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PAPER 2.1

Wills Variation and Blended Families

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WILLS VARIATION AND BLENDED FAMILIES

I. Introduction

The provisions of the *Wills Variation Act*, R.S.B.C. 1996 c. 490 ("*WVA*") were repealed on March 31, 2014 and substantially re-enacted, in their former state, under Part 4, Division 6 of the *Wills Estate and Succession Act*, S.B.C. 2009, c. 13 ("*WESA*"). The variation provisions in the *WESA* continue to provide some special and arguably greater challenges for blended families than the traditional nuclear family (defined as a husband and wife in a single marriage for each, with all children of both being the children of the couple), which is becoming less the norm. Providing variation rights to spouses and children who are not related to each other by blood, although they are related to the will-maker, presents challenges to the courts when, under the variation provisions, they are seeking to balance the respective and competing rights, entitlements and interests.

II. Wills Variation Under the *WESA*

As a reminder, s. 60 of the *WESA* provides as follows:

> **Maintenance from estate**
>
> Despite any law or enactment to the contrary, if a will-maker dies leaving a will that does not, in the court's opinion, make adequate provision for the proper

> maintenance and support of the will-maker's spouse or children, the court may, in a proceeding 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 will-maker's estate for the spouse or children.

Under the section, the deceased's spouse or children (biological or adopted) have standing to make a claim, provided the claimant is able to prove to the court that the will-maker failed to meet his or her legal and/or moral obligation to the claimant.

III. Key Wills Variation Challenges in the *WESA*

There are provisions of the *WESA* that affect several procedural issues relating to wills variations. Some key points are highlighted below.

A. Limitation Periods for Commencing and Serving Claim

The limitation period for commencing a wills variation claim under the *WESA* is 180 days after the issuance of the grant of probate: s. 61(a). In addition, unless the court otherwise orders, the Notice of Civil Claim must be served on the executor no later than 30 days after the 180 day limitation period for filing a claim expires: s. 61(b).

Under section 155 of the *WESA*, the executor must wait 210 days before distributing the estate, which dovetails with the limitation periods under the *WESA* (180 days to commence a claim and another 30 days to serve the executor with the claim). Where an executor has made distributions before being entitled to do so, even though done in ignorance of the statutory provision, the court has held that the executor must personally repay the distributed funds back into the estate or post security for amounts distributed prior to the permissible period (see *Stevens v. Wood Estate*, 2013 BCSC 2380).

B. Filing of Certificates of Pending Litigation

Under the *WESA* there is no requirement to file a Certificate of Pending Litigation (a "CPL") over property in an estate. This step is now optional, at the choice of the plaintiff: s. 61(5) of the *WESA*. If, however, the plaintiff chooses to register a CPL against the title to the Deceased's land, and potentially make a claim to an asset *in specie*, the registration must be done within 10 days of the filing of the Notice of Civil Claim.

C. Prohibition Period for Distribution

If there are no proceedings commenced that affect the distribution of the estate (such as a variation claim or a determination of whether an individual is a beneficiary or intestate successor of the estate), a distribution can only be made prior to the 210 day period if all of the beneficiaries and intestate successors who are interested in the estate consent. In circumstances where unanimous consent cannot be obtained, an application can be made to the court for such an order (see: *Henney v. Sander*, 2014 BCSC 889).

If proceedings have been commenced then, pursuant to subsection 155(2) of the *WESA*, no distributions can be made without the consent of the court.

The *WESA* enables the use of multiple wills in an estate plan. If there are multiple wills and only one is being probated, that could create some uncertainty with respect to protections for an executor under the non-probate will, who is distributing the estate governed by the non-probate will. By not probating, the 180 day limitation period for bringing a claim for a variation of that will would never be triggered and a claim remains alive in relation to the assets passing under the non-probate will. Further, there would be no expiry of the 210 day period on prohibition against distribution, such that a distribution after the 210 days would protect the executor on the distribution. The fact that there is no expiry of a limitation period for varying the non-probate will leaves the possibility of the executor and the beneficiaries thereunder being potentially exposed for an indefinite period.

If a variation claim is brought in an estate where a will is probated, it is possible that the variation claim would force the second will that was intended not to be probated, to also be probated. This could be done by the claimants compelling the executor to probate the non-probate will. This would of course upset the probate fee planning intended by the use of multiple wills but more importantly, it would subject all assets of the will-maker, regardless of the will, to the variation claim.

D. Definition of Spouse

The *WESA*, when read together with the *Family Law Act*, S.B.C. 2011, c. 25 ("*FLA*"), sets out who qualifies as a spouse for advancing a wills variation claim.

