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ESTATE LITIGATION BASICS FOR LAWYERS
PAPER 1.1

Wills Variation Act

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WILLS VARIATION ACT

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I. The Wills Variation Act

A. What is the Wills Variation Act?

The heart of the *Wills Variation Act*, R.S.B.C. 1996, c. 490, is s. 2 which says:

> ... if a testator dies leaving a will that does not, in the court's 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.

B. Who May Apply?

The *Wills Variation Act* says that the court may vary a will in favour of a "spouse or children."

Section 1 says that a spouse "means a person who

> (a) is married to another person, or
> (b) 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."

If faced with the issue of whether someone is living in a marriage-like relationship, see Mr. Justice Lambert's reasons for judgment in *Gostlin v. Kergin*, [1986] 5 W.W.R.1, 1 R.F.L. (3d) 448, 3 B.C.L.R. (2d) 264 (C.A.). *Gostlin* dealt with support obligations of a common law spouse under the *Family Relations Act*, but in *Janus v. Lachocki Estate*, 2001 BCSC 1702, Mr. Justice R.R. Holmes applied the

criteria set out in *Gostlin* to determine if the plaintiff fell within the definition of spouse under the *Wills Variation Act*. See also *Austin v. Goerz*, 2007 BCCA 586.

The *Wills Variation Act* does not allow claims on behalf of a divorced spouse, but a separated married spouse may apply. In *Wagner v. Wagner Estate* (1991), 62 B.C.L.R. (2d) 1, a majority of the BC Court of Appeal held that the fact that the wife and husband had signed a final separation agreement did not bar the wife from making a claim under the *Wills Variation Act* after her husband's death.

Because both a common law spouse and a separated married spouse can apply for a share of the deceased estate under the *Wills Variation Act*, two spouses may make competing claims under the Act.

"Child" and "Children" are not defined in the *Wills Variation Act*, but include a natural child, whether the child is born inside or outside of marriage, and an adopted child.

A stepchild does not have standing to make an application under the *Wills Variation Act* (*McCrea v. Barrett*, 2004 BCSC 208).

C. Time Limits for Applying

A spouse, or child, who wishes to make a claim seeking to vary a will under the *Wills Variation Act*, must file a claim "within 6 months from the date of the issue of probate of the will in British Columbia ..."

The *Wills Variation Act* does not contain any provisions extending the six-month limitation period. For example, in contrast to the provisions of the *Limitations Act*, R.S.B.C. 1996, c. 266, there are no provisions extending the six-month limitation period for minors or incapacitated persons.

In very limited circumstances it may be possible to successfully argue that the defendants are estopped from relying on the limitation period. See, for example, *Chan v. Lee Estate*, 2004 BCCA 644 where the plaintiffs missed the limitation period because they relied on promises made by the defendants that they would share the estate. Similarly, the defendants were estopped from relying on the limitation period in *Desbiens v. Bernacki*, 2008 BCSC 696, where the executrix sent the notices of her intent to apply for probate of the will as required by s. 112 of the *Estate Administration Act*, R.S.B.C. 1996, c. 122 to the wrong addresses of the testator's children, they did not receive the notices, and the court found that the executrix did not make reasonable efforts to ascertain their correct addresses.

Section 4(1) says, "If an action has been commenced on behalf of a person, it may be treated by the court as, and so far as regards the question of limitation is deemed to be, an action on behalf of all persons who might apply."

Although the plaintiff must file a writ within six months, and the plaintiff must serve the personal representative, the plaintiff does not have to serve the personal representative within the six-month period from the date of probate. This can create uncertainty for a personal representative who wishes to distribute the estate after the six-month period, but is unsure if a spouse or child has commenced a *Wills Variation Act* claim. If it is not served, the writ expires one year after it is issued, but the court may extend it.

D. To What Assets Does the Wills Variation Act Apply?

The *Wills Variation Act* gives the court jurisdiction to vary only those dispositions that are in a will. It has no application if the deceased died without a valid will. If there is a partial intestacy, then the *Act* applies to the testate portion only, and not to the portion that will pass on an intestacy (*Hammond v. Hammond*, [1995] 7 W.W.R. 345, 7 B.C.L.R. (3d) 25 (S.C.)).

The *Wills Variation Act* does not apply to assets that the testator has gifted to others during his or her lifetime, or to assets that pass outside of the estate. Examples of assets that are gifted or pass outside of the estate include:

(1) *Inter vivos* gifts.

(2) Assets that the testator has settled on an *inter vivos* trust.

(3) Life insurance proceeds, and segregated funds, if the owner has designated one or more beneficiaries in the policy, and the designated beneficiaries survive the life insured. A beneficiary can be designated to hold proceeds in trust.

(4) Registered Retirement Savings Plans and Registered Retirement Income Funds, if the annuitant has designated one or more beneficiaries who survive the annuitant.

