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Wills Variation Considerations

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WILLS VARIATION CONSIDERATIONS

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The wills variation provisions in *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 ("*WESA*") affect not only disputes that arise after death and estate litigation practice but they also affect estate planning. Understanding some of the issues arising from the case law can assist in both effective resolution of contentious post-death disputes as well as effective pre-death avoidance or limitation of post-death variation.

I. Recent Wills Variation Cases

A. Reasons for Disinheritance

The court will recognize testamentary autonomy and will permit a will-maker to limit an inheritance or disinheritance of a spouse or child under the will in some circumstances. However, the reasons for the will-maker's decisions must be "valid and rationale". These reasons can be set out in memorandum of reasons, as discussed in Section IV of this paper.

In *Hagen-Bourgeault v. Martens Estate*, 2016 BCSC 1096, the deceased made no direct provision or support for her daughter, and did not disclose any reasons for the disinheritance. Rather, she left the residue of her estate to her husband (who was not the father of the daughter), who survived her. In her will, provided that in the event her husband predeceased her daughter, the residue of the estate was to be held in trust for the daughter (with income being added to the capital and with one half of the residue payable to the daughter upon attaining the age of 30 and the balance at the age of 35). The residue of the estate consisted of an entitlement by the Deceased to receive annuity payments under a structured settlement agreement between the deceased and ICBC, which had a scheduled monthly payment of approximately $2,200 (as at the time of trial) commencing in 2000 until 2025.

The court found the evidence showed the deceased and her daughter had a close relationship and that the daughter assisted the deceased with her care when the deceased underwent treatment for cancer. The daughter was a single mother with two young children. The surviving husband on the other hand had a relatively brief relationship with the deceased (common-law for 4 years and married for 2 years) prior to the deceased's death. The court found that the evidence did not disclose the husband being financially dependent on the deceased and, by his own evidence, admitted that the deceased had intended for him to provide financial support for the daughter from the annuity payments he received at his absolute discretion. In the circumstances, the court varied the will to provide the entire residue of the estate be given for the benefit of the plaintiff daughter.

B. Spouses versus Children

The assessment of competing claims between spouses and children, where legal and/or moral obligations may be owed to both in certain circumstances is a difficult area for the application of the court's discretion. The blended family situation that now more frequently arise leads to a myriad of different factors that may affect the court's assessment and weighting the competing legal and moral claims, against the will-maker's estate.

Where the competing claimants are spouses and children, often from the claims of a first spouse, whose finances are limited and where the estate value is modest, takes paramountcy to the claim of an adult child (of both the surviving spouse and the will-maker) and the child's claim may be dismissed in favour of the spouse receiving the entirety of the estate: *Aulakh v. Aulakh*, 2016 BCSC 2414.

In *Wong v. Chong Estate*, 2016 BCSC 953, the claim of a second spouse, who was in poor health and of modest means, warrants a variation of the will to provide him with the entirety of the estate (which was comprised of an asset that had been previously held in joint tenancy with the spouse prior to the will-maker's severance of title) which was otherwise gifted to the adult, financially independent child, who had received significant assets outside of the will from the parent.

In *J.R. v. J.D.M.*, 2016 BCSC 2265, the court held that even where the will-maker wished his spouse to receive the whole of his estate, the fact that the marriage was: not of a long duration and one where the parties maintained separate finances led the court to the conclusion that the moral obligation owed to the surviving spouse was less than what ordinarily arises for a surviving spouse. In *J.R., supra*, the court also found that the adult child had been abused by the will-maker, but that a variation in his favour ought only be made to extent required to meet the obligation to the child and not to rewrite the will altogether.

In *Philp v. Philp Estate*, 2017 BCSC 625, the couple were married for 31 years. It was a second marriage for both of them and there was no child of the marriage. The deceased died leaving an

estate largely comprising of a hobby farm property, which the court found had a value of $677,000 at date of death. The Deceased's will provided the plaintiff husband with the right of occupation on the property, income generated from the residue of the estate and a discretionary interest in the capital of the residue of the estate (i.e. the trustee has the discretion to pay to the husband out of the capital of the estate). The deceased had five children, all of whom are financially independent adults. After the deceased's death, the husband's mental capacity declined significantly and he was living in a private assisted living facility with 24/7 care by the time of the trial of the action.

The court found that there was no legal obligation owed to the spouse, but that the moral obligation owed was significant given the contributions made by the husband to the farm property, the horse business operated on the property and the deceased's care. The court found that the farm property had deep meaning and value to the children. The court awarded the plaintiff a lump sum payment of $300,000, while leaving the remaining provisions under the Will unchanged.

C. Adopted Child

As with the former *Wills Variation Act*, *WESA* does not include the definition of "children". As such, the prior case authorities apply equally with respect to a wills variation claim brought by the deceased's child(ren).

