THE CONTINUING LEGAL EDUCATION SOCIETY OF BRITISH COLUMBIA CLE BC

BASICS OF WILLS AND ESTATE PLANNING 2019

PAPER 11.1

Wills Variation Considerations

These materials were prepared by Helen H. Low, Q.C. and Anna Che in 2017, and updated by Helen H. Low, Q.C. and Eric B. Clavier of Fasken Martineau DuMoulin LLP , with the help of J. Kendal Paul, for the Continuing Legal Education Society of British Columbia, June 2019.

WILLS VARIATION CONSIDERATIONS[1]

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.

---

1 We note that this paper is an update of the paper co-authored by Helen H. Low, Q.C. and Anna Chen in 2017. We also acknowledge with particular gratitude our colleague, J. Kendal Paul, for her extensive contribution and all of the hard work she put into producing this update.

I. Recent Wills Variation Cases

A. What Constitutes Adequate Provision

The leading authority on the basis upon which the Court is to determine the extent of a will-maker's duty to make adequate provision for the proper maintenance and support of a spouse or child is the Supreme Court of Canada decision of *Tataryn v. Tataryn Estate*, [1994] 2 SCR 807, 1994 CanLII 51 (SCC). The key points stated in *Tataryn* regarding the Court's exercise of its discretion under s. 2 of the *Wills Variation Act* (now s. 60 of the *WESA*) are:

1. The legislative provisions require the Court to determine whether the will "makes adequate provision for the proper maintenance and support" of the applicant and then, if the will does not, the Court may order what it thinks to be "adequate, just and equitable." The Court in *Tataryn*, at paragraph 13, clarified this is not a two-step test but rather "two sides of the same coin";
2. The test for determining what is "adequate, just and equitable" is that of the "judicious father of a family seeking to discharge both his marital and his parental duty" as se out in *Walker v. McDermott*, [1931] SCR 94 and should be determined according to contemporary standards which will change from time to time;
3. While the test in *Walker v. McDermott* was confirmed, the Court stated that the test now requires consideration legal and moral obligations owed by the deceased to the spouse or child. "Legal obligations" to a spouse consist of those that would have been imposed by the law if maintenance and property division were considered during the will-maker's lifetime. "Moral obligations" were not defined by the Court but appear to include those factors that had guided the Court's discretion in the cases prior to *Tataryn*; and
4. The Court must assess the competing claims to the estate having regard to the fact that not all claimants have claims of equal moral strength and that legal obligations take precedence over moral obligations.

In the recent case of *Peterson v. Welwood*, 2018 BCSC 1379, the Court had occasion to consider what constituted adequate provision to an (only) adult son in the context of a reciprocal will wholly benefiting the son (on the death of both of his parents) being changed by the will-maker after the death of his wife. In his new will, the will-maker left $20,000 in Canada Savings Bonds to his claimant son, as well as his interest in real property, which passed outside the will. This amounted to about 51% of the will-maker's estate. The residue of the estate was to be split between the Salvation Army, the will-maker's caretaker, his neighbours, and a few others in specific percentages. The evidence before the Court established that the claimant had a close and loving relationship with his mother, with whom he spoke on the phone every week. The son stopped being gainfully employed in 2004 as a result of a constellation of health afflictions such as obstructive sleep apnea, depression, and anxiety since at least 2004. In 2009, he had a heart attack and underwent an emergency heart stent procedure. In 2017, he had open heart surgery. The Court was sympathetic to the claimant's extensive medical history but noted that in the absence of properly admissible expert medical evidence, it would not be able to conclude that his medical condition impaired his ability to pursue gainful employment after 2004. There was evidence from the will-maker's friends and caretakers that the will-maker questioned his

son's work ethic (he may not have accepted the idea of depression) and that was one of the reasons he changed his will. On the variation claim, the central issue for determination was whether, having regard to all of the circumstances, the will-maker's testamentary disposition for his son fell within the range of adequate provision that would have been made by a judicious parent. The Court noted at paragraph 245 that the will-maker's moral duty owed to his son was enhanced by virtue of the son's expectation that he would be the sole estate beneficiary, but at the same time the moral duty was attenuated by their relationship becoming strained in the years prior to the will-maker's death. The Court concluded:

> [246] The plaintiff undoubtedly believes that his father has treated him unfairly. The Deceased's disappointment and mistrust in his son, whether justified or not, appears to have precipitated the change in his estate planning. However, even with the change, the plaintiff received approximately 51% of the Deceased's assets as of the date of death. This disposition was one of a range of possible dispositions of his assets. In all the circumstances, I am unable to conclude that the Deceased chose an option that fell outside the range of options that might be considered appropriate by a contemporary judicious parent. The appellate authorities have repeatedly cautioned that if a will-maker arranges his affairs in a manner that falls within the range of options that might be considered appropriate by a contemporary judicious parent, the will-maker's testamentary autonomy must be respected.
>
> [247] Viewing all of the facts objectively and in weighing the relevant factors, I conclude that in the circumstances existing at the Deceased's death, the bequest of the Canada Savings Bonds to the plaintiff constitutes adequate provision. This disposition, when considered in light of the circumstances of the plaintiff receiving the Property by right of survivorship, represents an option for distribution of his estate that discharges the moral obligation of a contemporary judicious parent. In the result, the Deceased's arrangement of his affairs falls within the range of testamentary freedom entitled to deference: *Saugestad v. Saugestad*, 2008 BCCA 38 (CanLII) at para. 39. It is not the function of this Court to recast the testator's will to accord with the Court's notion of what may have been a more equitable distribution of his estate.

