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WILLS AND ESTATE PLANNING BASICS

Wills Variation Act Considerations

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WILLS VARIATION ACT CONSIDERATIONS

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*.

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.

Alternatively, if the personal representative has obtained a grant without sending the notice required by s. 112 of the *Estate Administration Act*, R.S.B.C. 1996, c. 122, a claimant could seek to set aside the grant of probate, and require a new grant to be issued (*Shaw v. Reinhart*, 2004 BCSC 588).

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 (*Niles v. Lake*, [1947] 2 D.L.R. 248 (S.C.C.)). 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, but a claimant could seek to set aside a transfer of assets pursuant to the *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163, which I discuss below.

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).

The *Wills Variation Act* does not apply to land (or other immovables) outside of BC. Conversely, if the testator was not a resident of 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.)).

E. 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 C.J.C.) 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)
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> 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*)
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> 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.L.R. (2d) 371 (C.A.); *Dalziel v. Bradford et al.* (1985), 62 B.C.L.R. 215 (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 (C.A.); *Comeau v. Mawer Estate*, [1999] B.C.J. 26 (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.))

F. 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 (B.C.C.A.), Mr. Justice Finch (now C.J.B.C.) at para. 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.

G. Role of the Executor

The executor is required to remain neutral. Mr. Justice Bouck in *Quirico v. Pepper* (3 September 1999), Courtenay Registry S4550 (B.C.S.C.), said at para. 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.

H. 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. Estate Planning and the Wills Variation Act

A. Disinheriting a Child

If a parent disinherits a child, or favors some children over others, there is a risk that the disinherited or less favored will make a claim under the Act. We have a duty to discuss the risks with our clients, and suggest ways of minimizing the risks that our client's wishes will not be carried out or that the estate will be depleted through litigation.

B. Ask Why

It is important that we understand our clients' reasons. Here are a few possible reasons your client might have for disinheriting a child:

(1) the child is estranged;

(2) the child is financially well off, and the other beneficiaries have greater needs;

(3) your client has already given the child significant assets;

(4) the child has a drug or alcohol problem, and your client is concerned that an inheritance will feed the child's addiction;

(5) the child does not handle his or her finances well, and your client does not want his or her wealth ultimately going to the child's creditors;

(6) the child has a disability, is receiving provincial disability benefits, and your client is afraid that if the child receives an inheritance he or she will lose those benefits.

Unless you know your client's reasons for disinheriting a child, you cannot advise your client on alternatives or options.

C. Discuss Alternatives to Disinheritance

Once you know your client's reasons, you can discuss alternatives.

For example, in the case of an estranged child, you can suggest to your client that it does not have to be an all or nothing proposition. If your client leaves the child something of value, there is a lower risk that the child will make a *Wills Variation Act* application, and if he or she does, there is a better chance that the court will dismiss the claim.

If your client is concerned that the child has a drug or alcohol dependency, is unable to manage money, or is in receipt of a provincial disability benefit, one alternative to disinheriting the child is to create a discretionary trust for the child. The trustee then has management and control of the trust funds for the benefit of the child.

The child who is the beneficiary of a discretionary trust can still make an application under the *Wills Variation Act*, but might be less inclined to challenge the estate plan than if disinherited. Where the child has significant debts or is in receipt of disability benefits, the child may be persuaded that he or she will get greater benefit from a discretionary trust, than from an outright inheritance. If the child does make a claim, and the testator has good reasons for setting up a discretionary trust for the child, there is a reasonable chance that the court will dismiss the child's *Wills Variation Act* claim.

D. Memorandum of Reasons

If your client has rational and valid reasons for the dispositions he or she is making, it is a good idea to set these out clearly. They can be set out in the will, in a memorandum, or in a statutory declaration.

If the reasons might antagonize the child who is left little or nothing in the will, my practice is to draft a memorandum for my client, rather than put the reasons in the will. Sometimes, putting reasons in the will might trigger a challenge by a child who on reading the reasons will feel the need to vindicate himself or herself.

By setting out the reasons in a separate memorandum, the executor is not required to release the memorandum if no one starts a *Wills Variation Act* claim. If a child does make a claim, then the executor can disclose the memorandum, and the court may consider the reasons. But if the child does not bring an action, there is no reason to needlessly antagonize the child.

E. Ineffective Techniques for Disinheriting a Child (or Spouse)

Here are a few things that are either counter productive or ineffective:

(1) Leaving a token gift such as $1 or $100. The child may still make a claim, and perceive the gift as a greater insult.

(2) Hurtful comments about the child in the will. People bring estate litigation claims because they are hurt; not just for money.

(3) *In terrorem* clauses. This is a clause that purports to disinherit someone who challenges the will. This may be effective in some cases, because if a child is left something in the will, he or she might be reluctant to start a suit. But, in *Bellinger v. Fayers*, 2003 BCSC 563, 13 B.C.L.R. (4th) 348, the Court held that it is against public policy to enforce an *in terrorem* clause against someone who makes a *Wills Variation Act* claim. In *Bellinger*, the Court also held that the clause was unenforceable as an idle threat, although this aspect of the decision can be avoided with a gift over.