(5) Pension plan survivor's benefits if a beneficiary has been designated or is entitled to the benefits by the applicable legislation.

(6) A joint tenant's interest in a jointure, including land held in a joint tenancy, and joint bank accounts. When one joint tenant dies, that joint tenant's interest is extinguished, and the surviving joint tenant or tenants take by right of survivorship.

But, the fact that the testator has transferred title to assets to others during his or her lifetime, or that title flows to someone outside of the estate, will not avoid the application of *Wills Variation Act* if the court determines that the person who acquires title is holding the assets as a trustee for the estate on a resulting trust. For example, if the deceased had contributed his or her funds to a joint account, the court may hold that the surviving owner of the joint bank account holds the account on a resulting trust for the deceased owner's estate (*Pecore v. Pecore*, [2007] 1 S.C.R. 795)). In *Neufeld v. Neufeld*, 2004 BCSC 25, the Court applied the presumption of resulting trust to hold that the deceased's brother held the proceeds of a RRIF, as well as the joint bank accounts, in trust for the deceased's estate.

The *Wills Variation Act* does not have anti-avoidance provisions.

The *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163, does not prohibit making gifts or transferring assets into a trust or joint tenancy to avoid a potential claim under the *Wills Variation Act*. In *Hossay v. Newman* (Feb. 5, 1998), BCSC, Kelowna Registry 27559, the Court held that an independent adult child who had no claim independent of a *Wills Variation Act* claim, was not a "creditor or other" under the legislation. See also *Mordo v. Nitting*, 2006 BCSC 1761.

On the other hand, the gift or transfer may be set aside if the claimant had some other claim at the time of the transfer. In an Ontario case, *Stone v. Stone* (2001), 18 R.F.L. (5th) 365 (Ont. C.A.), the Ontario Court of Appeal found out he was dying. The Court held that, because the wife could have made claim under the upheld a decision setting aside the plaintiff's husband's transfer of property to his children when he *Family Law Act*, R.S.O. 1990, c. F-3, she came within ambit of Ontario's fraudulent conveyance legislation.

Although the *Wills Variation Act* does not apply directly to assets that the deceased disposed of during his or her lifetime, or that flow to beneficiaries outside of the estate, the court may consider that a beneficiary or claimant has received other assets from the deceased when making an award (*Chan v. Lee*, 2004 BCCA 644, 12 E.T.R. (3d) 163, 36 B.C.L.R. (4th) 37).

E. Conflicts of Law

The *Wills Variation Act* does not apply to land (or other immovables) outside of BC. Conversely, if the testator was not domiciled in BC at death, but owned land in BC, the Supreme Court of BC can vary the will in respect of the land in BC (see *In re Rattenbury Estate*, [1936] 2 W.W.R. 554 (B.C.S.C.)).

F. What is Adequate, Just and Equitable?

The most recent Supreme Court of Canada case on the *Wills Variation Act* is *Tataryn v. Tataryn*, [1994] 2 S.C.R. 807, 116 D.L.R. (4th) 193. *Tataryn* settled a long standing debate about whether the *Act* is limited to redressing economic need or if its function extends to address broader societal values. Writing for the Court, Madam Justice McLachlin (now CJC) took the more expansive view. In applying the Act, she held that the court must balance the principle of testamentary autonomy, with society's expectations of what a judicious spouse or parent would do in the circumstances.

McLachlin J. held that there were two sets of criteria that the court should consider when deciding what is adequate, just and equitable. First, the court should consider the testator's legal obligations, such as his or her obligations to a spouse under family law statutes during the testator's lifetime for support and division of property. Next, the court should consider the testator's moral obligations. Where the testator has met his or her legal obligations, the court should consider whether he owed a moral duty to his spouse, or children, beyond the legal obligations the testator had in life. She wrote,

> If the phrase "adequate, just and equitable" is viewed in light of current societal norms, much of the uncertainty disappears. Furthermore, two sorts of norms are available and both must be addressed. The first are the obligations which the law would impose on a person during his or her life were the question of provision for the claimant to arise. These might be described as legal obligations. The second type of norms are found in society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards. These might be called moral obligations, following the language traditionally used by the courts. Together, these two norms provide a guide to what is "adequate, just and equitable" in the circumstances of the case.