In *Boyd v. Shears* 2018 BCSC 194, the Court considered the adequacy of provision to a surviving spouse in the context of a 34 year marriage where the will-maker left her estate residue to be split between her three children (from a previous marriage). The will-maker left the plaintiff a cash gift of $20,000 to her husband and stated that she did not make any greater provision because the plaintiff would be entitled to one-half of her pension. However, the testatrix had actually selected a pension option under which the plaintiff was not entitled to any benefits after her death. The only significant asset in the will-maker's estate was her home valued at approximately $1.6 million. The plaintiff was 83 years old and surviving on his own pension income of approximately $2,000 per month. All parties agreed that the will failed to make adequate provision for the plaintiff. All of the parties except one agreed a just and equitable variation would give the plaintiff 40% of the residue (giving up the cash gift) with the balance to be shared amongst the will-maker's children. The Court found that the agreement that had been reached by all of the parties, other than K.S., appropriately addressed the will's failure to make adequate provision for the plaintiff and that the matters raised by K.S. did not provide any legal or factual basis for a different conclusion. In considering whether a will has made adequate provision for a spouse, the Court considers what the spouse would have been

entitled to in a notional separation immediately prior to the testator's death. That notional separation defines the minimum acceptable level of what is adequate, just, and equitable. In a notional separation, the plaintiff would be entitled to a claim to half of the amount by which the property's value had increased during their relationship. In the end, that would likely be more than what the plaintiff agreed to in the proposed settlement.

B. 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. These reasons can be set out in memorandum of reasons, as discussed in Section IV of this paper.

Since *Bell v. Roy Estate* (1993), 48 E.T.R. 209 (B.C.C.A.)) our Courts have generally found that a will-maker will have discharged his moral obligation to provide for an adult child if the reasons for disinheritance are found to be "valid and rational." In a subsequent decision, *Kelly v. Baker* (1996), 82 B.C.A.C. 150 (C.A.), the Court of Appeal reaffirmed the requirement that the will-maker's reasons must be valid, meaning factually true, and rational, in the sense that there is a logical connection between the reasons and the act of disinheritance. The Court went on to conclude that the contents of the will-maker's reasons for disinheriting a child need not be justifiable.

However, recent questions have been raised in the case law about whether a will-maker's reasons for disinheritance, if "valid and rational," should completely negate any moral obligation to a child (see for example, *McBride v. Voth*, 2010 BCSC 443, *Hancock v. Hancock*, 2014 BCSC 2398; *J.R. v. J.D.M,* 2016 BCSC 2265; and *Enns v. Gordon Estate*.) In *McBride*, Madam Justice Ballance observed that it is difficult to reconcile the analytical framework endorsed in *Bell v. Roy Estate* and *Kelly v. Baker* with the fundamental principles of *Tataryn*, that a will-maker's moral duty must be assessed objectively from a standpoint of what a judicious parent would do in the circumstances, by reference to contemporary community standards (para. 821).

In *Enns v. Gordon Estate* 2018 BCSC 705, Mr. Justice Branch analysed a will-maker's disinheritance of her adult daughter in the context of a two year estrangement. In deciding that the will-maker owed a moral duty to her daughter, the Court relied upon *Tataryn* as well as the Dunsdon Factors and endorsed in *Kong v. Kong*, 2015 BCSC 1669, where the Court declined to limit the analysis to the "valid and rational" test without an objective inquiry into the will-maker's reasons for disinheriting grown children with reference to community standards (in keeping with the fundamental principles of *Tataryn*).

Thus, as suggested by some commentators (see for example, Amy Francis' paper entitled "*Wills Variation: The Evolution of Contemporary Community Standards,*" CLEBC Estate Litigation Update 2018), there may be a trend away from the "valid and rational reasons" test and a movement towards an analysis requiring that the reasons for disinheritance are not only valid and rational but also justifiable, or at least linked.

In *Lamperstorfer v. Lamperstorfer Estate*, 2018 BCSC 89, the Court stated that the will-maker's personality, his mental health challenges and his reclusiveness from society all worked together to prevent him from appreciating the extent of his moral obligations to his sons and from being

a "judicious parent." The Court varied the will to provide 80% of the residue to be split between his two sons (an increase from 25% each).

In *Enns v. Gordon Estate*, the daughter was awarded 50% of an estate in place of a 1% gift where her estrangement with her mother was for only two years (and partly caused by her mother's own conduct) in the context of a 38-year adult relationship.

C. Competing Claims by Adult Children

The Court's approach to determining competing claims among a will-maker's children is not definitive. Some cases have held that, absent relevant reasons for an unequal division, there is a reasonable expectation that adult children will share equally in their parents' estate (*Ryan v. Delahaye Estate*, 2003 BCSC 1081; *Laing v. Jarvis Estate*, 2011 BCSC 1082). Therefore, where the will-maker divides his estate equally among his children, the Courts are likely, "as a rule of thumb," to consider such distribution to be *prima facie* fair (*Chernecki v. Vangolen* , 1996 CanLII 2046 (BC CA); *Vielbig v. Waterland Estate*, 1995 CanLII 2544 (BC CA)).

