

WILLS AND ESTATES DISPUTES

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B A R R I S T E R S & S O L I C I T O R S

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WILLS VARIATION ACTION

- ❑ Valid will?
- ❑ Estate with assets?
- ❑ A statutory right of legal action
(s.60 Wills, Estates and Succession Act) see handout

WHO CAN BRING A WILLS VARIATION ACTION?

- “by or on behalf of the spouse or children”

SPOUSE

- ❑ s.2 WESA – legal marriage or “marriage-like relationship for at least 2 years”
- ❑ “Relevant time” is date of death of will-maker

CHILDREN

- Natural (unless a “pre-adoption parent”)
- Adopted
- Not step-children

WHY CAN A WILL BE VARIED?

- Because the “will does not, in the court’s opinion, make adequate provision for the proper maintenance and support of the will-maker’s spouse or children”

THE COURTS SAY:

- The courts (Tataryn, SCC (1994)) say that a will-maker has:
 - A legal and moral obligation to his/her spouse and infant children; and
 - A moral obligation to his/her adult childrento make “adequate, just and equitable” provision for them in his/her will.

CIRCUMSTANCES

- Whether and extent of variation depends on the circumstances:
 - “the court may...order...the provision that it thinks adequate, just and equitable in the circumstances”
 - i.e., each case is decided on its own facts and merit

FACTORS CONSIDERED

- Many and varied depending on the circumstances
 - Size of estate
 - Gifts made outside the estate
 - Relationships between will-maker, plaintiff(s) and others

FACTORS cont'd

- Need
- Plaintiff's and others' contributions to estate
- Plaintiff's and others' contributions to will-maker's well-being
- The defeated gift

FACTORS cont'd

- Will-maker autonomy
- Will-maker's stated reasons for gift/non-gift ("valid and rational")
- Modern values and expectations

LIMITATION PERIOD

- A wills variation action must be commenced within 180 days from the grant of probate or administration in B.C.
- Must serve the initiating document on the executor no later than 30 days after the 180 day period
- Spouses and children must receive notice of intention to apply for probate

SMALL ESTATE ISSUES

- Inter vivos transfers – gift or trust?
- Jointly held property or bank account – gift of right of survivorship or other reason(s)?
- Beneficiary designations
- Various legal tools to attack “gifts”

VALIDITY OF WILL CHALLENGE

- A challenge to the validity of the purported last will
- Or a portion thereof
- What is it?
 - A common law and/or statutory right of legal action

VALIDITY cont'd

□ Why?

- To have an earlier will probated
or
- To create an intestacy
or
- To remove a provision of the will

VALIDITY cont'd

- Who can bring the action?
 - Interested persons
 - Beneficiaries under an earlier will
 - Those who take on an intestacy (also entitled to notice of intention to apply for probate and a copy of the will)
 - Executor named in earlier will

BASIS FOR ACTION

- Formal requirements under WESA (s. 37)
 - Effective under s.58, WESA?
- Incapacity of testator to make a will
 - (Banks v. Goodfellow, 1870)

BASIS FOR ACTION cont' d

- Undue influence/suspicious circumstances in making of will or a provision of it
 - s.52 WESA
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THE PROBLEM EXECUTOR/ ADMINISTRATOR

- ❑ The executor is not performing the job in a timely fashion, or at all
- ❑ Suspicion the executor is “hiding something”

WHY?

- ❑ Incompetence or lack of interest
- ❑ Conflict of interest between duties and personal interests
 - Living on an estate property
 - Using estate funds for personal benefit
 - Received assets outside of will that may not have been gifts

WHO CAN TAKE ACTION?

- Beneficiaries under the will
- Those who take on intestacy where no will
- Alternate executor

TOOLS?

- Citation
- Disclosure order
- Applications to pass over or remove and replace executor/administrator
- Passing of Accounts (interim and final)

PRESERVATION

- Caveat
- Certificate of Pending Litigation
- Injunction

DISPUTE RESOLUTION

- Court
- Settlement
- Mediation
- Judicial Settlement Conference

QUESTIONS?

We would be pleased to answer any questions you may have.