Section 3 of *WESA* addresses the effect of an adoption and provides:

> 3 (0.1) In this section, "pre-adoption parent" means a person who, before the adoption of a child, was the child's parent.
>
> (1) Subject to this section, if the relationship of parent and child arising from the adoption of a child must be established at any generation in order to determine succession under this Act, the relationship is to be determined in accordance with the *Adoption Act* respecting the effect of adoption.
>
> (2) Subject to subsection (3), if a child is adopted,
>
>> (a) the child is not entitled to the estate of his or her pre-adoption parent except through the will of the pre-adoption parent, and
>>
>> (b) a pre-adoption parent of the child is not entitled to the estate of the child except through the will of the child.
>
> (3) Adoption of a child by the spouse of a pre-adoption parent does not terminate the relationship of parent and child between the child and the pre-adoption parent for purposes of succession under this Act.

If a child is adopted, the adopted child is not entitled to his or her pre-adoption parents' estate, and the pre-adoption parents are not entitled to the estate of the adopted child. This section does not apply to an adoption of a child by the spouse of a pre-adoption parent. This section also does not affect the right of the adopted child to a gift left for the adopted child in the pre-adoption parent's will, or vice versa.

In *Boer v. Mikaloff*, 2007 BCSC 21, the court held that a child adopted by adoptive parents after birth, but who is named as a beneficiary under his or her birth parents' will, has no standing to seek a variation of the birth parents' will, even where the adopted child was named as a beneficiary in the birth parents' will.

D. Limitation Period

Pursuant to s. 61(1) of *WESA,* a wills variation proceeding must be commenced within 180 days from the date the representation grant is issued in British Columbia.

In *MacLean Estate v. Arsenault*, 2016 BCSC 1894, the plaintiff brought an application under Rule 9-5(1)(a) to strike those portions of the defendants' counterclaim that sought a variation of the deceased's will for disclosing no reasonable cause of action, because the counterclaim for variation was brought out of time, therefore, the plaintiff argued, was bound to fail as the court has no legislative authority to extend the limitation period set out in s. 61 of *WESA*.

The court agreed that there is no provision in *WESA* that allows the court to extend or suspend the limitation period for commencing a wills variation claim. However, the court dismissed the plaintiff's application, finding no definitive case authority as to whether a limitation defence alone can support an application to strike under Rule 9-5(1)(a) and that it could not determine whether the wills variation claim was bound to fail. In *MacLean*, *supra*, the defendants conveyed their intention to the court that they intend to rely on the principle of promissory estoppel at trial, where they say that the plaintiff (by her own words and actions) is not entitled to rely on the limitation defence.

E. Jurisdiction

The court addressed what is the proper forum for deciding a variation case in *Cresswell v. Cresswell*, 2017 BCSC 178. There, the husband and the deceased (second marriages for both) resided in Alberta all their lives but moved to British Columbia and purchased a home using husband's inheritance (which home formed part of the deceased's estate). Thereafter, the deceased was diagnosed with cancer and she returned to Alberta to live with her sister and extended family, and remained in Alberta until her death. The deceased left her estate to her own children under her Will, including the property purchased with her husband's inheritance funds. The husband claimed that the parties intended to return to British Columbia after deceased's medical treatments were completed in Alberta, but the deceased's family claimed that marriage was unhappy. The husband commenced the proceeding under the former *WVA*, and the children brought application to dismiss or stay proceedings or have them transferred to Alberta for determination on the basis that B.C. Supreme Court did not have territorial competence.

The court found that the Deceased had a settled intention to ordinarily reside in Alberta when she moved there to live with her sister. The court found the intention on the following evidence: the deceased was applying for Alberta medical coverage; she changed her mailing address on her Edmonton Royal Bank chequing account to that of her sister; she had a will drawn up in Edmonton to be governed by the laws in Alberta; at the time of deceased's death, she did not have any real and substantial connection to British Columbia.; and all of defendants and all evidence concerning execution of will and deceased's assets were in Alberta, as were witnesses. The court declined to exercise its territorial competence as it found Alberta is the more appropriate forum in which to hear the proceedings but would not decide on whether it would order the transfer the variation action to Alberta until it received further submissions on that point..

F. Want of Prosecution

In *Eastman v. Eastman*, 2016 BCSC 209, the executors brought an application to strike the wills variation claim for want of prosecution (after the plaintiff failed to prosecute her variation claim after 13 years) and for the removal of the certificate of pending litigation registered against the

family home, being the primary asset of the estate. Master MacNaughton granted the application in part, ordering that the CPL be removed to permit the family home to be sold but for the net proceeds to be held in trust. The court refused to strike the wills variation claim and held that although there was inordinate delay in the proceeding and the defendants have suffered actual prejudice (by reason that the plaintiff was deceased), the delay was justified, as the executors and the plaintiff had entered into a standstill agreement at the executors' request where either party could have ended it by delivering notice, but neither did.