In *Williams v. Williams Estate*, 2018 BCSC 711, the deceased transferred most of his assets into joint accounts and joint tenancy with his son, Brent, and made a will leaving all of his estate to Brent, to the exclusion of his other son, Ron. In addition to challenging the jointures, Ron sought a variation of his father's will. Ron and Brent were two very different individuals who never got along. Brent did not pursue post-secondary education, and worked for most of his life for CN Rail, rising ultimately to the position of train conductor. He was married at one time, but at the time of his father's death had been divorced for over 30 years. He had no children. He lived in a home in Surrey that he had owned for many years. Brent was dedicated to his father. Ron attended university and had been a chartered accountant since he was certified in 1975. He had lived in Saskatoon since that time, was married, and had four adult children. Ron worked as an accountant, university professor, and consultant. Between himself and his wife, they owned a cabin at Christopher Lake and two houses in Saskatoon. At the time of his father's death, Ron's salary was approximately $150,000 and his assets were in the range of $2 million. He described himself as good at sports and at school, and that he was perceived as the "golden boy." In his testimony, he put a strong emphasis on the values of prudence, process, and transparency. After hearing all of the evidence, the Court found that there was little evidence that was in direct conflict on the main issue: their father's stated intentions with respect to his estate. On this basis, every issue was decided in Brent's favour. The Court held that despite the one-sided nature of the outcome, "this decision was not based on any poor reflection of the plaintiff but rather a testament to the strength of character of his father. . . . Furthermore, the choices he made, while not necessary, were reasonable ones for someone in his circumstances and deserve the respect of this Court."

D. Competing Claims between Spouses and 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, warranted 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 were 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.

In *Kaufman v. Kaufman* 2017 BCSC 1347, an adult son brought a wills variation claim with respect to his father's estate. The will in question disposed of the deceased's $718,000 estate as follows: $20,000 to the plaintiff, $3,000 in specific bequests to others, and the residue of the estate to the deceased's spouse from whom, at the time of death, he was separated. The plaintiff had no assets, lived on disability benefits and had a history of addiction. He had a difficult relationship with his father but was not estranged and indeed moved in with his father in his later years. In many ways, the plaintiff in *Kaufman* was a person who faced difficulty in "fighting the battle of life" (*Lukie v. Helgason*, 1976 CanLII 237 (BC CA)), a characteristic which in previous cases may have enhanced rather than detracted from a plaintiff's claim. His claim for variation of the will was dismissed.

In *McLeod v. Balakrishnan*, 2018 BCSC 908, an application was made for an order that the defendant spouse disclose documents for a will variation claim made by the plaintiff son within a blended family context. The deceased left the entire residue of his estate, valued at $19 million, to his third wife. The will-maker had full custody of his 2 sons from prior marriage, ages 16 and 19 at time of his death. The wife and 2 sons were named as beneficiaries of *inter vivos* trusts he settled for their benefit. The older son brought a variation claim against wife and estate, and she was ordered to provide comprehensive list of documents and to produce documents relating to her assets and liabilities at time of will-maker's date of death; assets passing to her from the will-maker through right of survivorship or beneficiary designation; gifts from will-maker during his life in excess of $50,000; loans forgiven or trusts settled by will-maker for wife's benefit; copies of correspondence with the will-maker about his estate planning; and a copy of wife's will at date of will-maker's death. The wife was not require to produce documents relating to: assets she brought into the marriage; her current expenses and expenses at time of will-maker's death; cash gifts the will-maker made to wife's 3 children from previous marriage; status of mortgages in respect of properties purchased by wife for her children's benefit using funds derived from the deceased; trusts settled by the will-maker for his wife's children's benefit; and wills drawn up by the wife after will-maker's death. This was due to lack of relevance and/or breach of privacy.

E. Role of Executor

The executor must remain neutral, even where the will directs the executor to defend against any variation claims to the extent of depleting the assets of the estate if necessary - that is, contains an *in terrorem* clause: *Ketcham v. Walton*, 2012 BCSC 175; see also *Doucette v. Doucette Estate*, 2008 BCSC 506 and *Bellinger v. Nuytten Estate*, 2003 BCSC 563.

In *Mayer v. Mayer Estate*, 2018 BCSC 222, the Court confirmed that a personal representative is to be named as a defendant in a wills variation claim, as follows:

> [176] I pause to note again that in my view Ms. Mayer should not have brought a wills variation action while she is also acting as a personal representative. The "estate" has been named as a defendant. The estate is not a legal entity capable of being sued. The proper defendant, in relation to a wills variation action, is Ms. Mayer as a personal representative.

With respect to the role of a personal representative in the production of the deceased's legal file, there really should be no reason for the executor to waive solicitor-client privilege and produce the file in the context of a wills variation claim brought simply on the basis of inequity. However if the plaintiff alleges undue influence or lack of testamentary capacity, the executor will be compelled to waive privilege in order to defend the deceased's will and to provide the Court with evidence that substantiates the validity of the will.

