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The Spousal Life Estate: Thing of the Past?

Erlichman v. Erlichman

When I first began drafting Wills some 30 years ago, it was common for the husband, who in the majority of cases owned most of the assets, to have a Will that provided a life estate to his wife, with the remainder on his death to the children. There were a number of reasons for this: it supported a common assumption of the time that women didn't know how to manage money, it ensured that the widow didn't blow her inheritance all at once, and perhaps most important, it ensured that the widow would not be wooed and wed by some gold-digger who would himself spend the testator's hard-earned fortune, leaving nothing for his heirs.

Life estates such as these are now much rarer, for obvious reasons, but they still exist. The question is, can they be challenged by the widow under the *Wills Variation Act* on the ground that they do not constitute an adequate, just, and equitable provision for a surviving spouse?

This was precisely the challenge made by the testator's widow and life tenant in the recent case *Erlichman v. Erlichman*, heard by the BC Court of Appeal on January 24, 2002. The important judgment was given March 6, 2002, and creates new law.

Facts

Rose and Abraham Erlichman were married in 1945. Both had been married before, but had lost their respective spouses in the Holocaust. At the time of their marriage, Rose had a two-year-old-son, Sydney; Abraham had an 11-year-old son, Harry. The four immigrated to Canada as a family in 1948.

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In May 1988, the Erlichmans each made Wills. Abraham appointed his wife Rose and his son Harry as joint executors, and provided that his estate would be divided equally between them.

In 1996 Abraham became terminally ill. Rose cared for him until his death. On February 5, 1998, less than three months before he died, Abraham made a new Will. He again left one-half of his estate to his biological son, Harry, outright. Abraham modified his original bequest to Rose, however, leaving her a life estate in the income of the other one-half of his estate, with powers of encroachment for the benefit of both Rose and Sydney's children. The residue of this half was left to Sydney's children.

Abraham died in Vancouver on May 1, 1998, leaving an estate of approximately $2 million.

Trial

In February of 1999, Rose commenced proceedings for an interest in the estate assets under the *Wills Variation Act*. The trial judge dismissed her application in December of 2000.

At trial, the judge found that Abraham's modification of his original (1988) bequest to Rose arose out of his conversations with Harry about Rose's future care and her ability to manage money. Rose Erlichman is approximately 80 years old. Harry prepared her tax returns in the 1950s, while she was working. Mrs. Erlichman did not file another return until after her husband's death. Until less than a year before his death, Rose Erlichman did not have a bank account. She occasionally cashed cheques provided by her husband for household expenses. Mrs. Erlichman

testified that throughout their marriage, Mr. Erlichman took care of all their finances, as was the "European way." The trial judge found that Mr. and Mrs. Erlichman's "discussions about finances were limited to how their money was safe in Treasury Bills and the interest they were earning." In sum, the trial judge stated as follows.

> "...Mr. Erlichman relied heavily on Harry for assistance and business advice. It seems reasonable that Mr. Erlichman would want Harry to help Mrs. Erlichman with her finances and advice after his death because he was concerned about her ability to look after herself and the money. It is reasonable to conclude that Mr. Erlichman set up a spousal trust so that his wife would not be burdened with having to look after $1 million, when she had little or no experience with large sums of money."

Rose Erlichman had testified at the trial that if the Will were to be varied and she were to receive a capital sum, she would keep the money invested in Treasury Bills. Mrs. Erlichman wanted to leave her interest to her son Sydney on her death.

Appeal

Rose Erlichman appealed the trial judgment on the grounds that Madam Justice Loo was mistaken in concluding that Abraham Erlichman's Will made adequate, just, and equitable provision for his wife, having regard to current societal norms.

The leading *Wills Variation Act* case of *Tataryn v. Tataryn*, [1994] 2 S.C.R. 807, requires that maintenance and property allocations, which the law would support during the testator's lifetime, be reflected in the court's interpretation of what is "adequate, just, and equitable" in terms of the testator's bequest to his spouse. Mrs. Erlichman's appeal required the Court of Appeal to consider what is meant by "reflected" and whether additional considerations, such as the substantial size of the estate, and concerns about a surviving spouse's ability to manage money, are also relevant.