G. Interim Distribution

The personal representative is not permitted to distribute the estate in the 210 days following the date of the issuance of a representation grant except with the consent of all beneficiaries and intestate heirs or by order of the court: *WESA,* s. 155(1).

Under s. 155(2), the personal representative is prohibited from distributing the estate after the 210 days period if a wills variation proceeding has been commenced. As such, there could be a situation where the personal representative obtained the consent of all beneficiaries and intestate heirs to make the distribution period to the end of the 210 day period, but then the wills variation claim has been subsequently commenced by an intestate heir. S. 155(3)(a) states that nothing in this section affects the right or remedy against a person to whom an estate has been distributed in whole or in part.

An application made during a variation proceeding for an interim distribution payment by a beneficiary or a claimant requires that notice be given to all parties who may be affected by an order and not only to the executor: *Clozza v. Buck Estate*, 2016 BCSC 1358.

On application to the court for an interim distribution, the court's discretion as to whether to allow an interim distribution, ought to be guided by the four considerations below:

(a) the amount of the benefits sought to be distributed as compared to the value of the estate;

(b) the claim of the beneficiaries on the will-maker;

(c) the need of the beneficiaries for money; and

(d) the consent of the residuary beneficiaries to the payment.

An application to the court for an interim payment may require a *prima facie* assessment of the merits of the plaintiff 's claim as part of the discretionary exercise: *Davis v. Burns Estate*, 2016 BCSC 1982.

In *Clozza*, *supra*, the plaintiff husband brought an application, in part, for interim monthly payments to be paid to him from the proceeds from the sale of the family home. Although the court found that the husband "probably has a strong claim for a variation of the will", the court dismissed this portion of the application on two grounds: (1) the interim payments may lead to an abatement of the legatees' gifts, and they ought to have been served with the application so that they have an opportunity to object to that relief; and (2) it is not clear what, if anything, will happen to the wills variation claim and how much the estate will be.

In *Davis, supra*, the deceased made certain bequests to her daughter and granddaughter, and left 20% of her residue to her spouse and 80% to her friend. The spouse, who was 76 years of age and a common law spouse of the decease for about 5 years at date of death, brought an application for interim distribution in the amount of $250,000. The spouse's sole source of income was from the

Canada Pension and Old Age Security Plans. The court estimated the net value of the estate to be about $2,300,000, after expenses assuming the litigation proceeded.

The court allowed the application, on the basis that even if the daughter were successful in her wills variation claim, it was unlikely that she would be awarded an interest in excess of 50% of the residue, given the deceased's expressed intentions in her will. The applicant spouse had a need for money as his income was not sufficient to cover his expenses and the wishes of the wishes of the deceased was that the applicant enjoy his remaining years and ability to travel. These were unfulfilled because of the estate could not be wound up as a result of the outstanding variation claim. The court further found that there was no prejudice to either the wills variation claimant or the other residual beneficiary by making the interim order.

H. Death of the Claimant during Proceeding

In *Eastman v. Eastman* 2016 BCSC 1728, the surviving spouse commenced a variation claim and died during a standstill agreement during the prosecution of her claim. The court recognized that the surviving spouse may have been entitled to a share of the family assets and spousal support as part of the legal obligation owed to her had she pursued her claim during her lifetime. However, the court determined that it must also consider the changes in circumstances that have occurred between the deceased's death and trial, which included: the depletion of the estate; the plaintiff's death; and the existence of the standstill agreement that enabled the plaintiff to remain living in the marital home during the balance of her life. Given the circumstances of this case, the court dismissed the plaintiff's action.

I. Appeal of a Wills Variation Decision

On an appeal of a wills variation decision, the Court of Appeal will exercise an independent discretion under s. 72 of the *WESA* and reach its own conclusion as to the discretion properly to be exercised for the variation claim.

Historically, the Court of Appeal exercised that discretion with deference only to the trial judge on any question that depends on an assessment of oral testimony: *Tataryn, v. Taratyn Estate* (1994), 3 E.T.R. (2d) 229 at para. 11. That deference was extended to findings based on affidavit evidence by the five judge panel in the Court of Appeal decision in *Kish v. Sobchak Estate*, 2016 BCCA 65. Hence, whether the evidence is received orally or by affidavit, the applicable standard of review is a "palpable and overriding" error or "no supporting evidence".