In *Wang v. Halliday*, 2014 BCSC 1574, the plaintiff appealed the decision of Master Bouck that denied production of the testator's solicitor's file in the context of a wills variation claim by a common law spouse. At issue on appeal was the particular role to be played by an executor in the litigation given that he was to maintain a neutral role, but was nonetheless required to be named as a party to litigation. The executor's position was that a requirement to list documents is inconsistent with the impartiality and neutrality required of the position, and places him in the arena with the litigants. In addition, to impose an obligation to list documents in a variation

proceeding will require an executor to inventory the documents of a deceased, an additional burden, or, if delegated to the estate solicitor, additional expense. There, the Court allowed the appeal and clarified that:

> [26] It seems to me that the executor is in a position to control that risk, or avoid the burden simply by not filing and delivering a Response to Civil Claim. That is the step, if taken, that triggers the obligation to list documents under Rule 7-1, because that is the step that converts the executor from being a named party as required by Rule 21-6(2) to a "party of record," as defined in Rule 1-1, and it is as a "party of record," rather than named defendant or mere party, that the obligation to list documents attaches.

The decision left open the question of whether the executor, being only a "party to the proceeding" as opposed to a party of record, should then be entitled to his costs if he has inadvertently participated to a greater degree than was necessary. The case did not answer any specific questions regarding just how far an executor's disclosure should reach in wills variation actions, and whether only probate documents should be disclosed.

F. Costs

The usual rule in wills variation cases is that the successful party is entitled to costs from the unsuccessful party: *Vielbig v. Watertand Estate* (1995), 121 D.L.R. (4th) 485; *Doucette v. Clarke*, 2008 BCSC 506.

With respect to personal representatives, the usual rule is that they 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: *Steernberg v. Steernberg*, 2007 BCSC 953.

In *Chan v. Lee*, 2003 BCSC 513 (reversed in part on appeal at 2004 BCCA 64 but not in a way that undermines the following principle), the plaintiff sisters succeeded in a wills variation proceeding to vary their father's will over the objections of the defendant brothers who were both executors and beneficiaries under the will. The sisters then sought special costs against the brothers personally. The brothers' position was that party-and-party costs should be paid to the sisters out of the estate. At paragraph 8 of his reasons on costs, Mr. Justice Hood found that the defendants "were attacking the entitlement of the sisters and defending their own inheritance as beneficiaries and not as Executors" and that there "was nothing neutral or unbiased about the positions maintained by them." He agreed that it would be unjust to permit the defendants to take a position *qua* beneficiary at trial, and to then have their costs paid out of the estate when they lost, thus reducing the successful plaintiffs' ultimate distribution from the estate.

In *Doucette v. Clarke*, 2008 BCSC 506 at para 14, the Court concluded that the above reasoning in *Chan* remained good law. The Court also concluded that the pre-Chan authorities confirm that an executor-beneficiary cannot recover from the estate his or her legal costs flowing from his or her participation in a wills variation proceeding... The exception is where an executor participates in a WVA proceeding only to the point of waiving solicitor-client privilege, for example, so that the solicitor who drew up the will can testify to put the testatrix's reasons for disinheriting someone before the Court. The principle in *Vielbig* (paras. 40-45) that costs of an

unsuccessful action to vary the will be borne personally is equally applicable to an unsuccessful opposition to a variation.

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 *Family Law Act*, S.B.C. 25 (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 an *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.

In the recent case of *Carswell v. Engle Estate*, 2018 BCCA 164, the wills variation claim at trial was dismissed because the claimant lacked standing and this was appealed. The appellant and the deceased had married and divorced. When the appellant later challenged the validity of the

marriage agreement, the Supreme Court of the Northwest Territories determined that it was valid, and that decision was upheld by the Court of Appeal. In February 2014, the NWT Supreme Court found that the marriage K created an express trust in favour of the appellant of one-half of the sale proceeds of the former family home. The ex-husband died in 2014 and left all of his property to his new wife. The appellant applied to file a claim the deceased's estate, seeking a variation of his will (despite being a former spouse) and to contest the validity of the will. The judge below dismissed the application, finding the appellant had no standing to seek to vary the will because she did not meet the definition of "spouse" in *WESA* in light of the order of divorce. He also found that she lacked standing to challenge the validity of the will. He rejected the allegations of fraud in relation to the estate, there being nothing "beyond speculation" to justify the claim. The appeal was dismissed. The appellant clearly lacked standing to vary or otherwise contest the will since she was not a "spouse." The complaints of fraud concerned the proceedings in the Courts of the Northwest Territories. Those orders had not been successfully appealed, and the British Columbia Courts were bound to give effect to them.

B. Assessment of the Legal Obligations to Spouse

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 assets have been "ordinarily 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.

Under the former *FRA*, a Court would likely vary a will to provide the surviving spouse with the minimum amount that he or she would receive had there been property division under the *FRA* during the lifetime of the deceased (*Erlichman v. Erlichman Estate*, 2002 BCCA 160; *More v. More Estate*, 2002 BCSC 920). In respect of the application of this approach to the assessment of the legal obligations under s. 60 of the *WESA*, the following statement from Newbury J.A. in *Kish v. Sobchak*, 2016 BCCA 65 has attracted academic attention:

> [49] I infer that the analysis of legal obligation need not be a detailed or exact one, given the difficulty of drawing a direct analogy between the consequences of a marriage breakdown – which leaves both spouses with needs and obligations – and the death of a spouse. McLachlin J. stated that "there will be a wide range of options, any of which might be considered appropriate in the circumstances." (*Tataryn* at 824.) An action under the *WVA* should not normally become a proxy for divorce proceedings, complete with the elaborate features and special rules applicable to a family law trial.