A good summary of the law and of some of the factors that the courts consider when deciding *Wills Variation Act* claims is set out in Madam Justice Satanove's reasons for judgment in *Clucas v. Royal Trust Corporation of Canada* (1999), 25 E.T.R. (2d) 175, at para. 12, as follows:

> 12. Many cases have been decided under the *Wills Variation Act*. The considerations governing the court's decisions have evolved over time and there is a fairly comprehensive set of competing principles to which effect must be given. I have endeavoured to summarize these as follows:
>
> 1. The main aim of the Act is the adequate, just and equitable provision for the spouses and children of testators. (*Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807)
>
> 2. The other interest protected by the Act 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. (*Tataryn*, *supra*)
>
> 3. The test of what is "adequate and proper maintenance and support" as referred to in s. 2 of the Act is an objective test. The fact that the testator was of the view that he or she adequately and properly provided for the disinherited beneficiary is not relevant if an objective analysis indicates that the testator was not acting in accordance with society's reasonable expectations of what a judicious parent would do in the circumstance by reference to contemporary community standards. (*Tataryn*, *supra*; *Walker v. McDermott*, [1930] S.C.R. 94; *Price v. Lypchuk Estate* (1987), 11 B.C.LR. (2d) 371 (C.A.); *Dalziel v. Bradford et al.* (1985), 62 B.C.L.R. 215 (B.C.S.C.))

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. (*Price v. Lypchuk Estate*, *supra*)

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. (*Tataryn*, *supra*)

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. (*Tataryn*, *supra*)

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. (*Dalziel v. Bradford*, *supra* and *Price v. Lypchuk*, *supra*)

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. (*Bell v. Roy Estate* (1993), 75 B.C.L.R. (2d) 213 (B.C.C.A.); *Comeau v. Mawer Estate*, [1999] B.C.J. 26 (B.C.S.C.); and *Kelly v. Baker* (1996), 15 E.T.R. (2d) 21 (B.C.C.A.))

9. Although a needs/maintenance test is no longer the sole factor governing such claims, a consideration of needs is still relevant. (*Newstead v. Newstead* (1996), 11 E.T.R. (2d) 236 (B.C.S.C.))

G. Rational and Valid Reasons

Section 5 of the *Wills Variation Act* says:

> **5**(1) In an action under section 2 the court may accept the evidence it considers proper of the testator's reasons, so far as ascertainable,
>
> (a) for making the dispositions made in the will, or
>
> (b) for not making adequate provision for the spouse or children,
>
> including any written statement signed by the testator.
>
> (2) In estimating the weight to be given to a statement referred to in subsection (1), the court must have regard to all the circumstances from which an inference may reasonably be drawn about the accuracy or otherwise of the statement.

In *Kelly v. Baker* (1996), 15 E.T.R. (2d) 21 (BCCA), Mr. Justice Finch (now CJBC) at paragraph 58 set the law out as follows:

> The law does not require that the reason expressed by the testator in her will, or elsewhere, for disinheriting the appellant be justifiable. It is sufficient if there were valid and rational reasons at the time of her death - valid in the sense of being based on fact; rational in the sense that there is a logical connection between the reasons and the act of disinheritance.

Despite *Kelly v. Baker*, in practice trial judges often do consider whether a testator's reasons for disinheriting a spouse or child are justifiable. In *Rampling v. Nootebos*, 2003 BCSC 787, Mr. Justice Truscott declined to follow the above quoted portion of Mr. Justice Finch's reasons, saying:

> [46] I confess that I have always had difficulty in understanding the distinction that is sought to be made by these comments. The *New Oxford Dictionary of English* defines "justifiable" as "able to be shown to be right or reasonable; defensible".
>
> [47] On this definition, if the testator does not have to show that his or her reasons for disinheriting are justifiable, then there is to be no consideration of whether they are right or reasonable or defensible.

H. Role of the Personal Representative

The executor or administrator is required to remain neutral. Mr. Justice Bouck in *Quirico v. Pepper* (September 3, 1999), BCSC, Courtenay Registry S4550, said at paragraph 15:

> The primary duty of an executor is to preserve the assets of the estate, pay the debts and distribute the balance to the beneficiaries entitled under the will, or in accordance with any order made under the *Wills Variation Act*. An executor should not pick sides between the beneficiaries and use estate funds to finance litigation on their behalf under the *Wills Variation Act*. It is a matter of indifference to the executor as to how the estate should be divided.

I. Costs

Costs are at the discretion of the trial judge. The usual rule in *Wills Variation Act* cases is that the successful party is entitled to costs from the unsuccessful party. The court will usually order that an unsuccessful plaintiff pay the defendants' costs (see *Vielbig v. Waterland Estate* (1995), 121 D.L.R. (4th) 485, 1 B.C.L.R. (3d) 76 (C.A)). Although in some cases the courts have awarded the successful plaintiff costs out of the estate (see *Wilcox v. Wilcox*, 2000 BCCA 401), the trend is to require that defendant beneficiaries personally bear the successful plaintiff's costs (see, for example, *Doucette v. Clarke*, 2008 BCSC 506).

The personal representative will generally be entitled to be reimbursed for his or her reasonable legal expenses out of the estate, provided that he or she remains neutral. Where the personal representative is also a beneficiary, his or her expenses for opposing the plaintiff's claim must be borne personally, and not by the estate. See *Steernberg v. Steernberg*, 2007 BCSC 953.