In *Klaus v. Hamilton*, 2016 BCCA 380, the Court of Appeal confirmed that an appeal of a wills variation ruling is not a second trial and that the Court of Appeal will not engage in reconsidering or reassessing what weight should be given to the evidence or findings of fact, unless the trial judge has made a legal error in the assessment of the evidence. In *Klaus*, the trial judge dismissed the wills variation claim on the basis that the plaintiff was not a spouse within the meaning of the *Wills Variation Act* and, that in any event, the deceased left effectively no estate having depleted her small estate for the plaintiff's benefit. The appeal was dismissed, as the findings of fact were supported by the evidence and no error was demonstrated.

II. Wills Variation and the Family Law Act

The most significant change to the law of wills variation in British Columbia is as a result of the replacement of the *Family Relations Act*, R.S.B.C. 1996, c. 128 (the "*FRA*") by the *FLA*. Under the new regime of WESA and FLA:

(a) only one spouse can bring a variation claim while a separated spouse may have a FLA claim against the estate; and

(b) there are no property division entitlement differences between a married and a common law spouse, leading to no differences in the assessment of the legal obligation owed to a surviving spouse.

A. Spousal Status

Only the will-maker's spouse or children are entitled to bring a claim under s. 60 of *WESA* for wills variation. Two persons are considered spouses for the purpose of *WESA* if they were both alive prior to the will-maker's death and were married to each other or lived with each other in a marriage-like relationship for at least two years: *WESA,* s. 2(1).

Two persons cease being spouses of each other if:

(a) in the case of a marriage, an event occurs that causes an interest in family property, as defined in Part 5 of the *FLA*, to arise; and

(b) in the case of a marriage-like relationship, one or both persons terminate the relationship: *WESA*, s. 2(3).

An interest in family property, as defined in Part 5 of the *FLA*, arises on "separation": *FLA*, s. 81.

Separation ends a spousal relationship and accordingly, any entitlement of the surviving spouse to bring a claim for wills variation, even where the couple remain legally married. The word "separation" is not expressly defined in either the *FLA* or *WESA*, but a large body of case law has developed in: the context of the *Divorce Act* regarding the what constitutes "separate and apart"; claims by common law spouses for support under the *FRA*; and claims under the former *Estate Administration Act* with respect to what it means for a couple to have separated. These case authorities will likely be relevant in the court's consideration of what constitutes separation under the *FLA*.

For common-law relationships, the termination of the marriage-like relationship ends the spousal status, and any entitlement to bring a variation claim. These changes are to ensure that a will-maker will only have one spouse at any given time and there will only one individual who will be entitled to bring a variation of the will as the surviving spouse. Under the former *WVA* regime, it was possible for two persons to claim spousal status and bring variation claims.

B. Assessment of the Legal Obligations to Spouse

Furthermore, there is no longer a distinction between the property division rights of a common-law spouse and a married spouse under the FLA, as there was under the *FRA* and as such, this affects the manner by which the legal obligation to both types of spouses are assessed under the variation provisions of *WESA*. Under the *FRA*, only married spouses had a right to the division of family assets and common-law spouse were limited to spousal support rights and equitable claims that could be made. This distinction in entitlement between married spouses and common law spouses

has been removed under the *FLA*, as the definition of "spouse" includes common-law spouse (s. 3(1)), and all spouses are entitled to family property division under Part 5 of the *FLA*.

Therefore, in determining the legal obligation owed to the spouse, the court will consider the spouse's entitlement in a notional separation immediately prior to the will-maker's death. Accordingly, one of the considerations will be the notional division of family property immediately before the will-maker's death under Part 5 of the *FLA*. Under the former *FRA*, family assets subject to division were characterized by how they were used (whether the asset have an "ordinary use for a family purpose"). Under the current regime, how an asset was used during the marriage is no longer determinative, as on the date of separation, each spouse is entitled to an undivided half-interest in family property.

In *Ciarniello v. James*, 2016 BCSC 1699, the court held that the legal obligation under the *FLA* owed to a longstanding spouse in a variation proceeding entitles her to 50% of the total family property immediately before the will-maker's death, even in circumstances where the estate is large (approximately $11.5 million) and the spouse has no need. The determination of value is done at date of death and the court has discretion regarding taking into account liabilities, arising at or after death.

However, property that falls under the definition of excluded property under the *FLA* is not subject to equal division. Excluded property are property acquired before or after the relationship, gifts or inheritances, damage awards and insurance proceeds (with some exceptions) and specified kinds of trust property. The increase in the value of excluded property, however, is subject to equal division.

There may therefore be cases where despite a longstanding relationship, the property subject to equal division (and accordingly, influencing the legal obligation owed to the surviving spouse) may be minimum, as for example, the majority of the assets were acquired by the title-holding spouse prior to the marriage and there was minimum amount of increase in value. However, the court will likely also consider a departure from equal division of family property under circumstances that are "significantly unfair" to divide equally. This will be consistent with the case authorities under the *FRA*: *Westman (Guardian ad litem of) v. Westman Estate*, 2000 CarswellBC 377, 2000 B.C.S.C. 236.

