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Mr. Attorney: Don't Change the *Wills Variation Act*

In the summer of 2006, the British Columbia Law Institute delivered to the Attorney General a sweeping report entitled "Wills, Estates and Succession: A Modern Legal Framework."

Many of that report's recommendations involve well-considered and welcome changes.

Two recommendations in that report, however, appear to be ill considered and arguably contrary to public policy. Specifically, the problematic recommendations propose changing the *Wills Variation Act*.

The *Wills Variation Act* permits a spouse or child to contest a Will where it does not make adequate provision for them. The class of claimants eligible to bring such a claim includes any spouse, common law spouse, or same-sex spouse and includes both the natural and adopted children of the deceased.

The troublesome changes proposed in the report would

a. eliminate adult children as claimants unless they are unable to be self-supporting; and

b. discourage lump sum payments under the Act in favour of periodic maintenance.

The supposed "rationale" for the proposed changes is to make the law of British Columbia consistent with the law in other provinces. In fact, we say that British Columbia is actually ahead of the other provinces. Our legislation permits BC courts to bring more fairness into the law of Wills and succession by introducing the principles of equity.

The potential for inheritance conflicts has been growing, especially with the increasing number of "blended family" situations and second or even third families.

These proposed changes would reverse almost 90 years of jurisprudence enforcing the claims of adult children who have not been adequately provided for in a parent's Will. We believe it is contrary to good public policy to abolish these long-standing rights. Indeed, the only apparent rationale is to provide certainty to testators and their solicitors and Notaries who do not like to see their well-crafted Wills rewritten.

In this paper, we intend to briefly sketch the background to the legislation and illustrate, with real life examples, the clear need for such legislation.

Today's Society

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

The question of a child's "entitlement" to share in a parent's estate often provokes a lively discussion. Thus it is common, in our experience, for people to criticize the *Wills Variation Act* because it permits mere "malcontents" to contest a Will. It is said these ingrates should instead be grateful for whatever their parents have given them.

Unfortunately, such critics simply do not appreciate that many successful claims involve disempowered individuals who have been raised in dysfunctional families. Too often, the last act of abuse by an abusive parent is to disinherit his or her child.

For example, we have had a couple of cases involving childhood incest victims who have been

disinherited as adult women, yet they will carry the scars of this devastating abuse all their lives. This is just one type of claim that would be eliminated if the legislation is passed.

Let us begin by reviewing three recent successful claims that would be eliminated by the proposed changes. Perhaps these examples will help illustrate the dangers of "tinkering" with this legislation—particularly in an increasingly diverse and multicultural society.

1. The Cultural Bias for Males Over Females—Preferring Sons Over Daughters in Wills

Many cultures including, for example, South Asians and Chinese, commonly favour sons over daughters, both in life and in death. The decision of *Prakash and Singh v. Singh et al*. 2006 BCSC 1545, involves such a case. Most of the mother's estate went to her sons. They were left bequests of $260,000 each, compared to the $10,000 left to each of three daughters.

Mr. Justice Rice increased the daughters' bequests to an almost equal share with the sons. In doing so he eloquently stated:

> In modern Canada, where the rights of the individual and equality are protected by law, the norm is for daughters to have the same expectations as sons when it comes to sharing in their parents' estates. That the daughters in this case would have this expectation should not come as a surprise. They have lived most of their lives, and their children have lived all of their lives, in Canada.
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> A tradition of leaving the lion's share to the sons may work agreeably in other societies with other value systems that legitimize it, but in our society, such a disparity has no legitimate context. It is bound to be unfair, and it runs afoul of the statute of this Province.

2. Disinheriting Gays and Lesbians

Peden, Smith et al. 2006 BCSC 1713 involved a deceased who left 3 sons—2 heterosexual sons and 1 gay son. The deceased's Will provided that the 2 heterosexual sons would receive an outright inheritance, whereas the gay son would receive only the income of a share to be held in trust during his lifetime. The capital of his share would be left to his two brothers after his death.

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The drafting lawyer gave evidence that the deceased had been greatly upset that his son was gay and actually had wanted to completely disinherit him. The court concluded that it was the son's gay lifestyle that had thus caused the deceased to dispose of his estate as he did.