Madame Justice Saunders, who gave judgment for the majority in the BC Court of Appeal, found that the case did:

> "...not engage the many conflicting interests that are sometimes present in *Wills Variation* cases, for example, cases of short-term marriages, dependent adult children, or multiple families. Nor is it a case in which the parties, at one time, concurred on the disposition of the estate set out in the Will that is subsequently challenged. And it is not a case in which both parties held substantial assets in their own names, or conducted their financial affairs, in some measure, independent of the other.

Mrs. Erlichman testified that throughout their marriage, Mr. Erlichman took care of all their finances, as was the "European way."

> "On the other hand, Mr. and Mrs. Erlichman were married for a goodly time, 53 years. At the time of Mr. Erlichman's death, Mrs. Erlichman was 77 years old with, it can be inferred, at least several years of remaining life expectancy. Mr. and Mrs. Erlichman rose by their combined hard work and thrift from near penury to financial comfort such that their amassed wealth at the time of Mr. Erlichman's death, held in his name, was near $2 million. (With the exception of $10,000 held in the appellant's name for convenience in the event of her husband's death, no assets of value were owned by Mrs. Erlichman.) At various times in Mr. Erlichman's business life, assets were held temporarily in Mrs. Erlichman's name for asset protection from potential creditors. In the 1988 Will that Mrs. Erlichman thought would regulate the estate upon Mr. Erlichman's death, Mr. Erlichman provided that one-half of the estate would pass to his only natural child Harry Erlichman, and one-half of the estate would pass to Mrs. Erlichman; at the same time her Will, to his knowledge, left her estate to her only natural child, Sydney Erlichman. One may conclude that at least in 1988, Mrs. Erlichman was viewed as capable of managing a significant sum of money. And at the time of her husband's death, Mrs. Erlichman was the only person to whom Mr. Erlichman owed a legal obligation.
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> "There can be no doubt that in these circumstances, Mrs. Erlichman would have been entitled to one-half of their joint assets, had she applied for a division of assets under the *Family Relations Act* immediately prior to Mr. Erlichman's death. This undisputable proposition, in my view, gives Mrs. Erlichman a strong claim to at least one-half of the estate on the basis that the content of Mr. Erlichman's legal obligation to her, in these circumstances, was to leave Mrs. Erlichman at least that much. In my view, a life interest in one-half of the estate does not adequately meet this legal obligation. Nor, in my respectful view, does the disposition proposed by my colleague. In circumstances in which fully one-half of the estate is allotted to Mr. Erlichman's natural child (the disposition and moral correctness of which is not challenged by Mrs. Erlichman), as is the case here, the only way in which the testator's legal obligation to Mrs. Erlichman can be met, in my view, is to provide that Mrs. Erlichman receive the balance of the outright.
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> "I am further of the view that the independence of spirit contemplated in the discussion of the moral obligation in *Tataryn*, in these circumstances, supports this disposition.

> "In reaching my conclusion as to a fit disposition, I have considered Mrs. Erlichman's entitlement to provide for her issue and their offspring from her life's labours as she sees fit, not as the testator saw fit. In this, the case differs substantially from *Crerar*, in which all children in the family unit were children of the testator and surviving spouse, and shared equally under the Court's decision.
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> "I have considered the reason found by the trial judge for the creation of the trust, that Mrs. Erlichman lacked capacity to manage such a large fund. I observed, however, that Mrs. Erlichman's general competence was not challenged at trial. In her evidence, she described the conservative plan for management of the funds consistent with Mr. Erlichman's practice, and she has been paying bills, banking, and hiring persons to prepare tax returns since Mr. Erlichman's death. There is no basis on the evidence to conclude that she cannot learn to manage these funds, as Mr. Erlichman was required to do when he sold the properties for the funds now in issue.
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> "It occurs to me that the independence sought by Mrs. Erlichman through this appeal may provide her the right to spend some of the funds unwisely. While that has not been her history, while the trial record does not support this concern, and while it is to be hoped this will not occur, it is perhaps the mark of independence that the risk should be there. I further observe that the beneficiaries of the trust alive today, her grandchildren, have supported Mrs. Erlichman in her application."

In my own opinion, this case means that any spouse in a lengthy marriage, where there has been no marriage agreement, can with automatic success challenge a Will that does not leave that spouse at least 50 percent outright. Any life estate would have to be limited to the other half.

Anyone with a Wills practice should seriously consider:

- reviewing Wills he or she has drawn, to see if there are any life estates that could be struck down under *Erlichman*, and
- suggesting to the testator client that allotting at least one-half outright to the surviving spouse might avoid a challenge to the Will. ▲

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