III. Wills Variation and Other Estate Claims

New procedural rules were introduced with the enactment of *WESA* and the corresponding procedural rules introduced in the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 ("*SCCR*"). However, there remains confusion and inconsistency amongst practitioners with respect to the proper procedure (for example, whether to commence by notice of application, notice of civil claim or petition) for commencing certain claims related to wills, and joining a wills variation claim with other estate-related claims in the same proceeding.

A. Current Procedural Rules

The procedures for commencing estate-related claims or proceedings are set out in the *SCCR* and the relevant statutes, including *WESA* and the *Trustee Act*, R.S.B.C. 1996, c. 464.

Some common estate-related claims and the procedure for commencing same are as follows:

(a) a *wills variation claim* must be commenced by a Notice of Civil Claim (*SCCR,* Rule 21-6);

(b) challenges to *correct, amend or revoke a will* after a grant has been issued must be commenced by a Notice of Application (*SCCR,* Rule 25-5);

(c) a *proof of will in solemn form* proceeding:

  (i) may be commenced in an existing proceeding within which it is appropriate to seek that order (*SCCR,* Rule 25-14(4)(a);

  (ii) must be commenced by a Petition if there is no existing proceeding within which it is appropriate to seek that order (*SCCR*, Rule 25-14(4)(b));

(d) *removal of a personal representative* must be brought by a Notice of Application (*WESA*, s. 158(2));

(e) an appointment of an *administrator pending legal proceedings* must be brought by a Notice of Application (*WESA*, s. 103);

(f) *curing deficiencies* or to *rectifying a will* must be brought by a Notice of Application (*WESA*, s. 58 and s. 59); and

(g) an *asset recovery* action may be commenced by a Notice of Civil Claim, a Petition or a Requisition (*WESA*, s. 151(1); *SCCR*, Rule 1-1(1), "proceeding").

Under Rule 25-14(8) of the *SCCR*, the court may, on its own motion or on an application, give directions concerning procedure in relation to an estate-related claim, including examination for discovery, document discovery and the trial of any or all of the issues. Hence, for claims required by the rules and legislation to be commenced by way of an application or a petition, the parties may still obtain the same rights as under an action, as the court has broad discretion under Rule 25-14(8) to grant that right.

B. Multiple Claims in One Proceeding

In practice, many estate files involve multiple claims and issues. In some circumstances, it may be appropriate to commence one single proceeding capturing a number of claims. The consolidation of claims into one proceeding becomes complicated when the claims are seen as "unrelated" to each other or the claimant advances various claims in different capacities. However, for the same costs and efficiency reasons, there are more cases now where these claims are brought together to be heard at the same time.

One example of claims seen as "unrelated" to each other is a proof of will in solemn proceeding and a wills variation claim. There is longstanding case authority that these two claims cannot be heard at the same time, as a wills variation claim is not "a matter relating to a grant of probate": *Clark v. Nash*, [1986] B.C.J. No. 1655 (BCSC). Hence, often, the proof of will proceeding will be heard first; and then once that decision has been rendered, the wills variation claim will be heard. There is some logic to this order, as in some circumstances, when the will is set aside, that will eliminate the need to bring the wills variation claim at all (e.g. if the prior will pronounced as valid provides equal division to the surviving children or if there is no prior will and the estate falls on intestacy).

However, notwithstanding the longstanding case law, issues of validity and variation are now sometimes joined and heard together without objection from opposing counsel or by the court.

For instance, in *Petrie v. Burnett*, 2008 BCSC 1503, Mr. Justice Smith heard and decided the proof of will in solemn form and the wills variation claim at the same time.

The joinder for hearing of the two claims together may be appropriate in cases involving smaller estates where two trials (one for the proof of will and one for the wills variation) would be cost prohibitive. For instance, *Petrie*, *supra*, involved joint properties worth approximately $300,000 and an estate worth approximately $460,000, and five different parties represented by three counsel. No objections were raised by the court or by the parties in *Petrie* with respect to the hearing of the two claims together, and Mr. Justice Smith ultimately found that the will at issue was valid but ought to be varied.

When a single proceeding is commenced by the claimant for a number of claims, the claimant should clearly distinguish between the various capacities that the plaintiff is bringing the claims. For example, if the claimant commences one proceeding for the recovery of estate assets (under *WESA*, s. 151(1)) while at the same time advancing a claim for wills variation, the claimant ought to make a clear distinction that he or she is pursuing the recovery of the estate assets on behalf of the estate and the wills variation claim on his or her personal behalf.

