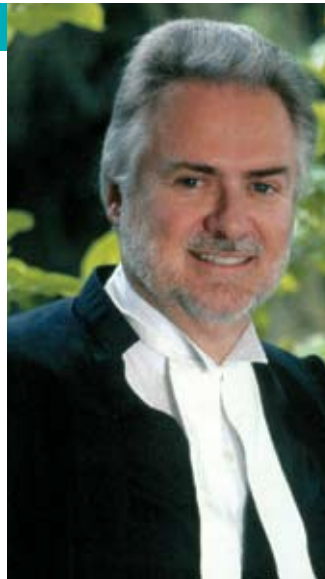


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“Standing” in Estate Litigation



The question of legal standing is crucial in estate litigation.

A person must have legal standing—in lay terms, that person must be legally *eligible*—to bring a particular court action. Legal standing is an essential prerequisite to bringing a successful action.

The issue of legal standing is a question of law—the issue being whether the court has jurisdiction to hear and decide the claim made by this particular plaintiff.

For the court to recognize the claimant has legal standing, that claimant must have a legal interest in the outcome of the case. The common law has established that a claimant has such an interest if the outcome of the case will either advance or curtail that claimant’s rights.

As Professor Hogg stated in *Constitutional Law of Canada*, Fourth edition, section 56.2:

The question whether a person has “standing” (also known as *locus standi*) to bring legal proceedings is a question about whether the person has a sufficient stake in the outcome

to involve the judicial process. The question of standing focuses on the position of the party seeking to sue, not on the issues that the lawsuit is intended to resolve.

A third party has no standing to become involved in a legal dispute between others. This principle applies to all private court actions, whether the legal dispute involves a claim for damages for personal injury or a dispute over a transfer of property by way of gift or testamentary disposition.

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Estate Litigation

Historically, the executor of an estate was the person solely responsible to “get in” or collect the testator’s estate. The executor, too, was the person solely responsible to distribute that estate, once collected.

Ultimately, to fully discharge his or her responsibilities, the executor had to account to the beneficiaries both with respect to the “getting in” of the assets and with respect to the distribution of those assets once “got in.”

In time, our courts developed the principle that the executor *alone* had exclusive authority to act on behalf of the estate in bringing a court action to collect assets. Thus the beneficiaries had little or no authority to act on behalf of the estate, even though as a practical matter they could be greatly affected by what assets were collected and distributed by the executor.

Many older BC cases held that a beneficiary under a Will had no legal standing in relation to claims involving disputed estate assets. It was as if the beneficiary were a complete stranger to the estate. The cases held it was the sole responsibility of the executor to claim the disputed assets and the beneficiaries had no legal standing to do so.

Examples of Standing in Estate Litigation

Neuman v. Chudjak, 2001 BCSC 957, involved a claim by a stepson of the deceased. First, he claimed that certain lands, legally owned by the deceased, were actually held in trust for him. He made this claim on the basis he had contributed to the purchase of the lands.

Second, the stepson claimed the deceased’s Will was invalid due to lack of capacity and undue influence by the executor and her husband

(who also happened to be the residual beneficiaries).

Notably, if the Will were set aside, the plaintiff had no potential claim to inherit on an intestacy because he was not a blood relative.

The court found the plaintiff had standing to bring an action for trust, but no standing to maintain the action to set aside the Will. Any claim to set aside the Will did not advance the plaintiff's legal interest, thus he was in the same position as stranger to the Will.

Another example is *Rotvold v. Rotvold Estate*, unreported, November 27, 1991 Doc. Cranbrook 120901, (B.C.S.C.). In this case, the court struck out part of a claim contesting a Will and seeking to set aside an *inter vivos* transfer by the deceased. The court struck out this latter claim, holding that the plaintiff had no status to contest the transfer. The court found that because during her lifetime only the transferor had standing to make such a claim, therefore after her death only her executor could do so.

Statutory Claims

Where a statutory claim is created, the statute in question gives standing to any potential claimant who has a claim under the statute. Thus the *Wills Variation Act* gives standing to either the spouse or child of the deceased to make a claim contesting the Will on the basis the Will did not adequately provide for that particular claimant.

No other disappointed heirs—for example, siblings or stepchildren—have standing to bring such an action because they are not included within the definition of eligible claimants under the *Wills Variation Act*.

Standing in Claims Based on Undue Influence

The landmark decision of *Bellegarde v. Murcock* (1978) 25 N.S.R. (2d) 375 (N.S.C.A.) clearly established that a person interested in an estate may maintain an action for undue influence against the recipients of gifts from the deceased. In this case, the claimant was *not* the deceased's personal representative.

