

ESTATE PLANNING: DISINHERITING BENEFICIARIES

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Estate planning is wrought with difficult choices to be made in the contemplation of one's own death. One of the difficult choices is reducing the entitlement of a spouse or child in a will. The reasons for this could be varied, some of which may be justifiable. What is important to understand, however, is that affected persons can apply to court to vary a will and make a claim against estate's assets. As such, careful estate planning must be done to avoid this consequence if you want to disinherit or reduce the entitlement of a beneficiary.

The applicable legislation is the *Wills Variation Act* ("WVA"). Only two groups of people in B.C. have the right to make a claim to vary a will. First, children can claim under the WVA, including adopted children and "illegitimate" children.

The second class of persons entitled to make WVA claims are spouses. The WVA defines a spouse as someone who is married or as someone:

... living and cohabiting with another person in a marriage-like relationship, including a marriage-like relationship between persons of the same gender, and has lived and cohabited in that relationship for a period of at least 2 years.

In addition to that definition, the courts also require that any spouse must have cohabited with his or her partner immediately before that partner's death but separated spouses who are still legally married at the time of death may still be entitled to claim under the WVA. If, however, a divorce has been obtained before a testator's death, a former spouse has no status to apply and any gifts to that spouse in the will are likely invalidated.

Section 2 of the WVA states that a will must make "adequate provision for the proper maintenance and support of the testator's spouse and children" and, where the will fails to do so, the court can intervene and make an order that is "just and equitable" to vary the will. Thus, "adequate provision for proper maintenance and support" is the threshold that must be met for any will that purports to disinherit or reduce the entitlement of a spouse or a child.

The leading case on the WVA is the Supreme Court of Canada's decision in *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807. Canada's highest court held that the test in determining whether adequate provision for proper maintenance and support has been made is: (1) whether the legal obligation to

provide for the spouse and children has been met; and (2) whether the moral duties of the testator have been met. In addition, a court may also consider other various factors.

Different considerations apply when children are claiming under the WVA, especially in the case of adult children as it is well-settled law that a testator owes legal and moral obligations to minor children.

Currently, the B.C. government is considering legislative changes to the WVA that would exclude self-sufficient adult children from claiming under the WVA (with exceptions for claims related to illness or education). Further changes being considered include allowing step-children to claim if they were dependant on the deceased for at least one year immediately prior to death. Another notable change might be to restrict child claimants of any age to “reasonable and necessary maintenance,” suggesting a different standard than previously provided under the WVA.

Whether or not one can disinherit or reduce the entitlement of a spouse or child depends on the whole of the circumstances. It should be remembered that one’s own determination of whether legal and moral obligations are met is not necessarily the position a court will adopt. It is therefore crucial to obtain legal advice about wills variation matters especially in consideration of the reasons for disinheriting or reducing the inheritance of a spouse or a child.