The clear distinction of the capacities in which the claim is being brought and against which parties in what capacity allow for costs awards to be properly made in each of the various claims. In the above example, party and party costs to the successful party against the unsuccessful party in their personal capacities are typically awarded in a wills variation claim. Full indemnity costs are typically awarded to the successful executor or trustee (or individual acting on behalf of the estate) in the recovery of assets.

IV. Considering Wills Variation in Estate Planning

In British Columbia, the existence of s. 60 of WESA and the manner by which the courts have developed the law, makes for a special additional consideration in estate planning. In fact, in many estate plans, the very fact of a potential variation drives the choice of the plan and how to implement it such that the will-maker's testamentary wishes are preserved and unsuccessfully challenged after the deceased's death.

There are many tools for estate planning to avoid or limit variation:

(a) inter vivos gifts;

(b) a will supported with a memorandum of reasons;

(c) direct beneficiary designation;

(d) passing assets by right of survivorship with joint tenancy;

(e) a marriage agreement; and

(f) an inter vivos trust.

The importance of considering s. 60 in the wills planning you are effecting for your client arises whenever the will-maker has a spouse and children or children where there is unequal division amongst them. The consideration of whether variation claims may be brought should be considered in every blended family context.

The uncertainty of a will being upheld is often a motivation for other estate planning.

A. Effective Use of a Will in Contentious Circumstances

There are circumstances where a will is a necessary planning tool, notwithstanding the availability of other planning vehicles. In cases where other planning methods are utilized, the existence of a "back-up" will is important should some of those methods be successfully challenged and the asset falls back into the will-maker's estate to be distributed in accordance with a will (and any variation awards that could be made to the will).

1. Memorandum of Reasons

Should a will append a memorandum to it to explain the will-maker's intentions and wishes in those circumstances? What ought that memorandum address and would a memorandum to a will be an effective instrument for upholding the planning done by non-wills methods?

The reasons for limiting an inheritance or for making no provision for a spouse or a child may be recorded in a memorandum of reasons, which the court may take into account under s. 62 of *WESA*.

The test for what regard the court will give to a memorandum of reasons is that they must be valid and rational. This has been interpreted to mean that the facts must be accurate (true) and that the reason be logically related to the act of disinheritance. The leading case on this point is *Berger v. Clark et al*, 2002 BCCA 316. The court will also take into consideration all of the circumstances from which an inference may be reasonably drawn about the accuracy or otherwise of the statements contained in the memorandum.

In *Sharma v. Sharma Estate*, 2016 BCSC 1397, the disinheritance of two of three adult children in favour of one child, who was also preferred with the benefit of other real property located in a foreign jurisdiction, was varied to provide for equal division amongst the three children of the British Columbia estate. The reasons stated in the memorandum for disinheritance were not valid - the court found that in fact there had been no substantial gifts from the mother to the other two children and no abandonment of the mother or misconduct directed at the mother by them.

In *Sim v. Sim Estate*, 2016 BCSC 1222, no variation was made in favour of the will-maker's children from a prior marriage where the will, containing a memorandum of reasons, left the entire estate to the longstanding second spouse. The memorandum made reference to the existence of the insurance policy and the reasons for making no further provision for them. The court found that the moral obligation owed to the "first children" was met with the insurance benefit given to them outside the will.

2. In Terrorem Clauses

Since it is a matter of public policy that maintenance and support be provided for spouses and children, a provision in a will that revokes a benefit to a beneficiary (i.e. an *in terrorem* clause) who commences wills variation proceedings is contrary to public policy and therefore void: *Bellinger v. Fayers, Nuytten et al*, 2003 BCSC 563.

In *Ketcham v. Walton*, 2012 BCSC 175, the will-maker disinherited his adult independent children and left his estate to several friends and charities. His Will included a clause explaining his rationale for doing so and instructed his executor to take an active role in defending the Will if any of his children were to bring a wills variation action. The children commenced a wills variation proceeding and the executor brought an application seeking directions from the Court with respect to the clause. The Court held that notwithstanding the clause, the executor cannot take an active

role in upholding the Will in the variation action. Instead, the executor should act in a non-adversarial role as an amicus to assist the Court in determining the merits of the wills variation claim.

Further, the Court held that although the clause in question is not the typical *in terrorem* clause, that would otherwise prevent a beneficiary from receiving an inheritance if a claim were made, the clause is in actuality an *in terrorem* clause because the executor is instructed to resist the children's claim, even if do so would deplete the entirety of the estate to the detriment of the named beneficiaries. The executor was also granted the authority to incur whatever legal costs he decided were necessary and the Will prevented those legal bills from being taxed. The clause did not directly divest the children of an inheritance, but it did have the potential to deny them the fruits of any victory. Because children have a statutory right to bring a variation claim against a parent's will, any clause that attempts to deny them this right (or, by extension, any effective remedy under this right), offends public policy and will be held to be void.

