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A Tribute to the *Wills Variation Act*

The question of a child's "entitlement" to share in a parent's estate often provokes a very lively discussion.

Many individuals feel quite strongly that once the parents have "fed, clothed, educated, and sent the child on his or her way," that ends their obligation to adult children. Such people will argue that testators should be free to leave their inheritance as they see fit, subject of course to any claims by a surviving spouse.

In my practice I am frequently told that grownup children should be grateful for what they have received and should not be able to successfully challenge their parents' Wills.

The potential for family inheritance conflicts has been growing with the increasing number of "blended family" situations. Today's parents may have second or even third families. In such cases, for example, there may be differing perceptions of any obligation to provide an inheritance for younger children, as opposed to older, more established children.

Thus it is common, in my experience, for people to criticize the *Wills Variation Act* because it permits the "malcontents" to contest a Will.

In a nutshell, the *Wills Variation Act* is the British Columbia statute that permits certain next-of-kin to contest a Will on the basis that it does not make adequate provision for an individual claimant. The class of claimants eligible to bring such a claim include the surviving spouse, common-law spouse, same-sex spouse, and the natural and adopted child of the deceased.

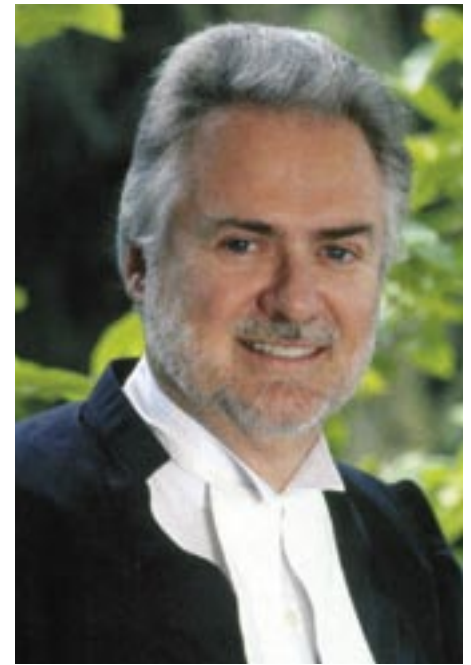
The English common law provided that when a person died, that person could leave his or her property to whomsoever he or she wished.

In this article, I intend to set out briefly the background to the legislation and provide real life examples from my own practice to illustrate the clear need for such legislation.

As such, this article is intended as a tribute to the provisions of the *Wills Variation Act*.

Background

Any discussion of the *Wills Variation Act* requires an understanding of the common law we inherited from England because this common law underlies the legislation.



The English common law provided that when a person died, that person could leave his or her property to whomsoever he or she wished.

This ability to dispose of one's estate is known as "testamentary autonomy" or "testamentary freedom." It is legal doctrine that was developed by the English courts during a time (1700–1900) when little property was actually disposed of by Will.

During that time, most wealth was made up of real property, which was generally considered to be family property. Because it did not belong to the individual, it was not part of the estate to be disposed of by Will upon death.

When the children of wealthy families married, their families often made marriage settlements that included conditions with respect to the ownership of the property and its passage upon death. Thus, property governed by a settlement was not part of an individual's estate.

It was in this context that the English courts decided that a testator was free to decide the beneficiaries who would inherit under his or her Will.

Thus, the English law of succession left it to the discretion of testators to dispose of their estates as they saw fit. At common law, testators are not legally

obliged to make provision for their spouse or children. There is no binding obligation to leave a set amount to their spouse or their children.

In modern estate law, however, this common law doctrine has been modified in many jurisdictions that have passed enactments to permit the spouse or children to make a claim against the estate where a deceased has not made adequate provision for them. Would-be heirs may claim against the deceased's estate and ask the court, in effect, to rewrite the Will to provide appropriately. In British Columbia, this enactment is known as the *Wills Variation Act*.

Unless there is a successful statutory claim brought under the *Wills Variation Act*, however, the principle of testamentary freedom still prevails at common law.

It is noteworthy that this common law approach is in stark contrast to much of the rest of the world. In civil law countries (which includes most of the non-English-speaking world and all of non-English Europe and its former colonies), a fixed portion of a deceased's estate (often 50 to 75 percent) passes automatically to the surviving spouse and children. The testator can only dispose freely of a portion of his or her estate. The credo seems to be "you had them, you pay for them."