That decision followed an older line of authorities establishing that a person interested in an estate, although *not* the personal representative, may sue if, but for the lawsuit, assets would be lost to the estate. This same reasoning was adopted in *Fairchild v. Mitchell* (1959) 43 M.P.R.9 and other subsequent cases, including *Nietsche v. Nietsche* 2007 BCSC 172.

In *Nietsche*, the testatrix had sold her home for \$270,000 in 1997. In 1998 she signed a Will that named all the parties as equal residual beneficiaries. Between 1998 and 2001, the legally blind testatrix signed two cheques payable to the defendants. The cheques totalled \$207,126.30 and were used by the defendants to purchase a home.

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In each case, the testatrix had signed her name but the defendant completed all other particulars. Although the testatrix had been engaged in some strange behaviour, she had never been found mentally incompetent.

After her death, her residual estate was bequeathed equally to all the parties. The plaintiff was recognized by the court as having standing to bring an action for the return of the monies on grounds of undue influence. Ultimately the action was successful and the defendants were ordered to return the monies advanced to the deceased's estate on the basis of undue influence over the testatrix.

Trust Claims versus Gift Claims

Recently in BC, the case of *Doucette v. Doucette Estate* has provided major clarification as to the standing of a beneficiary to bring an action in his or her personal right against the estate. This clarification was required

because in many similar cases, the courts had allowed such claims without the question of standing ever being raised in argument or addressed by the courts.

In *Doucette*, the plaintiff brought an action claiming that certain assets, jointly held by the deceased and others, were actually held in trust for the estate and were *not* gifts to the recipient as she asserted.

The testatrix had four children. During her lifetime, she jointly held funds totalling \$425,000 in joint investments with three of the children. In her Will, she left the bulk of her estate to one of those joint owners who was also a co-executor with another joint owner.

Litigation had been commenced under the *Wills Variation Act*. During the course of those proceedings, the disappointed child applied to amend the claim. The proposed claim was for an accounting, that is, an order requiring the surviving joint tenants to account to the estate for the funds they received as a result of the joint investments with the deceased.

The motion was initially dismissed by the Master (2006) BCSC 1657 on the basis the plaintiff had no standing to bring such an action. The Master found that the *Estate Administration Act* RSBC, subsections 2 and 14, confirmed the common law position that only the executor had standing because the executor alone was charged with getting in the testator's estate and distributing it according to the Will.

Dorgan J. allowed the appeal (2007) BCSC 289. Madame J. Dorgan recognized the plaintiff's standing to bring the action, largely on the basis that the courts had on many previous occasions allowed nonexecutors to bring actions challenging jointly held assets

Specifically the court referred to two cases, namely *Neufeld v. Neufeld* 2004 BCSC 25 and *Cooke v. Miller*, 2005 BCCA 263. In both precedent cases, the plaintiffs were not executors but rather beneficiaries under the

respective Wills. Nevertheless, both beneficiaries were permitted to maintain their actions seeking a court order that bank accounts jointly held at the time of death were resulting trusts and owned by the estate. In both cases, the accounts had been held jointly by the testator and the executor.

One final example, which arguably goes even further, is the recent Ontario case of *Nystrom v. Nystrom* 25 E.T.R. (3d) 297.

In this case, the action was brought by a potential beneficiary even before death. This claim was brought by the daughter of a mentally incompetent mother.

The court recognized she had standing to bring an action to determine the validity of joint account agreements purportedly executed by the mother while she was incompetent. She was recognized as having a legitimate interest in the question because the mother had, when previously mentally competent,

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executed a Will leaving her estate in equal shares to her children.

Because the mother was now incompetent with no hope of recovery, the Will was recognized to be of a permanent character and thus conferred a vested interest to the plaintiff that was beyond mere hope of succession. The plaintiff's standing was thus recognized during the mother's lifetime, even without a Power of Attorney.

This decision was followed in *Cornacchia v. Cornacchia* 2007 O.J. No. 157.

Conclusion

It appears clear that our courts are increasingly prepared to recognize

the standing of beneficiaries under Wills to bring actions to protect their legal interests. We expect this trend will continue, with the courts allowing nonexecutor beneficiaries to assert their rights by bringing these actions to claim property rightfully belonging to the estate. ▲

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.

Judith Milliken QC has practised law for 32 years in the areas of commercial law, criminal law, and most recently estate litigation. She practises estate litigation together with her husband Trevor Todd.