a relationship, unless they have specifically agreed to such rights.

In the case of *Jack v. Parkinson* (1994), 91 BCLR (2d) 96 (BC SC), Mr. Jack died in 1988, having been separated from Mrs. Jack since 1986. Mr. Jack had filed a petition for divorce in 1986, and Mrs. Jack had filed a counter-petition claiming maintenance and an order for division of family assets. However, the parties had taken no further steps to finalize the divorce. Shortly before his death, Mr. Jack severed joint tenancy on the house owned by both of them, and transferred his half-interest to the woman he had been living with since the separation. The court held that Mrs. Jack had standing under the *FCA* as a "creditor or others", although in the end it held that Mr. Jack had not made the conveyance with the intention to delay, hinder or defraud her.

Mr. Justice Mackenzie in *Hossay* referred to the *Jack* case and in particular, that Mrs. Jack "because of the divorce proceedings and her claim to family assets" had a claim against Mr. Jack's assets during his lifetime.

However, the courts have not clearly stated whether an uncrystallized potential claim to family assets or to support during the lifetime of a spouse constitute a sufficient pre-existing claim to establish standing under the *FCA* after the spouse's death.

Support claims

A married spouse may have a claim for spousal support under the *FRA* or the *Divorce Act*. Common law spouses may have obligations to provide support and maintenance to one another depending on the circumstances listed in section 89 of the *FRA*. Under section 88 of the *FRA*, each parent is responsible for and liable for the support and maintenance of a minor child.

However, all of these support obligations remains uncrystallized until a court order is made for support or a binding support agreement is entered into.

The case law does not clearly establish whether a potential claim for support against a spouse, common law spouse, or parent during that person's lifetime would be sufficient to establish

standing to bring a claim under the *FCA* after his or her death in respect of a transfer of property made prior to death. A crystallized support obligation may be a sufficient pre-existing claim on which to base such an action, even though under our current law the support obligation itself will generally cease on death unless the court order or agreement provides otherwise.

Adult dependent children

In many cases an adult child will not be able to establish pre-existing equitable or legal claims against a deceased parent, so that they will be precluded from bringing an *FCA* claim to bring assets back into the parent's estate. In *Hossay*, for example, the plaintiff Mr. Hossay was the adult son of the testator, who had conveyed most of his assets into joint tenancy during his lifetime. Mr. Hossay had no claim against the testator apart from his claim under the *WVA*, and therefore was unsuccessful in overturning the transfers under the *FCA*.

Similarly, in the case of *Mordo v. Nitting*, 2006 BCSC 1761, the deceased Mrs. Mordo used transfers into joint tenancy, gifts of property during her lifetime, and the settlement of property upon an *inter vivos* trust, all for the express purpose of ensuring her son would not receive a share in those assets upon her death. Relying on *Hossay*, the court stated in no uncertain terms that the son had no standing to challenge the transactions.

WILLS VARIATION ACT and FRAUDULENT CONVEYANCE ACT CONSIDERATIONS

September 21, 2011

Presented by Amy Mortimore
& Doug Howard

CLARK WILSON LLP
BC's Law Firm for Business

Wills Variation Act, s.2

- if a testator dies leaving a will that does not, in the court's opinion, make adequate provision for…the testator's spouse or children, the court may…order that the provision that it thinks adequate, just and equitable… be made out of the testator's estate
- Significant encroachment upon testamentary autonomy

Smith v. Smith

- Mr. Justice Williams recently stated in *Smith v. Smith*:
  - It is a trite observation that each fact pattern, like each snowflake, is unique. None will be exactly like any other, and the subtle (and not so subtle) differences and distinctions will inform the ultimate outcome

Dependants' Relief Legislation – the early years

- Husband/father generally held all of the family's assets
- Enacted legislation that allowed the courts to ensure that the financial needs of the family were met from the estate of the deceased, not from the state's resources
- Recognition of early equality movement

Two Lines of Authority

- Financial need test
- Broader test encompassing moral duty

Tataryn

- 1994 Supreme Court of Canada
- Rejected the narrower needs-based test in favour of a broader interpretation of moral duty
- Search for “contemporary justice”
- Consideration of legal obligations and moral obligations

Who may bring a claim under WVA?