J. Appeals

The Court of Appeal has an independent discretion in a *Wills Variation Act* case (*Swain v. Dennison,* [1967] S.C.R. 7). This is a lower standard of review than in many other areas of law where the appellant must show that the trial judge made a palpable or overriding error.

II. Practice Tips

A. Representing the Plaintiff

Evaluate the merits of the case early. I think this is the most challenging aspect of representing (or deciding whether to represent) someone who wishes to make a claim. Just because someone has the right to apply under the *Wills Variation Act*, does not mean that he or she has a strong case. Evaluating your client's case requires a calculus of diverse factors.

Here are a few things to consider:

(1) How was your client related to the testator?

Following *Tataryn*, other things being equal, a spouse or dependant child will have a stronger claim than an independent adult child.

Not all spousal relationships are treated equally. In *Picketts v. Hall Estate,* 2007 BCSC 133, Mr. Justice Bauman distinguished the testator's legal obligations to his common law spouse, from the obligations of a married spouse, to whom the *Family Relations Act* would apply. In *Saugestad v. Saugestad*, 2006 BCSC 1839, varied 2008 BCCA 38, Madam Justice Russell suggested that a spouse's moral obligations to a second spouse of a moderately long relationship, with children from the first marriage, were not as strong as those of a spouse to the first spouse of a life-long marriage.

(2) Who are the beneficiaries?

This is the converse of your client's relationship to the testator. The court will look at the competing legal and moral claims of the beneficiaries. The stronger the testator's legal and moral obligations are to them, the more difficult it may be to persuade the court to significantly vary the will. Your client's case will be stronger if the beneficiaries are more distant relatives, friends, or charities.

(3) What are the financial positions of your client and of the defendants?

The plaintiff might not have to prove financial need to succeed, but it sure helps. For example, in *Bareham v. Petersen* (December 23, 1999), BCSC, New Westminster Reg. S053797, the court awarded a disinherited, disabled child an equal share with six siblings and step-siblings despite the plaintiff's total rejection of his mother. Mr. Justice Rowan said: "It is unseemly that a person who has rejected his mother all his adult life should preempt the estate but it is also unseemly that a child, no matter how estranged, should be a public charge and treated unequally and disadvantageously in a will."

Conversely, if the plaintiff is financially secure, and the beneficiaries are not, the plaintiff may have a difficult time persuading the court to vary the will.

Interrogatories are an effective means of discovering the financial circumstances of the opposing parties. Sometimes, a file can be settled after disclosure of financial information without more costly oral examinations for discovery.

(4) How large is the estate?

You must consider the competing legal and moral claims of the plaintiff and beneficiaries in the context of the size of the estate. If you are representing an independent adult child making a claim against a spouse beneficiary of a small estate you will likely have a more difficult task than if the estate is a large one. In a larger estate, more assets are available to satisfy the more tenuous moral claims.

(5) Did the testator provide for your client or for the defendants outside of the will?

Find out early on if your client or any of the beneficiaries have received significant assets from the testator outside of the will. Your client's claim will be weakened if the testator provided him or her with significant assets through jointures or beneficiary designations; it will be strengthened if the testator provided significant assets to the other parties outside of the will.

(6) Did the testator have rational and valid reasons?

This is usually the most contentious issue. Keep in mind that in many claims by independent adult children the child was estranged from the parent. Yet, the estrangement is not necessarily a rational and valid reason for disinheritance. If the court finds that the parent is responsible for the estrangement, or (as is often the case) both the parent and child are to blame, then the court may vary well make an award to the child.

Because there are competing principles, and the court has a fair amount of discretion, there is a tremendous amount of uncertainty in these cases, especially in those made by adult children.

B. Representing a Defendant

Educate your client.

Defendants may feel strongly that the testator's wishes should be respected. Your client may have a strong principled view that the testator's intentions should be upheld. Your greatest challenge may be explaining to your own client that the court will consider the testator's legal and moral obligations as well as the testator's wishes. Testamentary autonomy is an important consideration, but not the only one.

If the plaintiff has a reasonably strong case, it will often be in your client's best interest to resolve the claim early in the process to reduce the costs. But your client may be resistant to your advice to negotiate early if he or she will not get past the notion that he or she must seek to uphold the testator's wishes at all costs.

C. Representing the Personal Representative

The personal representative's main function is to manage the estate assets well, and provide the parties and the court with information concerning the estate assets and liabilities. It is helpful if the personal representative provides updated accounts before any mediation, as well as before trial.

As counsel for the personal representative, you will need to explain his or her role, and the obligation to remain neutral. Many personal representatives, and some lawyers, think it is their function to uphold the will.

If the *Wills Variation Act* claim goes to trial, the personal representative's counsel may not need to attend, or he or she may play a limited role of providing the court with the accounts.