

LITIGATION SERVICES

Wills Variation ~ Know Your Rights

One of the most common types of estate litigation in British Columbia is a wills variation action.

By the Wills Variation Act, despite any law to the contrary, if a person (the “testator”) dies leaving a will that does not, in the court’s opinion, make adequate provision for the testator’s spouse or children, the court may, in an action by or on behalf of the spouse or children, order that the provision that it thinks is adequate just and equitable in the circumstances be made out of the testator’s estate for the spouse or children.

It is not uncommon for a testator to treat one or more of his or her children less favourably than his or her other children under the will. There may be good reasons for such differential treatment. One or more children may have been treated more favourably in terms of gifts made by the testator while the testator was alive and therefore less favourably under the will. The child may be estranged from the testator through no fault of the testator. But there are many cases where the court has found that the testator has not made adequate, just and equitable provision for a child and did not have a reason for doing so that is acceptable in the view of the court. Examples of this may include favouritism of one child over all others due to their age, gender or sexual orientation. Another example is when the children from a first marriage are treated unfairly under the will relative to children from a second marriage. A further example is where, while the treatment of the children under the will is equal or close to equal, one or more of the children have received significant gifts from the testator outside of the estate, possibly including land, bank account or other assets held in joint names between the testator and child. These are but a few examples – the circumstances under which the court may order a variation of a will are many and the facts of every case are different. The court will consider evidence it considers proper of the testator’s reasons for the gifts (or the lack thereof) made in the will. This includes any written statement signed by the testator explaining his or her reasons.

Likewise, there are a large variety of circumstances where the court may conclude that a spouse is not adequately provided for under the will of their deceased spouse. In many marriages, the assets of the marriage, including the family home, are often the fruits of both spouses’ efforts regardless of in whose name legal title is held. The court may well order a variation of a will that gifts the family home to a child or children, or that provides just a life interest in the home to the spouse. Again, however, the facts of every case are different, and the courts will consider a wide variety of evidence – length of the marriage, how the assets of the estate were accumulated, gifts to the spouse outside of the estate – in determining whether a wills variation order should be made.

“Spouse” is a defined term under the Wills Variation Act. It means a person who is married to another person or who is living with another person in a marriage-like relationship and has done so for a period of at least two years. It includes same sex relationships. “Child” is not a defined term. Case law provides, however, that both natural (whether born in or outside of wedlock) and legally adopted children can challenge a will under the Wills Variation Act.

There is a small window of opportunity to bring a wills variation action. It must be commenced within six months from the date that probate of the will is issued in British Columbia. If a wills variation action has been commenced by a person within the time allowed, however, it is deemed to be an action on behalf of all persons who might apply. In other words, if a person who wishes to bring a wills variation action has missed the allowable time for doing so, he or she can piggyback back onto a wills variation action commenced by some other person challenging the provision made under the will, or lack thereof.

If you are a person unhappy with the gift, or lack thereof, received under your parent’s or spouse’s will, or an executor facing a wills variation action, you may wish to consult a lawyer regarding your rights and obligations.

PRESENTED BY :

hobbs | giroday

BARRISTERS & SOLICITORS

Suite 908- 938 Howe Street, Vancouver, BC V6Z 1N9
ph: 604-669-6609 | fx: 604-669-6612