B. Acquiescence and Spousal Agreements

Potential variation claimants cannot relinquish their rights to vary the will prior to the will-maker's death either implicitly or explicitly. For example, it was argued by the defendant children that the spouse had acquiesced to the will-maker's decisions as to the division of her estate because he was aware of the provisions and did not voice any objection prior to his wife executing the will. The court did not accept that here was any authority for the proposition that acquiescence precludes a claim for variation: *Allchorne v. Estate of Allchorne*, 2005 BCSC 104.

In *Mawdsley v. Meshen*, 2012 BCCA 91, a decision discussed in more detail in the section below, the Court of Appeal held that even if the transfers of assets into trusts were a fraudulent conveyance and the assets fell back into the estate, the plaintiff would not have been entitled to substantially more from the estate on a variation claim given that the trial judge had found:

(1) an agreement between him and the will-maker that they would retain their respective assets and money;

(2) the plaintiff knew that the will-maker did not intend to include him as a beneficiary in her will and he was present at many meetings at which her estate planning was discussed; and

(3) the plaintiff never questioned his spouse's plans and indeed allowed her to "trust" that he would honour their understanding.

In *Philp, supra*, the court found that the surviving husband had financially assisted the deceased, and had been concerned about the expenses related to the deceased's horse business, but the court found that the husband was also a willing participant in and enjoyed many aspects of the horse farm operation. The court found that the farm was essentially a "hobby farm" and the funds that were invested in the farm were consumed to maintain a particular lifestyle. The court further held that the farm business consistently lost money and therefore, found that the husband had not enriched the estate. A variation in favour of the husband was made based on a high moral obligation owed to him.

On the other hand, in *Miller v. Millir*, 2011 BCSC 29, the will-maker died leaving the residue of his estate to one of his three sons (one of the "disinherited" sons received under the will any computer and automobiles that may exist at the time of the will-maker's death). The only significant asset in the estate was the family home, sole for approximately $522,000. The surviving spouse of four years received some assets by right of survivorship, totalling about $169,000. The court found that the will and the arrangement for the surviving spouse to have survivorship rights on the bank and investment accounts were part of the an overall plan that the surviving spouse had knowledge of

and to which she had not objected to at the time. However, the court found that the fact that the claimant did not object to the arrangement did not create a binding agreement and that the moral obligation owed to the surviving spouse as compared to the adult son beneficiary required a variation of the Will to provide the spouse with a payment of $75,000 from the estate.

In *Bath v. Bath Estate*, 2016 BCSC 1239, a variation award was given to a long-standing second spouse, who had an agreement with the will-maker that none of the other spouse's children would benefit from each of their own respective assets, to reflect her legal entitlement to spousal support from the will-maker. However, as the court determined that no legal or moral obligation was owed to the surviving spouse in respect to the Deceased's farm, which he had inherited from his own mother, the calculation of the variation award excluded any consideration of the value of the farm that was gifted under the will to the Deceased's son, which gift was entirely preserved.

Further, cohabitation, marriage and separation agreements that purport to preclude the variation claims by one or both parties also do not necessarily operate as such, as the court will take into consideration whether the agreement can be upheld under the *Family Law Act*.

In *Kuzyk v. Czajkowski*, 2016 BCSC 1109, a prenuptial agreement between spouses, each of whom left their own assets to their respective children under their respective wills in accordance with their agreement, was upheld by the court such that the variation given to the surviving spouse in relation to the deceased's spouse's will was limited to a lump sum award for spousal support, which was not a right waived in the agreement whereas rights to the property of the other spouse, including on death, was expressly waived.

C. Ethical Issues Relating to Planning to Avoid Variation Claims

A person is entitled to arrange their affairs as they choose, including arranging their affairs to avoid a claim for wills variation, so long as there is no fraudulent conveyance in the steps taken: *Usher v. Larabee*, 2010 BCSC 1608; *Hossay v. Newman* [1998] B.C.J. No. 3289, 22 E.T.R. (2d) 150 (BCSC).

In *Hossay, supra*, the will-maker placed his major asset into joint tenancy with one of the defendants shortly prior to his death. The Court was asked to consider whether the provisions of the *Fraudulent Conveyance Act*, R.S.B.C. 1996, c, 163 ("*FCA*") applied to that disposition, made by the will-maker during his lifetime that have the effect of defeating or hindering claims for wills variation that may be made against his estate. The Court held that a wills variation claimant has standing to invoke the *FCA* only if he or she had a legal or equitable claim which predated the will-maker's death, and not merely as a result of their claim under the then *WVA*.