The court varied the Will and converted the life estate to be an outright direct gift to the gay son. In so doing, the court observed "homosexuality is not a factor in today's society justifying a judicious parent disinheriting or limiting benefits to his child."

3. A Child Abandoned to a Life of Abuse and Deprivation by Her Mother

Austin v. Janzen Estate involved a plaintiff who was born illegitimate. Her mother, rather than putting the girl up for adoption, farmed her out to an abusive home. Over the years, the mother paid $20 per month to have her daughter raised by this abusive family. She visited occasionally until she had a new boyfriend.

She continued to repeatedly reject this daughter. For example, their last contact was when the 14-year-old daughter wrote to ask for money for badly needed dental treatment. The mother wrote back that she could not afford the money because she needed it to paint the nursery for the new baby she and her husband were about to adopt.

This mother effectively abandoned the plaintiff, yet went on to be a loving and supportive mother to two adopted daughters. Not surprisingly, these adopted daughters were well educated and enjoyed happy, successful marriages and lives. On the other hand, the plaintiff left school when she was young and struggled through abusive marriages and many other traumatic events.

At age 60, the plaintiff learned her mother had died leaving her very sizable estate to her two *adopted* daughters. To the plaintiff, she left $100.

The court varied the Will to provide for an equal one third to each daughter.

Background: Testamentary Freedom at Common Law

Any discussion of the *Wills Variation Act* requires an understanding of the English common law underlying the legislation.

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 to 1900) when little property was actually disposed of by Will.

During that time, few people actually had assets to leave in a Will. 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 a testator was free to decide the beneficiaries to 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. Even today 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.

This English common law was inherited by all of the former English colonies, including Canada. It is noteworthy that this common law approach is in stark contrast to most of the rest of the world. The law of most civil law countries (all of Europe but for England, South America, Africa, Japan) requires that the majority of a person's estate pass on death to their spouse and children.

In civil law countries, which include most of the non-English-speaking world, 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 smaller portion of his or her estate. The credo seems to be "you had them, you pay for them."

In our common law world, this historic common law doctrine of testamentary freedom has been modified by statutes such as the *Wills Variation Act* that permit the spouse or children to make a claim against the estate in appropriate circumstances. Unless there is a successful statutory claim brought under the *Wills Variation Act*, however, the principle of testamentary freedom still prevails at common law.

Eliminating the claims by adult children would prevent the courts from doing equity in appropriate circumstances.

We contend that our Canadian society should not be slaves to the historic concept of testamentary autonomy. The common law is always focused backward and the usefulness of this outdated concept is extremely questionable.

Quite simply, the *Wills Variation Act* provides for equity to be done, where appropriate. Eliminating the claims by adult children would prevent the courts from doing equity in appropriate circumstances. It is for that reason we strongly suggest that eliminating appropriate *Wills Variation Act* claims would be a move backward, rather than forward.

It is only assets that actually form part of the deceased's estate that are subject to *Wills Variation Act* claims. Testators who are truly determined to disinherit their children may still use trusts and *inter vivos* transfers to circumvent the Act. Indeed, the rich have historically utilized trusts to circumvent the Act and other statutory law. Many will continue to do so. It is not illegal to arrange one's affairs to avoid the application of the Act altogether.

Claims under the *Wills Variation Act* by Adult Children

In our practice, claims frequently involve the children of abusive and alcoholic parents, generally fathers. We hear 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. Some become substance abusers themselves. At best, they remain emotionally damaged individuals.

Naturally, such abusive parents generally have little insight as to the lifelong effects of their mistreatment. Thus the abuser, when preparing his or her Will, will typically disinherit the children on the basis of estrangement. The handling lawyer or Notary often just accepts this statement as the truth of the matter and makes little enquiry into the history of the estrangement.

Most of us had the remarkable fortune to be raised in happy, healthy families.

A visit to the Canadian Department of Justice Family Violence fact sheet indicates much more family violence than we would wish to believe. A large body of information is available that attests to the unfortunate frequency of such dysfunctional families.

In our practice, many of the estrangement cases involve a history of physical, emotional, and/or sexual abuse by the parent or step-parent toward the child. Where the estrangement can be properly explained and put into perspective, then the adult child well may have a meritorious claim under the *Wills Variation Act*.