F. Disinheriting a Separated Spouse

The best way to avoid a *Wills Variation Act* claim from a separated spouse is for the spouses to resolve all property issues and divorce. A divorced spouse does not have standing to apply under the Act.

Although a separation agreement may not be an absolute bar to making a *Wills Variation Act* claim, the court may give a separation agreement significant weight especially if it is negotiated with legal representation, and is fair. If the testator has abided by the separation agreement, the court may be persuaded that the testator has met his or her legal and moral obligations to the separated spouse even if no provision has been made for the spouse.

It may assist the court if there is a memorandum of reasons referring to a separation agreement, or if there is no written agreement, to the fact that the parties are living separate and apart and have divided their property.

For an excellent analysis of the effect of marriage and separation agreements on claims under the *Wills Variation Act*, see AnnaMarie Laing, "Use of Marriage/Separation Agreements to Defeat Wills Variation Claims," Trial Lawyers Association of British Columbia, *Attacking the Will 2005*.

G. Blended Families

Your client is married for the second time. She has a minor child with her second husband, and two independent adult children from her previous marriage. Her husband and minor child are dependant on her, and she wants to make sure that if she dies first, their needs are met, but she also wants to provide something in the future to her adult children.

Or, a husband and wife consult with you jointly about their estate plans. Both have children from previous relationships, and both were financially independent before their marriage to each other. Each wants to make sure the other's needs are met, but each wants to make sure that his or her assets ultimately go to his or her own children, and not to the other's children.

These scenarios are common, and fraught with the risk of future *Wills Variation Act* litigation. The risks can be reduced—but not eliminated—with good advice and careful planning.

Ask your client to consider what happens if she dies before her husband. What will he need? What if he goes first? What assets does she have? What does he have? What are their incomes, and anticipated future incomes?

In some cases spouses in second marriages leave everything to each other, with a provision that if the other has predeceased, the children of each of the spouses will share the estate. In modest estates this may be the most practical estate plan. But, consider the possibility that the surviving spouse changes his or her will, and cuts out the deceased spouse's children. Or, the surviving spouse remarries. Even if the survivor does not change his or her estate plan, the adult children of the first to die may feel insecure about their inheritance. We must discuss these possibilities with our clients.

After you have gathered information about your client's assets and liabilities, family, and you have identified your client's estate planning goals, you can consider the tools available to meet those goals. These include:

(1) testamentary spousal trusts;

(2) *inter vivos* trusts;

(3) life insurance designations, including life insurance trusts for minor children;

(4) RRSP and RRIF designations;

(5) jointures (with good documentation of the client's intentions);

(6) agreements between the spouses not to revoke their wills in respect of the portions of their estates that they are leaving to each other's children.

Different lawyers may reasonably recommend different approaches, and each of these tools has its place. In some situations, I recommend spousal trusts, with powers to encroach on capital for the surviving spouse, and the remaining capital going to the children on the death of the surviving spouse. There may be some tax advantages to the surviving spouse, if the capital generates income that can be taxed in a testamentary trust.

There is no simple solution to the complex estate planning problems that blended families present. But, if with your assistance your client attempts to find a good balance, his or her spouse and children are likely to feel treated fairly. They are less likely to challenge the will and estate plan.

For more in-depth discussions, see CLE's *Planning Considerations for Blended Families*, May 12, 2006.

H. Wills Variation Act Avoidance

If your client structures his or her affairs so that substantially all of the assets flow to beneficiaries outside of the estate, then there will be nothing in the estate available to give a *Wills Variation Act* claimant. Even if there are assets in the estate, the assets that flow outside of the estate will not be available to satisfy a *Wills Variation Act* claim, although the court may consider the fact that beneficiaries or claimants received assets from the deceased outside of the estate when deciding a *Wills Variation Act* case.

In some cases *inter vivos* trusts are an effective way to avoid the *Wills Variation Act*. For example, if you have a client who is over 65 and wishes to disinherit a child, your client can roll substantial assets into an alter ego trust. To qualify as an alter ego trust for income tax purposes (thereby deferring capital gains tax, which would otherwise be triggered when the assets are transferred to the trust), your client must receive all of the income from the trust during his or her lifetime, and no one else may be entitled to the capital during your client's lifetime. Your client can be the original trustee of the alter ego trust, thereby maintaining control of the assets. The trust sets out who receives the capital, or the remaining capital, at your client's death. You can include a power of appointment for your client to appoint the remainder beneficiaries, thereby preserving flexibility in case your client changes his or her mind.

Your client may also use jointures to pass assets outside of his or her estate. But, if your client transfers assets into a joint account intending the beneficiary to receive the assets as a gift, your client's intention should be well documented. If not, a court might find that the surviving joint tenant is holding the asset on a resulting trust for the estate, in which case it will be an estate asset available to satisfy a *Wills Variation Act* claim.

If your client intends for the equity to pass only at death (rather than as an immediate gift), arguably the transfer is testamentary in nature, must comply with the *Wills Act*, R.S.B.C. 1996, c. 489, and could be varied under the *Wills Variation Act*. (See *Hill v. Hill* (1904), 8 O.L.R. 710, and *Larondeau v. Larendeau*, [1954] 4 D.L.R. 293 (Ont. H.C.) for cases where the courts held that when one person contributed funds into a joint account intending for the equity to pass to the survivor as a gift only at the contributor's death, the transactions were testamentary in nature.)