In *Mordo v. Nitting et al*, 2006 BCSC 1761, the parents held a common intention to leave all of their assets to their daughter to the exclusion of their son. They feared that the son would challenge any will favouring the daughter, and so they took steps over the years to ensure that none of their assets would pass to their estates upon their deaths. At the time of the surviving parent's death, all of their substantial assets were held either jointly with their daughter or in trust for her benefit. The son brought a proceeding challenging the dispositions and then seeking reapportionment of the estate under the then *WVA*. The Court held that all of the assets passing outside of the Will were valid *inter vivos* transfers. Following decision in the *Hossay, supra,* the Court held that the trust created was not void on grounds of public policy even though the transfer defeated the son's wills variation claim and avoids the payment of probate or other fees.

In *Mawdsley*, *supra*, the Court of Appeal affirmed *Hossay, supra*, and held that in that the *FCA* cannot be applied to invalidate a transfer of assets to an alter ego trust that defeats or hinders a claim

solely under the *WVA*. The Court of Appeal further held that it is not necessary to invoke the *FCA* to prove that the transferor intended to delay, hinder or defraud creditors.

In *Mawdsley*, *supra*, the will-maker transferred most of her substantial assets into trust of which the spouse was not a beneficiary, thereby impoverishing her estate. She left nothing to her common-law spouse of 18 years in her Will. The surviving spouse applied to vary the Will and to set aside the transfer to the trust of which he was not a beneficiary. He was successful in his wills variation claim (which gave him a limited award) but his claim against the trust under the *FCA* was dismissed. In affirming the trial judge's decision, the Court of Appeal held that the claimant was not a "creditor or other" under the *FCA* and he did not have that status solely based on the right to bring a wills variation claim after the transferor's death.

The law has been more clearly summarized in *Easingwood v. Cockroft*, 2011 BCSC 1154, affirmed 2013 BCCA 182, by Dillon J. at paras. 43 and 45:

> 43 In order to set aside the transfer of assets to the Trust as a fraudulent conveyance, the plaintiff must establish: her standing as a "creditor or other" within the meaning of the Fraudulent Conveyance Act, R.S.B.C. 1996, c. 163, s. 1 [*FCA*]; that the dispositions were made with the intent to delay, hinder or defraud her; and that she has been deprived of her just and lawful remedies (*Mawdsley v. Meshen*, 2010 BCSC 1099 at para. 203 [*Mawdsley*]).
>
> 45 An essential threshold to standing as a creditor of [the deceased] under the FCA is that the legal or equitable claim must exist during [the deceased's] lifetime (*Mawdsley* at para. 205; *Hossay v. Newman* [1998] B.C.J. No. 3289 at paras. 9-10 (S.C.) [*Hossay*]). A claim under the WVA arises upon death and is not a claim that pre-exists the death of the testator so to qualify as a creditor under the FCA unless the claim can be supported by a legal or equitable claim prior to the testator's death (*Hossay* at para. 10).

An emerging issue is the extent of estate planning that may be effected for an individual after that person's incapacity. Some express restrictions have been set out in legislation:

(a) Section 21 of the *Power of Attorney Act*, R.S.B.C. 1996, c. 370, expressly prohibits an attorney from making or changing a will of the adult; and

(b) Section 85(3) of the *WESA* expressly prohibits an attorney or committee from making, altering or revoking a direct beneficiary designation unless authorized by the Court and only if the designation is not made in a will.

In *Easingwood v. Cockroft*, 2013 BCCA 182, the Court of Appeal upheld the authority attorneys, being sons for their incapable father, to create an *inter vivos* trust into which all of the father's assets were transferred for the father's benefit during his lifetime. The remaining property on the father's death was to be distributed in the same manner as the terms of the father's existing will (which left some but not significant benefit for the second spouse). The only difference is that, by settling all of the father's assets into a trust, the Deceased was able to preclude any variation claim by the wife as there were no assets to fall into his estate. In *Easingwood*, *supra,* the terms of the trust related to the post-death distribution of the remaining assets were identical to the provisions under the father's will, including the benefits for the persons who otherwise had variation claims. The question still remains as to whether the authority exists for a representative of an incapable person to create a trust if the incapable person's testamentary wishes were altered the terms of the trust.

In *Hollander v. Mooney*, 2012 BCSC 1972, the Court held that the adult's representatives were able to settle a legal proceeding involving the incapable adult by entering into an agreement with the other parties that involved the settlement of an *inter vivos* trust for the adult that would also

determine the distribution of the adult's estate after his death. In this case, the post-death distribution provisions of the trust did not adhere to any of the known estate planning of the Deceased, prior to his incapacity and the estate planning done was under legal challenge by the potential beneficiaries under the various plans.