While some have interpreted the statement of Newbury J.A as signalling a departure away from the notional *Family Law Act* analysis, the Court of Appeal in *Gibbons v. Livingston* 2018 BCCA 443 confirmed that the approach to the assessment of the legal obligations under s. 60 of the *WESA* remains unchanged (see in particular paras 21 to 23).

The former cases respecting short marriages and what is required to meet the legal obligation to the surviving spouse need to be considered with caution under s. 60 of the WESA (see, for

example, *More v. More Estate*, where an award of less than the equal division of family assets under the former *Family Relations Act* was considered sufficient, and *Chapman Estate v. Chapman*, [1976] B.C.J. No. 257 (QL) (S.C.), where small *inter vivos* contributions by the will-maker to the surviving spouse were found to be sufficient to discharge the legal obligation in a short and unhappy marriage). The property division scheme under the *Family Law Act* takes into account short-term relationships, given that it is the increase in the value of the excluded property that is divisible and original assets brought into the relationship are excluded. However, if the relationship was short and there was a dramatic increase in the value of excluded property during that brief period, the amount of the growth in the excluded property and, consequently, the legal obligation to the spouse in a variation claim may still be high. Whether this will be tempered by the fact of the short relationship remains to be seen, given that there is no ability for reapportionment of the equal division of family property.

The former cases that assessed the legal obligation owed to non-married spouses are likely of little relevance in the calculation of the legal obligation under s. 60 of the *WESA*. In *Picketts v. Hall Estate*, 2009 BCCA 329, the Court of Appeal confirmed that the legal obligation owed to a common law spouse was limited to spousal support under the former *Family Relations Act* and, therefore, the claim was largely founded on the moral obligation owed to a longstanding common law spouse. As such, the Court gave some consideration to the entitlement of a common law spouse on an intestacy. With the *Family Law Act*, the common law spouse may not need, in many cases, to rely on the moral obligation to secure a proper variation award. If there has been an increase in the value of the property brought into the relationship and in the value of other excluded property during the common law relationship, the division of that increase would be the legal obligation owed to the surviving spouse. However, the analysis in *Picketts v. Hall* may still be useful in assessing the moral obligation where the legal obligation calculation under the *Family Law Act* does not result in a significant entitlement to the common law spouse.

C. Family Property and Excluded Property

In order to understand how a Court considering a wills variation claim might assess the legal obligation owed to a spouse under the *FLA*, estate practitioners should be familiar with that statutory regime. Under the *FLA*, "family property" (being property owned by either or both spouses at the time of separation in which at least one spouse has a beneficial interest) is subject to *prima facie* equal division. Certain property is excluded from division under the concept of "excluded property." In the case of assets that fall within "excluded property," only the growth in the value of the excluded property during the relationship is subject to division. The original value of the assets brought into the relationship remains with the owning spouse as excluded property. The list of what constitutes excluded property also includes gifts, inheritances, insurance proceeds, and property held in a trust in which a spouse is a beneficiary and where the trust was settled by some person other than the spouse and the property was not contributed to by the spouse. The Court, under the *FLA*, has the limited ability to divide excluded property in some defined circumstances, being:

1. where the family property or family debt is located outside British Columbia and cannot be practically divided; or

2. where it would be "significantly unfair" not to divide, given the duration of the relationship between the spouses and the spouse's direct contribution to the preservation, maintenance, improvement, operation, or management of excluded property. In the second scenario, what constitutes "significant unfairness" has not yet been defined, but presumably, it meets a higher standard than the unfairness standard under the former *FRA* that would lead to reapportionment. Further, under the new provision, there must be a direct contribution by the claiming spouse to the excluded property itself and not just a general contribution to the benefit of the spouse owning the excluded property

As a result, there may be circumstances where the legal obligation does not provide adequately for a spouse on a variation claim and the Court will need to resort to the moral obligation to increase the amount given to the surviving spouse (for example, *Philp v. Philp Estate*, *supra*).

Spouses may enter into agreements to divide property in a different manner than is provided for in the *Family Law Act* but the Court has the jurisdiction to vary those agreements if they are "significantly unfair." This language suggests a more stringent test for the Court to vary a property division agreement than was the case with marriage or cohabitation agreements under the former *Family Relations Act*. The impact of such agreements and their variability and enforceability under the *Family Law Act* on will variation claims brought by spouses (married or common law) who have entered into such agreements remains yet to be decided in the case law.

III. Wills Variation and other Estate Claims

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. Wills Variation and Resulting Trust

Proceedings seeking to recover assets for an estate ordinarily fall within the purview of the estate's personal representative. Where the personal representative declines to make such a claim, a beneficiary can seek leave of the Court under s. 151 of the *WESA* to commence such a claim on behalf of the personal representative. Without the Court's authority, beneficiaries do not have standing to make an asset recovery claim.