Claims under the *Wills Variation Act*

In my practice, a common claim involves the children of abusive and alcoholic parents, generally fathers. Many of their stories have a recurring theme—a father coming home drunk after work, beating his wife and children, and generally terrorizing the family on an ongoing basis. Many of these children leave home at very early ages and, quite understandably, bear a strong resentment against the abusive parent. Many of these children themselves also become alcoholics or drug users. At best, they remain emotionally damaged individuals.

Needless to say, the abusive parents generally have little insight as to the effects of their actions. Thus the abuser, when preparing his or her Will, will typically disinherit the children on the basis that he has not heard from them for a lengthy

period of time and thus considers himself estranged from his children and owes them nothing. The handling lawyer or Notary often just accepts this statement as the truth of the matter and makes little enquiry into it.

A visit to the Canadian Department of Justice Family Violence fact sheet indicates that there may well be much more of this type of family violence than the public would wish to believe. A large body of information available on family violence and abuse tends to corroborate this type of *Wills Variation* scenario.

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Most of us had the good fortune to be raised in happy, healthy families; any experienced teacher, minister, or doctor, however, will attest to the great number of dysfunctional families.

In my practice many of the estrangement cases involve a history of physically, emotionally, and/or sexually abusive treatment by the parent or step-parent toward the child. Where the estrangement can be properly explained and put into perspective, then the adult child may well have a meritorious case based on the *Wills Variation Act*.

Real Life Examples

In terms of other types of cases, my first example involves a claim made by the three adult independent children relating to the death of their father, Mr. M.

Mr. M had been married for almost 50 years when his first wife died. He had a good relationship with his children; living alone, however, he became very lonely and depressed. He engaged the services of a woman, known as Ms. R, through an "escort service."

Shortly after they met, Ms. R moved into the deceased's residence. Mr. M was

71 and Ms. R was 41. Ms. R changed the residential phone number to her own unlisted number and soon completely isolated Mr. M from his children. Within two months they "married" (unbeknownst to Mr. M, his "bride" was still legally married to another man). She began to run her escort service from the home, publishing ads that she "specialized in seniors." Shortly after the marriage, Mr. M prepared a new Will leaving his entire estate to Ms. R and alternatively to her daughter, thus completely disinheriting his own three children.

This so-called marriage ended abruptly a few weeks later when Ms. R beat Mr. M to death. In fact, she beat him so severely, she broke every rib in his body. She was subsequently convicted of his murder and thus became disentitled to share in his estate. As a wrongdoer, she was prevented by law from benefitting from her own crime.

In these circumstances, however, Ms. R's daughter arguably continued to have a valid claim as the alternate beneficiary under the Will. This daughter had never met the deceased. At common law, however, she still had a claim as the named beneficiary under the Will.

In these circumstances, an application under the *Wills Variation Act* ultimately resulted in a ruling leaving Mr. M's entire estate to his three adult children.

A second example involved a 40-year-old woman known as S who was adopted at age 7 by the deceased and her husband. It seems she was adopted as a servant more than a child. She was made to work long hours at the deceased's kennel business. Each morning before school, she had to get up at 4:30 to feed and care for up to 100 dogs. She was forced to work long hours and was severely beaten by her mother for any perceived misbehaviour or insubordination. In extreme situations, she was denied food. Mother wore the pants in the family and her father did not intervene on her behalf.

When S skipped school for the first time at age 16 (to help her friend prepare for the friend's mother's release from

hospital), the deceased became exceedingly angry. S stayed away for a couple of days to let her mother cool down; when she phoned home, her mother told her that she had burned all her possessions. She also told S that she would be putting S's dog down and said, "you came into the house with nothing and you will leave with nothing." This woman not only disowned S, she obliged her husband and other family members to disown S, as well.

S was homeless and was taken in by friends. With few options, she became pregnant and married a severely abusive man who continued to abuse her and the children for years before she left him. Their third child was born severely disabled; she raised this son on her own for 24 years. He cannot speak, still wears diapers, weighs 40 to 45 pounds, and is catastrophically injured in every sense of the word.

Nevertheless S managed to get a university education by attending classes while her young son was at daycare. Once he became an adult, however, this eligibility ended and she cared for him full-time rather than put him into an institution.

S had attempted to contact her adopted mother on several occasions, but was rebuffed at each turn.

The deceased died, leaving an estate of approximately \$250,000. Her Will provided S with a bequest of \$5000 on the basis that they were estranged for 25 years.

In this case, a *Wills Variation* action was commenced; once the proper facts were brought to the attention of the executor and beneficiaries of the estate, however, the case was settled on the basis of S receiving one-half of the net estate.