If your client is considering transferring assets into a joint tenancy, or making outright gifts, make sure that the client has considered all of the consequences including loss of control of the asset, availability of the asset to the transferee's creditors, and tax consequences.

Insurance, RRIF and RRSP designations are often a better way than jointures to avoid the *Wills Variation Act*. But, in light of *Neufield v. Neufield*, 2004 BCSC 15, make sure that your client's intentions are clearly documented.

For insurance designations, consider drafting an insurance declaration, which may include trusts, to provide contingent beneficiaries in case your client's first choice as a beneficiary predeceases your client, to avoid the insurance proceeds from falling into the estate.

I. Fraudulent Conveyance Act

The case law suggests 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*. But, the gift or transfer may be set aside if the claimant had some other claim at the time of the transfer.

Section 1 of the *Fraudulent Conveyance Act* provides:

> 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 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.

In *Hossay v. Newman* (5 Feb. 1998), Kelowna Registry 27559 (B.C.S.C.), 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.

On the other hand, in *Jack v. Parkinson* (1994), 91 B.C.L.R. (2d) 96 (C.A.), the plaintiff's separated husband severed the joint tenancy of their matrimonial home, and transferred a half interest in the home to his common law spouse shortly before his death. Mr. Justice Goldie said at 98, "There is no doubt in my mind that Mrs. Jack [the Plaintiff] falls within the words in the statute, 'creditors and others.'" On the facts, the Court held that there was no fraudulent intent, and upheld the trial judge's decision dismissing the claim by the plaintiff to set aside the transfer.

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

Accordingly, a transfer to avoid a claim of a spouse may be set aside as a fraudulent conveyance. An independent adult child, who is making a claim under the *Wills Variation Act*, may also be able to persuade the court to set aside a transfer to avoid his or her claim, if the child had an unjust enrichment or other claim at the time of the transfer.

J. Proposed Legislative Reforms

In June 2006, the BC Law Institute published a comprehensive report by the Succession Law Reform Project entitled *Wills, Estates and Succession: A Modern Legal Framework*. The report recommends repeal of the *Wills Variation Act*, and its replacement with a Part 5, Dependant's Relief, in a new *Wills, Estates and Succession Act*.

The BC Law Institute's proposals include the following changes:

(1) Restricting claimants to spouses (the definition includes two persons who lived and cohabitated with each other in a marriage-like relationship for at least two years), minor children, adult children who are students under 25, and adult children who are not self-supporting and are unlikely to become self-supporting by reason of "illness," "mental or physical disability," or "other special circumstances ..." Independent adult children would no longer be able to make a *Wills Variation Act* or analogous application.

(2) Allowing minor stepchildren to whom the deceased "had contributed support and maintenance for at least one year immediately before his or her death ..." to make a claim.

(3) Eliminating the right of a spouse who had been separated for more than two years from the testator with the intention of one or both of them to live separate and apart from making a claim.

(4) Enforcing waivers of dependants' relief claims.

(5) Extending the ambit of the legislation to include intestate estates, and partial intestacies.

(6) Restricting the type and extent of relief that is available to children and stepchildren. The proposed legislation provides for periodic payments or a lump sum equivalent to children and stepchildren. It expressly provides that the court may not consider whether the will provides a "fair share" of the estate to the child or the parent's moral obligations to the child.

(7) Giving the court power to make orders in respect of "transactions" conferring a benefit on others, if the deceased's purpose in making the transaction is to defeat the rights of a dependant's relief claimant. Such "transactions" are voidable as against a claimant.

K. Ethical Considerations

Is it ethical for an estate-planning lawyer to assist a client in structuring his or her affairs so that all or substantially all of the assets pass outside of the estate to avoid the application of the *Wills Variation Act*? Does the answer depend on whether the client is attempting to avoid a claim by a spouse or minor child to whom the client owes a legal duty, as opposed to a claim by an independent adult child to whom the client owes at best a moral obligation?

It is clearly unethical to assist a client in making a fraudulent conveyance. For example, if the client seeks to transfer significant assets to others on the eve of a separation from his or her spouse to avoid any claims by the spouse including a potential *Wills Variation Claim*, a lawyer may not assist in the transaction.

On the basis of the case law to date, I do not consider it to be unethical to assist a client in transferring his or her assets into an alter ego trust to avoid a *Wills Variation Act* claim by an estranged independent adult child, who does not have any legal claim to the assets apart from the potential *Wills Variation Act* claim.

The hard cases are in between.

What if you do not consider it to be unethical to assist a client in an estate plan intended to avoid a *Wills Variation Act* claim, but you feel that is wrong. Can you decline to act? I suggest that the answer in most cases is yes. The client is entitled to legal assistance, but the client is not necessarily entitled to insist that you act for the client. There may be exceptional circumstances, where the client is on his or her deathbed, and does not have an opportunity to get other counsel.