An interesting development to this requirement under the *WESA* arose in *Sharma v. Sharma*, 2018 BCSC 1262, wherein the Court confirmed the ability of a disinherited adult child to bring a resulting trust claim without leave of the Court. In this matter, the deceased owned a home valued at approximately $1.5 million that he excluded from his estate by registering it jointly with the two defendants to whom it passed by survivorship after his death. The plaintiff daughter sought a declaration that the jointly held home was held by the personal defendants on a resulting trust for the estate. The defendants applied to strike the resulting trust claim brought by their sister on the basis that she should be required to seek leave under section 151 of *WESA*. At issue was the plaintiff's standing to seek a declaration that her late mother's home was impressed with a resulting trust. The Court held that since the daughter was excluded under the will (and was therefore not a beneficiary or an intestate beneficiary as required under section 151 of the *WESA*), she did not need to seek leave of the Court given her status as a child of the deceased and her interest in the estate.

> [36] In *Doucette* the Court found a non-executor had standing to seek a declaration of trust alongside a will variation claim. The Court noted that in *Mordo v. Nitting*, 2006 BCSC 1761 (CanLII), a Wills Variation Act action, the plaintiff was not a beneficiary and was completely excluded by the will and all of the estate passed by jointure to the deceased's daughter. Justice Wedge permitted the plaintiff's arguments respecting the jointures to go forward. There was no challenge to the plaintiff's standing to advance that argument. A person then with an interest in an estate is entitled to inquire about assets that may form part of the estate. See also: *Drummond v. Moore*, 2012 BCSC

> 496 (CanLII) at paras. 29 to 35, *Kuo v. Kuo*, 2014 BCSC 519 (CanLII) at paras. 202-208, and *Kurmis v. Zilinsk*i, 2011 BCSC 1433 (CanLII) at paras. 22-24
>
> [37] As a result, the plaintiff, who has an interest in the estate and its potential assets is entitled to seek declaratory relief. Were that not the case and given her lack of ability to apply under s. 151 of WESA, the plaintiff and the Court would be denied access to a consideration of the assets that may properly form part of the estate.

However, contrast this with the decision in *Naidu v. Yankanna (Estate)*, 2018 BCSC 878, where the disinherited children of the deceased sought a declaration that three properties which passed by jointure were held on resulting trust for the beneficiaries of the estate (in the context of a proof in solemn form claim and wills variation claim) and the Court found that they did require leave under section 151 of the *WESA* and since they did not apply, they did not have standing.

C. Wills Variation and Proof of Will 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).

In the recent case of *Naidu v. Yankanna (Estate)*, 2018 BCSC 878, *Clark v. Nash* was applied. Y had died in Vancouver in 2016. He was married in Fiji and had five kids there. His wife died in 1967. Y then moved to Canada, followed by his children. He remarried once in Vancouver and had two further children. Before Y died, he transferred several Vancouver properties to his second wife or to himself and his wife as joint tenants. The plaintiffs in the variation claim were three children from his first family, who filed an action seeking various forms of relief: they alleged that the deceased did not adequately provide for them; they challenged his capacity to make a will in 2009; and they sought to have some of the transferred property brought back into the estate. In addition to making rulings with respect to the need to obtain leave under section 151, the Court found struck the proof of solemn form claim on the basis that the validity of the will could only be decided in a proof in solemn form proceeding, commenced under R. 25-14(4).

However, notwithstanding this longstanding case law requiring these matters to be heard separately, 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.

D. Procedure for Bringing All Claims at the Same Time

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. Impact of Wills Variation on Estate Planning

In British Columbia, the very existence of s. 60 of *Wills, Estate and Succession Act* (the *"WESA"*) promotes proactive estate planning. The importance of considering this legislation for your client will arise whenever your client wishes to make a will which unequally divides his or her assets between his spouse and children and in every blended family context.

Estate planning tools to avoid or limit wills variation claims, include:

1. gifting prior to death;
2. direct beneficiary designations;
3. holding assets in joint tenancy and passing those assets by right of survivorship;
4. marriage agreements;
5. a will supported with a memorandum of reasons; and
6. settling assets into a trust prior to death.

Where your client has instituted an estate plan that does not include a will, it is nonetheless wise to consider recommending a "back-up" will, in the event that the estate plan is successfully challenged post-death, which would otherwise cause the deceased's assets to fall back into his estate and to be distributed in accordance with the intestacy provision of WESA, as opposed to distribution according to the terms of a carefully considered will.

A. Memorandum of Reasons

Should a will-maker append a memorandum to his will to explain his intentions and wishes in those circumstances? If the will-maker has disinherited (or treated unequally) a person who has standing to vary the will under the *WESA*, then a memorandum should always be considered.

Under section 62 of the *WESA*, the will-maker's reasons for limiting an inheritance or for making no provision for a spouse and/or a child may be recorded in a memorandum of reasons, which the Court may consider. The Court will give consideration to whether the will-maker had a valid or rational reason for failing to provide adequately for a spouse and/or child. The will-maker's reasons need not be morally justifiable, but they must be valid (that is, based on true facts) and rational (that is, logically connected to the act of disinheritance).[2] The Court of Appeal in *Kelly v. Baker* (1996), 15 E.T.R. (2d) 219 (B.C.C.A.) held at para. 58:

> 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.

