

HOW YOUR WILL CAN BE CHANGED AFTER YOU DIE

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In the last issue of *Letter of the Law* we discussed how ownership of assets in more than one jurisdiction can complicate the drafting of a will. Another issue to be considered in any estate plan is whether or not your assets are subject to dependent relief legislation such as British Columbia's *Wills Variation Act* (WVA).

Historically, British common law followed the principle of testamentary freedom: everyone was free to choose how they distributed their estate's assets when they died, even if this distribution (such as disinheriting children in favour of complete strangers) was morally repugnant to an objective observer. However, the twentieth century gave rise to the concept of dependent relief legislation which provides that family members who are financially dependent on a deceased person should be provided for in the will. All provinces in Canada have adopted dependent relief legislation.

The central principle of B.C.'s *Wills Variation Act* is contained in Section 2 which states:

... if a testator dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's spouse or children, the court may, in its discretion, in an action by or on behalf of the spouse or children, order that the provision that it thinks *adequate, just and equitable in the circumstances* be made out of the testator's estate for the spouse or children. [authors' italics]

The WVA is unique compared to dependent relief legislation in other provinces in two respects: it allows for independent adult children who are not financially dependent on the testator to make a claim to vary a will *but it does not permit* others who may be financially dependent on a testator, such as stepchildren, to make similar claims.

When interpreting the WVA a court considers the following principles:

1. The phrase "adequate, just and equitable in the circumstances" is an objective test to be applied in accordance with society's reasonable expectations of what a parent would do in the circumstances, rather than a subjective test of what is reasonable in the testator's opinion.
2. "Adequate" and "proper" are two different concepts. (A small gift may be "adequate" but, if an estate is very large, it may not be "proper".)

3. A court first considers whether a testator has legal obligations to his or her spouse and children. For example, if a spouse and children are entitled to support under the *Family Relations Act*, it is likely that they will have a claim under the WVA.
4. Children and spouses who were financially dependent on the deceased person at the time of his or her passing may also have a moral claim on the estate. It is possible that independent adult children can make similar, albeit weaker, claims.
5. There are many circumstances that can give rise to a deceased's moral obligation to recognize the claims of adult children in a will. These include: an adult child's disability; a deceased's assurance to an adult child of an inheritance; or an implied expectation by the adult child arising from a very large estate.
6. While it is still possible to disinherit adult children (see *Letter of the Law*, Spring, 2008), the testator must have valid and rational reasons for doing so that are based on facts logically connected to the act of disinheritance.

If you are preparing a will that provides for your spouse and child in only a limited way, distributes assets unequally to your children, or makes a substantial bequest to persons other than your immediate family, it is important to consider if the WVA's provisions can apply. The cost of subjecting your estate to a WVA action can substantially reduce the amount your beneficiaries will receive.

Amendments to the *Wills Variation Act* may be coming under the proposed *Wills, Estates and Succession Act* which was introduced in the Legislative Assembly last year but did not proceed to third reading. If and when this legislation is proclaimed into effect, it will significantly overhaul the current legislative framework for succession, reducing the number of acts involving estate law from seven to one.