The third case involved D, a 45-year-old woman. She was an only child who had been doted upon by her parents. D was of average intelligence; she had, however, been a physically disabled child from birth due to cerebral palsy. D lived at home with her overly protective parents until her late 30s. During that time, life was not easy in the household. Among other difficulties, D's mother was extremely depressed; this made life difficult for everyone.

In her late 30s, D rebelled by leaving her parents' home to marry her childhood sweetheart. This was done over her parents' protest. Before long, however, they came to accept the marriage but did continue to try to control their daughter to some degree.

D was unable to work and, by marrying, lost her only source of income: her disability pension. By any objective standard, the husband was a good husband and provider; he worked as a school janitor, however, so they had very little disposable income. The couple had been married for eight years when D's father and mother died within a few months of each other.

The main object of the Act is to provide adequate, just, and equitable provision for the testator's surviving spouse and children.

D's mother left a homemade Will that provided the executor could pay off the mortgage on D's townhouse (\$100,000) and could pay her the sum of \$1000 per month until age 65. Thus D would not inherit the capital of her mother's estate unless and until she reached age 65. If she died before 65 years, the residue would be divided among her 22 first cousins. The estate assets totalled in excess of \$800,000.

D commenced action under the *Wills Variation Act* seeking to have the Will varied so she could receive the entire estate immediately. Her application was opposed by some of the alternate beneficiaries. They felt very strongly that their aunt's wishes should be honoured and the Will upheld.

Expert evidence was tendered at court from an occupational therapist, setting forth all the substantial expenses that the handicapped, such as D, would incur to live as reasonably normal and comfortable a life as possible.

The Judge used the provisions of the *Wills Variation Act* to give the entire \$800,000 estate to D for her own use absolutely.

Summary of Basic Principles: The *Lucas* Decision

Turning to the statute, an excellent summary of the basic principles of the *Wills Variation Act* can be found in the decision *Lucas v. Lucas Estate* 29 E.T.R.(2d) 222.

Let me paraphrase those principles.

The main object of the Act is to provide adequate, just, and equitable provision for the testator's surviving spouse and children.

The Act also protects the interest in testamentary freedom, which is not to be interfered with lightly. In the absence of other evidence, a testator is presumed to know best how to meet his legitimate obligations and concerns.

The Act provides an objective standard by which to measure whether a testator has provided "adequate and proper maintenance and support" for his surviving spouse and children. Thus the court should examine the Will, keeping in mind society's reasonable expectations of what a judicious parent would do in the circumstances.

In making a determination, the court must consider any legal obligations of the testator to the spouse and children, followed by the moral obligations to them.

Independent adult children have a more tenuous moral claim than any spouse or dependent adult children. If the size of the estate permits, however, parents should generally make some provision for adult independent children (unless there are circumstances that rule out such an obligation).

A testator may have a moral duty to adult children in a number of different circumstances including disability, legitimate expectation of inheritance, probable future difficulties of the child, the size of the estate, and other legitimate claims.

This moral obligation by a testator may be negated by "valid and rational" reasons that justify disinheriting the child. In such a case, these reasons must be based on true facts and must be logically connected to the disinheritance

Although a needs/maintenance test is no longer the sole factor governing such claims, a consideration of needs is still relevant.

Conclusion

The purpose of this article is to demonstrate that despite the frequent criticisms made of the *Wills Variation Act*, there are many circumstances in dysfunctional families where the merits of the Act allow justice to be effected despite what the testator had intended in the Will.

The British Columbia Court of Appeal recognized this scenario in their decision *Gray v. Nantel* 2002 BCCA 94, when it allowed the claim of a purported estranged child and stated:

I cannot accept that a child so neglected for his first 18 years and then treated shabbily during a brief reconciliation can be said to forfeit the moral claim to a share in his father's estate by abandoning any further effort to establish a relationship. The fault in this sad story lies with the father and, in my opinion, the onus to seek further reconciliation was on his shoulders. The testator gave the appellant virtually nothing in an emotional or material way; **the Will was his last opportunity to do right by his son** (emphasis added). ▲

Trevor Todd restricts his practice to Wills, estates, and estate litigation. He has practised law for 31 years and is a past chair of the Wills and Trusts (Vancouver) Subsection, BC Branch of the Canadian Bar Association, and a past president of the Trial Lawyers Association of BC. Trevor frequently lectures to the Trial Lawyers, CLE, and the BC Notaries and also teaches estate law to new Notaries. His Website includes 30 articles on various topics of estate law.

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