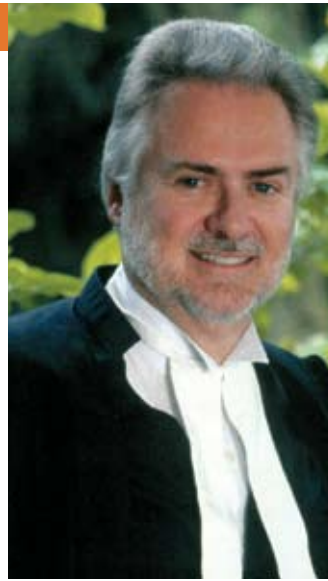


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Limitations for *Wills Variation* Claims



There is a relatively abbreviated limitation period for claims brought under the *BC Wills Variation Act (WVA)*.

The *WVA* section 3 provides that any would-be claimant commence a court action within 6 months of the granting of probate or letters of administration of the impugned Will.

This shortened period allows for the timely distribution of the estate by enabling the executor or administrator to distribute the estate to beneficiaries without fear of claims arising long after the estate assets are out of his or her hands.

On the face of it, the 6-month limitation period is fixed and no discretion is given to the court to extend that time limit. Thus claims brought beyond the 6-month limitation period will *almost always* be dismissed.

Nevertheless, this article will deal with three notable exceptions where the statutory time limit may be extended effectively.

The *Limitation Act* Exception

The first exception occurs where another claimant has already commenced a *WVA* action *in respect of the same estate* within the prescribed 6-month limit. In such a case, section

4 of the *Limitation Act* permits an additional party to commence his or her action relating to the same estate even after the 6-month limitation period.

Section 4 of the *Limitation Act* provides

- 4(1) If an action to which this or any other act applies has been commenced, the lapse of time limited for bringing an action is no bar to
- proceedings by counterclaim, including the adding of a new party as a defendant by counterclaim;
 - third-party proceedings;
 - claims by way of set off; or
 - adding or substituting a new party as plaintiff or defendant, under any applicable law, with respect to any claims relating to or connected with the subject matter of the original action. (emphasis added)

As a practice note, it is *extremely* important for counsel to keep this possible pitfall in mind when seeking to settle any *WVA* action. Even though the 6-month limitation period has long since elapsed, in the absence of a court-ratified settlement, other eligible claimants may decide to make a late claim.

The Equitable Doctrine of Estoppel

The second exception involves the doctrine of estoppel that in some cases can effectively prevent a defendant from successfully pleading that a late action is statute-barred under the *WVA*. This doctrine first arose in the form of promissory estoppel.

Halsbury's Laws of England defines promissory estoppel thus.

When one party has, by his words or conduct, made to the other a clear and unequivocal promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, the one who gave the promise or assurance cannot afterwards be allowed to revert to their previous legal relations subject to the qualification which he himself introduced.

In British Columbia, this equitable defence of estoppel has been successfully raised as a shield to defeat the defendant's argument that the plaintiff's *WVA* action is statute-barred.

This case law has stemmed from the case of *Maracle v. Travellers Indemnity Co. of Canada* (1991) C.P.C. (2d) 213 (S.C.C.) that held that promissory estoppel may prevent a defendant from relying on a statutory

limitation where a plaintiff can establish the following three conditions:

1. the defendants made an unambiguous promise or assurance that they would not rely on the limitation period;
2. the defendants intended to alter the legal relationship between the parties; and
3. the plaintiff reasonably relied upon the representation of the defendants and thus did not commence an action within the prescribed time.

In British Columbia, the case of *MacDonald v. MacDonald Estate* (1996) 8 W.W.R. 160 first established that this defence of promissory estoppel could be used in respect of an otherwise statute-barred action under the *Wills Variation Act*.

This case involved the Will of a mother who died leaving two sons. To one son she left \$1. To the other son, her executor, she left a residence. The disinherited plaintiff son had received proper notice of the application for a grant of probate, yet brought his action after the limitation period had elapsed. The defendant sought to have the case dismissed on the basis it was time-barred by virtue of section 3 of the *WVA*.

The plaintiff argued promissory estoppel. He alleged that even before their mother's death, the defendant had told him of the disinheritance but assured him he would nevertheless share the estate equally between them.

Those assurances continued after her death and the plaintiff thus did hundreds of hours of work on the home. This abruptly ended when the defendant reneged on the agreement 2 months after the limitation period expired. The plaintiff argued that the defendant was estopped from relying on the limitation period.

Harvey, J. held that the doctrine of promissory estoppel *does* apply to statutory limitation under the *Wills Variation Act*, saying as follows.

In my opinion, the case and textual authority favours the

position that estoppel is available as an argument whenever a limitation period is relied upon, regardless of the source. It is admittedly easier to use the estoppel argument where the statute gives the court discretion to extend the limitation period. However, the absence of such statutory jurisdiction in the *Wills Variation Act*, in my opinion, does not preclude the court from exercising its equitable jurisdiction in considering the remedy of estoppel. (para. 54)

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Harvey J. held that the requirements for promissory estoppel appeared to be met. He thus refused the application by the defendant to dismiss the case as being out of time. The plaintiff was permitted to proceed to trial.