- Spouse
- Children

What's the time limit to bring an application?

- 6 months from the date of grant of probate of the will

Role of the executor in a wills variation action?

- very limited role
- remain neutral

When would the court vary a will?

- Adequate, just and equitable in the circumstances, including
  - Legal obligation as well as moral obligation
  - Size of the estate
  - Contribution of the spouse or child to the accumulation of the deceased's assets
  - Care provided to the deceased by the spouse or child
  - Assured expectation of the spouse or child
  - Financial need of the spouse or child
  - Mental and physical capacity of the parties involved
  - Rational reason or lack of rational reason for not providing for a spouse or a child
- Other circumstances unique to testator

Fraudulent Conveyances Act ("FCA")

Fraudulent conveyance to avoid debt or duty of others

1. If made to delay, hinder or defraud creditors and others of their just and lawful remedies

   (a) a disposition of property, by writing or otherwise,

   (b) a bond,

   (c) a proceeding, or

   (d) an order

   is void and of no effect against a person or the person's assignee or personal representative

Fraudulent Conveyances Act ("FCA")
(cont'd)

whose rights and obligations by collusion, guile, malice or fraud are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.

Application of Act

2. This Act does not apply to a disposition of property for good consideration and in good faith lawfully transferred to a person who, at the time of the transfer, has no notice or knowledge of collusion or fraud.

Estate Planning Before *Abakhan & Associates v. Braydon*

The Case law and prevailing practice among professionals supported the proposition that a transfer of assets would not be rendered void and of no effect if:

- both before and after the transfer, the transferor was solvent and meeting his or her current obligations as they become due; and
- the intention to shield assets from future creditors was only one reason for the transfer, that is, the transferor was also making the transfer for other prudent business reasons, such as gaining tax and management efficiencies.

Abakhan & Associates v. Braydon Investments Ltd. 1009 BCCA 521

- If there is an "intention" to shield assets, it is irrelevant that there are no current creditors or that there is also a legitimate business reason for the transfer.
- The transfer will be set aside even if there is no "dishonest" intention.

Practice Points Arising from *Abakhan*

- Advise your clients on the current state of the law in British Columbia.
- You must not counsel your clients to undertake estate planning which encompasses a transfer to "delay, hinder or defraud creditors and others".
- "Don't ask", "don't tell" will likely become the prevailing practice.

Practice Points Arising from *Abakhan* (cont'd)

- "Intent" is essentially a matter of fact to be proved which may be based on the inference drawn from the transfer itself and other circumstances. An "intent" to avoid creditors will be difficult to prove is there is no direct evidence and the transfer is being made for other prudent business and estate planning purposes.

Practice Points Arising from *Abakhan* (cont'd)

- A transfer will not be set aside under the FCA if such transfer is made for good business reasons and if there is no intention to "delay, hinder or defraud creditors and others". In other words, asset protection may only be a by-product of other estate planning objectives and not an objective in itself.

The FCA and Asset Transfers to Avoid the *Wills Variation Act* ("WVA")

- ***Hossay v. Newman* (1998) 22 E.T.R. (2d) 150**
  - the FCA does not extend to claims that arise solely on the death of the debtor/testator
  - this case also suggests that the Courts will consider setting aside the transfer of assets to avoid the WVA is the spouse or child had a legal or equitable claim against the estate prior to the date of death
- See Clark Wilson article, "Avoiding Wills Variation Claims: How Far is Too Far?"

Traditional Ways to Avoid or Lessen the Impact of the WVA

- Form and transfer property to an alter ego or joint spousal trust or other inter vivos trust
- Own property jointly with right of survivorship
- Gift property absolutely
- Designate a beneficiary under an RRSP, RRIF, TFSA, life insurance contract
- Die intestate
- Take up permanent residence outside of BC
- Invest in real estate assets outside of BC and ensure your BC Will is restricted to assets situate in BC

THANK YOU

These materials are necessarily of a general nature and do not take into consideration any specific matter, client or fact pattern.

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