Recently, in *Enns v. Gordon Estate*, the will of a mother who essentially disinherited her adult daughter[3] in favour of two registered charities, was varied to provide her 40% of the residue with the balance to the registered charities. In reviewing the deceased's memorandum of reasons, the Court found that the weight of those reasons were diminished by their factual or logical flaws, the timing of the will falling within the only two-year period when the mother had been estranged from the daughter (who had "gracefully fulfilled all her duties to her mother for 36 of 38 adult years"), and the mother's stubborn refusal to consider whether new facts altered her original reasons. One of the key paragraphs in this judgment is Branch J's review of the "valid and rational" test, where he seems to signal a departure from the strict test to also consider whether the reasons for disinheritance are justifiable:

> [95] But what seems to be missing in a bare application of a "logical connection" test is at least some degree of proportionality. For example, if an adult child on one occasion insulted the testator's character, that could be argued to create a "logical connection" to a subsequent decision to disinherit. However, complete disinheritance would seem to be a vast overreaction to a single act of defiance. When this example was put to the charities, counsel conceded that when a Court is considering whether expressed reasons for disinheritance were "rational", it is entitled to resort to the concept of community standards, which standards might not be met in the case of disinheritance over a single insult.

In *Williams v. Williams Estate*, discussed above, the deceased made a will in 2012 leaving all of his estate to his son, Brent, and disinheriting his other son, Ron. The will contained the following memorandum of reasons for the deceased's decision not to leave anything to Ron:

> In making this my Will I have fully considered my obligations to my son, RONALD ARTHUR WILLIAMS as he has received many benefits from me while I

---

2 *Hall v. Hall*, 2011 BCCA 354

3 She was provided a gift of only $10,000 within the context of a $1.1 million estate.

> was alive including assisting him with his education and he has been estranged from me for some time and he has interfered with my finances and property. I feel that I have fulfilled any and all obligation to him.

The Court placed considerable weight on testamentary autonomy and held that "this decision was not based on any poor reflection of the plaintiff but rather a testament to the strength of character of his father. Furthermore, the choices he made, while not necessary, were reasonable ones for someone in his circumstances and deserve the respect of this Court."

In *Trudeau v. Turpin Estate*, 2019 BCSC 150, the 88 year old mother died leaving a will which unequally divided the residue of her estate amongst her four adult daughters: 60% to Dorothy, 30% to Laura and 5% each to Janice and Sylvia. The Court found that the deceased had a very close relationship with Dorothy, who lived on her property in a coach house. The deceased had a low opinion of and was disappointed with her remaining children, who seldom visited over the years. The Court accepted an undated note and a journal maintained by the deceased as a memorandum of reasons relating to her feelings towards her daughters and how her estate should be divided. The Court commented that it was a fairly straightforward case involving the competing claims of the deceased's children, requiring an examination of the factors set out in *McBride v. Voth,* 2010 BCSC 443 at 129. The Court found the Deceased's reasoning regarding her unequal treatment of her children was apparent on the evidence as a whole. After examining each of factors, the Court nonetheless varied the will to divide the residue of the estate as follows: 50% to Dorothy, 30% to Laura and 10% each to Janice and Sylvia.

B. In Terrorem Clauses

It will not be effective to include a provision in a will which restricts the ability of a spouse or child to bring a wills variation claim (i.e. an *in terrorem* clause) because it is a matter of public policy that maintenance and support be provided for spouses and children and therefore such clauses will be void: *Bellinger v. Fayers,* 2003 BCSC 563, *Nuytten et al*, 2003 BCSC 563.

In *Kent v. McKay*, [1982] 139 DLR (3d) 318, the will-maker left all of his real and personal property in trust for his wife and daughter. His son and daughter were to receive the income from separate trusts; however, they could only receive income so long as they did not start litigation in connection with any provisions of the will. The purpose of the clause was to limit his children's shares. The children nevertheless had wills variation standing. In finding that the provision was void for violating the *in terrorem* rule, the Court set out three criteria that must be met for a clause to be invalid pursuant to this doctrine:

1. the gift must be of personal property or blended personal and real property;
2. the condition must be either a restraint on marriage or one which forbids the beneficiary to dispute the will; and
3. the threat must be idle in that it must be imposed solely to prevent the beneficiary from undertaking that which the condition forbids.

In *Ketcham v. Walton*, 2012 BCSC 175, the will-maker disinherited his three adult independent children with whom he was estranged and left his estate to several friends and charities. His will included a clause instructing 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 said as follows about the clause:

> [19] The clause in question does not obviously prevent the children from an inheritance if they bring a WVA claim, but that possibility clearly lurks within it. The executor is instructed to resist their claim, even if it depletes the entirety of the estate to the detriment of the named beneficiaries. The executor is also granted the authority to incur whatever legal costs he feels are necessary and not have the legal bills taxed. It is easy to see how this clause, if given full effect, could be used to erase the $800,000 in the estate.

In providing its directions, the Court held the active defence clause instruction by the will-maker "to his Executor towards any wills variation claims with potential to deplete the entirety of the estate, if necessary, should be regarded as void at law." 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.