This decision was cited with approval in the later decision of *Chan v. Lee Estate* 2004 BCCA 644. In this later case, the trial judge found that estoppel, by conduct effectively extended the *WVA* limitation period by preventing the defendants from pleading the action, was statute-barred.

This case involved a Chinese family where the deceased father gave his sons the lion's share of his estate. His daughters brought their *Wills Variation Act* claim 3 years after probate had been granted. The sons opposed the claim on the basis it was out of time.

The trial judge found the sons were estopped by their conduct, concluding it would be "wholly inequitable" to permit the sons to succeed with their defence that the daughters' action was statute-barred. This finding was upheld by the Court of Appeal.

Newbury J. A., speaking for the court, at paragraph [31] said as follows.

...the fact is that the trial judge found on all the evidence that a case for estoppel by conduct was "overwhelmingly" made out. He found as a matter of fact that from at least the time of Mr. Lee's death until February 1999, the sons had led the daughters to believe that they would address the "obvious unfairness or imbalance" in the distribution of the father's estate, while at the same time they "stalled and put off the uninformed plaintiffs whenever they could, and even later on when at least William had no intentions of doing anything" (para. 134). In all the circumstances described by the trial judge, I see no error in the conclusions he reached. I would not accede to this ground of appeal.

Needless to say, such late claims are clearly precarious. For example, the court refused to accept the claim of estoppel in *Westover v. Cairns* 2004 BCSC 1572. In that case a child commenced a *WVA* action slightly out of time. The child had hired a lawyer shortly after probate was issued and the court found he had clearly contemplated a *WVA* claim at that time. The court found nothing in the correspondence or conduct of the other beneficiaries to evidence an unambiguous promise that they would not rely upon the limitation period. Thus the claim was dismissed.

Lack of Proper Notice of Intention to Apply for Probate

The third exception involves section 112(1) of the *Estate Administration Act* RSBC. This section requires an applicant for a grant of probate or letters of administration to give notice of the intended application to all those eligible to make a claim under the *WVA*. This notice is clearly designed to afford potential *WVA* claimants a reasonable time to consider their options.

Desbiens v. Bernacki 2008 BCSC 696 dealt with a case where the deceased's children did *not* receive the notice as required under the *Estate Administration Act*.

The case involved a deceased who had left his four young children in the care of the Ontario Children's Aid Society. Other than brief and occasional contact, he had almost no contact with his children for the rest of his life. He moved to British Columbia where he remarried in late 2003, dying shortly thereafter. By his Will he appointed his lawyer as his executrix and left his estate to his widow.

In giving Will instructions to his lawyer, the deceased had explicitly denied having any children. It was thus only after death that the executrix lawyer learned of the children when she found the names and addresses of three children among his papers. She mailed the required notices to those addresses.

The children learned of the death long after the passage of the limitation period and commenced a *WVA* action. The executrix and widow sought to have the children's claims dismissed as statute-barred.

The plaintiff children argued that the executrix had failed to take reasonable steps to give them proper notice as required under the *Estate Administration Act* and the defendants were therefore estopped from invoking the limitation period in defence of the claim.

The court conducted a detailed analysis of the steps taken by the executrix in an effort to comply with the notice provisions in section 112 of the *Estate Administration Act* and ultimately agreed with the plaintiffs' position.

The court ruled that section 112 requires the applicant to take at least *reasonable* steps to determine the correct addresses of the intended recipients. More is required than merely dropping an envelope into a mailbox. Here the accuracy of the addresses was questionable as they were for individuals who had long been out of touch with the testator. Therefore the court ruled the executrix was required to take some further reasonable steps to confirm that any notices sent would likely reach the intended recipients.

The court was critical that the executrix had not applied for an order

under section 112(3) of the *Estate Administration Act* for directions by the court with regard to the notices to be sent. In particular the court noted she had presented no evidence of any steps taken to verify the currency of the addresses in the address book or of any research to find the plaintiffs' current addresses. The court found that all of the addresses were long outdated and that none of the four children received any notice.

Citing the case of *Chan v. Lee*, the court ruled in favour of the timeliness of the children's claim. The court ruled that the executrix's failure to take reasonable steps to determine the correct addresses was conduct that estopped or prevented the defendants from raising the limitation defence. Bracken, J. held that the plaintiffs' claim should not be dismissed as statute-barred but rather should proceed to trial.

Conclusion

In conclusion, we should emphasize the utmost importance of commencing any action under *Wills Variation Act* in a prompt and timely manner. As a practical matter, it is always far more difficult to effectively realize any judgment, once the horse is out of the barn. Above all, however, as illustrated in the above cases, in any late claim brought after the 6-month limitation, it will be an extreme uphill battle to convince the court that the action should proceed. ▲

Trevor Todd restricts his practice to Wills, estates, and estate litigation. He has practised law for 33 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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