Two Real-Life Examples from Our Practice

Example 1 involves a claim made by the three adult independent children relating to the death of their father, Mr. M, a victim of murder.

Mr. M had been married for almost 50 years when his first wife died. He had a good relationship with his three adult children and his grandchildren. Living alone, however, he became very lonely and depressed and thus engaged 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.

…just ask any experienced teacher, minister, police officer, or doctor; they will attest to the great number of dysfunctional families.

Within 2 months, they "married" (unbeknownst to Mr. M, his "bride" was still legally married to another man). On their tropical "honeymoon," he was treated at a medical clinic for a lacerated scrotum—it appeared he had been kicked.

Shortly after the marriage, Mr. M prepared a new Will leaving his entire estate to R, and alternatively to her daughter, thus completely disinheriting his own three children.

Once back in Canada, the "bride" began to run her escort service out of their now-joint home, publishing ads that she "specialized in seniors." 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, testamentary freedom prevails and this daughter had done no wrong. Ms. R's daughter was very arguably entitled to receive the entire estate as the named beneficiary under the Will.

Fortunately, however, an application under the *Wills Variation Act* led to the court rewriting the Will to leave the estate instead to Mr. M's three adult children.

Example 2 involves a 40-year-old woman known as S. She had been adopted at age 7 by the deceased and her husband—it seems more as a servant than as a child. She was made to work long hours at her "mother's" puppy farm business. Each morning, S rose at 4.30 to feed and care for 100 animals before catching the school bus into town for school.

The deceased would routinely beat her for any perceived misbehaviour or insubordination. In extreme situations, she was denied food. The deceased wore the pants in the family and her husband, rather a more kindly man, did not intervene on S's behalf. Presumably he, too, was victimized by his wife.

S skipped school for the first time at age 16 (one Friday afternoon, to help her friend prepare for the friend's mother's release from hospital). S learned from her father that the deceased intended to beat her, so she stayed away until Sunday, hoping her mother would cool down.

When she phoned home, her mother told she had already burned all of her possessions and would be putting her dog down. The mother said, "You came into the house with nothing and you will leave with nothing."

This deceased not only disowned S, she obliged her husband and other family members to disown S, as well. (Fortunately, one kindly aunt defied this order. She, too, paid the price for disobedience.)

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.

He beat her and starved her and the children while she was pregnant—gambling all their money away.

Their third child, a son, was born severely disabled. S finally summoned the courage to leave her husband and raised her children on her own for 24 years. She continues to care for this adult son who cannot speak and is incontinent. He weighs only 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 son was at eligible government care as a child. Once he became an adult, however, this eligibility ended and she continued to care for him full-time rather than put him into an institution.

S was a very kind person who repaid her aunt's kindness many times over. She also 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 had been estranged for 25 years.

We commenced a *Wills Variation* claim on her behalf. Once the proper facts were brought to the attention of the executor and beneficiaries of the estate, the case was settled with S receiving one half of the net estate.

Summary of Basic Principles: The *Clucas* Decision

Madam Justice Satanove, in *Clucas* v. *Clucas Estate* 29 E.T.R.(2d) 222, did an excellent summary of the basic principles of the *Wills Variation Act*.

Let us paraphrase those principles briefly.

- 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 or her 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 or her 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.

If the current right to bring such actions is curtailed, it will be particularly damaging to those already disempowered.

Conclusion

The purpose of this article has been to demonstrate there are many circumstances in which the *Wills Variation Act* allows equity to be done for adult children. That ought not to change.

In effect, the British Columbia Court of Appeal has specifically recognized dysfunctional families in their decision *Gray* v. *Nantel* 2002 BCCA 94. In permitting the claim of an estranged child, Mr. Justice Donald, spoke for the court:

> 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.

For close to 90 years, adult independent children have had the right for equity to be done, in appropriate circumstances, under the *Wills Variation Act*. The five actual cases discussed in this article represent a small sampling of the legitimate claims brought under this Act by independent adult children.

If the current right to bring such actions is curtailed, it will be particularly damaging to those already disempowered. It will eliminate the claims of the disempowered, whether they be the daughters of Asian-Canadian families, gays, or victims of family abuse.

If you agree with the position in this article, we encourage you to write to the Attorney General and to let your Provincial MLA know of your concern. ▲

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