In the recent Alberta case of *Mawhinney v. Scobie*, 2019 ABCA 76, the Alberta Court of Appeal considered a "no contest clause" in the context of a disappointed beneficiary's application for directions. The will-maker had changed his will about one month before his death (and in a state of declining health) such that the estate residue would be equally divided amongst his adult children, rather than being divided between his adult children and his long-term partner[4] as in the previous four wills. The no contest clause stipulated as follows:

> 21. If any beneficiary of this my Will challenges the validity of this my Will or any Codicil hereto or commences litigation in connection with any provision of my Will or any Codicil hereto, other than for:
>
> (a) Any necessary judicial interpretation or for the assistance of the Court in the course of administration of my estate; or
>
> (b) Seeking to enforce or obtain any rights or benefits conferred by the laws of the Province of Alberta;
>
> then, such beneficiary shall absolutely forfeit and lose all entitlement to benefits or to any gift to him or her hereunder, and every such benefit or gift so forfeited shall fall into the residue of my estate and the residue of my estate shall be distributed as if such beneficiary had predeceased me and left no issue surviving me.

A grant of probate in common form was obtained and Ms. Mawhinney applied to the Court of Queen's Bench for directions on the question of whether an application to request the personal representative to obtain formal proof of a will[5] due to the existence of suspicious circumstances would trigger the no contest clause. The lower Court found that the application fell within the exception of the no contest clause in paragraph 21(b). However, the majority of the Court of Appeal disagreed. While the Surrogate Rules may form part of the laws of Alberta, "the rules themselves do not confer any right or benefit on the applicant, save for a procedural right to challenge the will." The Court ruled that if the disappointed beneficiary gave evidence of "suspicious circumstances" relating to the will, with a view to asking the Court to direct a full

---

4 Ms. Mawhinney was nonetheless gifted a parcel of land, a house and its contents, and $2.6 million dollars. Her status as a spouse of the deceased was disputed by the will-maker's children.

5 Pursuant to section 75(1)(a) of the *Surrogate Rules*, Alta Reg 130/199.

hearing regarding its validity[6], this would constitute a challenge to the will itself and would trigger the no-contest clause. This would result in Ms. Mawhinney losing her inheritance unless she ultimately succeeded in proving the will-maker lacked capacity, in which case the will would be invalid along with the no contest clause. This, the Court commented, "was the dilemma the no contest clause [was] designed to create, and what was presumptively intended" by the will-maker. It is well-established in Canadian law that a no-contest clause cannot deprive a person of rights arising under dependants' relief legislation. Thus, this would suggest that Ms. Mawhinney chose not to challenge the distribution made under the will because of her dubious spousal status.

C. Spousal Agreements and Acquiescence

Potential wills variation claimants cannot relinquish their rights to vary the will prior to the will-maker's death either implicitly or explicitly. Further, cohabitation, marriage and separation agreements that purport to preclude wills variation claims by one or both parties 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, the deceased left all of his assets to his children in keeping with a prenuptial agreement reached with his wife. Pursuant to the agreement each of them expressly waived their rights to each other's property, including on death. On the surviving spouse's application to vary the will, the Court upheld the prenuptial agreement and ordered a lump sum award for spousal support, which was not a right waived in the agreement.

In *Wong v. Soo*, 2015 BCSC 1741, the husband of 12 years was not provided for in the will of the deceased. At the time of preparing her will, the deceased swore a statutory declaration, which stated the following:

> I am aware of the provision of the Wills Variation Act …, but I do not wish to provide for my current husband, Joseph Cho Wong, under the term of my Will for the following reasons:
>
> Joseph is not getting a share of my estate because we have separated our assets. Joseph's estate will be given to his own children from his first marriage. My estate will be given to my own children from my first marriage with my deceased husband Chik Pon Cheung.

The deceased's four children and her sister shared equally in $2 million estate in equal shares and the plaintiff received $89,000 outside of the will from an insurance fund, as well as two pensions from the deceased. He received five pensions in total for a monthly income of $3,500. The Court found that a statutory declaration was not an "agreement" within the meaning of s.61 of the former *Family Relations Act*. However, the Court did hold that the invalid agreement was a factor for consideration and not determinative of entitlement. The Court varied the will to provide an additional $230,000 to the plaintiff.

In *Miller v. Millir*, 2011 BCSC 29, the will-maker died leaving the residue of his estate to one of his three sons. The only significant asset in the estate was the family home, sold for approximately $522,000. The surviving spouse of four years received some assets by right of

---

6 Pursuant to section 75(1)(a) of the *Surrogate Rules*, Alta Reg 130/199.

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.

D. Ethical Issues Relating to Planning to Avoid Wills 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 ("*Hossay*").

In *Hossay*, 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 (the *"FCA"*) applied to this disposition of property. 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 crystallized prior to the will-maker's death, and not merely as a result of their claim under the then wills variation legislation. *Hossay* remains good authority that a plaintiff whose claim arises solely on the death of the debtor does not have the necessary standing under the *FCA*.

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 respective 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 *Wills Variation Act*, R.S.B.C. 1996 c.490 (the *"WVA"*). The Court affirmed *Hossay* and held that a claim by an adult independent child on moral grounds to vary a will does not give that child standing as a "creditor or other" under the *FCA*.

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 (CanLII) at para. 203 [*Mawdsley*]).
>
> …
>
> [45] An essential threshold to standing as a creditor of Reg under the *FCA* is that the legal or equitable claim must exist during Reg's lifetime (*Mawdsley* at para. 205; *Hossay v. Newman*, 1998 CanLII 15139 (BC SC), [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).