Section 2 of the *WESA* provides as follows:

> **When a person is a spouse under this Act**
>
> 2 (1) Unless subsection (2) applies, 2 persons are spouses of each other for the purposes of this Act if they were both alive immediately before a relevant time and
>
> a) they were married to each other, or
>
> b) they had lived with each other in a marriage-like relationship for at least 2 years.
>
> (2) Two persons cease being spouses of each other for the purposes of this Act if,
>
> a) in the case of a marriage, an event occurs that causes an interest in family property, as defined in Part 5 [Property Division] of the *Family Law Act*, to arise, or
>
> b) in the case of a marriage-like relationship, one or both persons terminate the relationship.
>
> (2.1) For the purposes of this Act, spouses are not considered to have separated if, within one year after separation,
>
> a) they begin to live together again and the primary purpose for doing so is to reconcile, and
>
> b) they continue to live together for one or more periods, totalling at least 90 days.

Two persons are spouses of each other for the purpose of the *WESA* if they were both alive immediately prior to the will-maker's death and they were married or had lived in a marriage-like relationship for at least the two preceding years.

WESA introduced a change to the definition of spouse in relation to the cessation of spousal status. Under s. 2(2)(a) of the *WESA*, married spouses cease to be spouses if "an event occurs that causes an interest in family property, as defined in the *FLA*, to arise".

Section 81(b) of the *FLA* addresses when an interest in family property arises, namely on separation. Section 81 provides:

> **Equal entitlement and responsibility**
>
> 81 Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [Pension Division],
>
> a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and
>
> b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

Separation ends a spousal relationship, even where the parties remain married. For a marriage-like relationship, the termination of the marriage-like relationship ends the spousal status.

Previously, under the *WVA*, a legally married but separated spouse still had standing to apply for the variation of the deceased spouse's will. The length of the separation and the division of property rights upon separation were factors that could affect the award but they did not bar a claim. However, under the *WESA*, as soon as property division rights arise under the *FLA* (in other words, on separation), a previously qualified spouse automatically loses the right to apply for a variation of the will-maker spouse's will.

There is no definition of separation *per se*, or a statement of what constitutes separation, under the *FLA*. Subsection 3(4) of *FLA* however provides as follows:

> **Spouses and relationships between spouses**
>
> 3 (4) For the purposes of this Act, …
>
> a) spouses may be separated despite continuing to live in the same residence; and
>
> b) the court may consider, as evidence of separation,
>
> (i) communication, by one spouse to the other spouse, of an intention to separate permanently, and
>
> (ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

It appears that the intention of permanency of separation held by one spouse alone is sufficient to trigger the ability of the spouses to make a claim for the division of family property under the *FLA* and as a result, the existence of the intention by one spouse ends the entitlement of the surviving spouse to be a claimant under the *WESA* for a wills variation.

Subsection 2(2.1) of the *WESA* does expressly allow for reconciliation after separation. Therefore, if the spouses who have separated live together for at least 90 days prior to death of one spouse, with the primary purpose being to reconcile, they effectively re-qualify as spouses. This provision is a codification of the principle that reconciliation should defeat separation, as recognized by the court in *Tran v. Novix*, 2003 BCSC 2032.

As can be seen from the case below, the determination of spousal status is an exercise that is very dependent on the assessment of the specific circumstances of the particular relationship. The case law that was decided under the *WVA* related to finding a marriage-like relationship and when separation occurs, continues to be applicable under the *WESA*, in addition to the cases decided under the *FLA*.

In *Richardson Estate (Re)*, 2014 BCSC 2162, a case decided under the *WESA*, the applicant for a grant of administration asserted that she was the common law spouse of the deceased, over the objections of the deceased's brother. The court found that spouses do not need to cohabit in the same home in order to be found to be in a marriage-like relationship. In *Richardson Estate*, the couple each maintained separate residences in different cities. However, the court found other indicia of a marriage-like relationship, including: the applicant gave advice to the deceased about his finances; the applicant was named as a beneficiary of an RRSP and investment account of the deceased; the couple had an intimate relationship spanning 15 years; the applicant and the deceased presented themselves as a couple and the community accepted them as an exclusive couple; and there was some financial comingling between them. The court attributed the lack of cohabitation in a single residence to the necessity of the couple to attend to work and family obligations in different cities.

Under the *WVA*, it was possible to have two persons claiming as the testator's spouse. While the definition of spouse under the *WESA* at first blush lends itself to the interpretation that a will-maker can only have one spouse at any given time, changing family dynamics and recent court decisions suggest that a will-maker can leave behind multiple spouses, each of whom would have a right to make a claim for wills variation, provided that each person claiming spousal status is able to meet the definition of a spouse under the Act.

Re Connor Estate, 2017 BCSC 978 involved a deceased ("Patty"), who was in a relationship with a married man ("Joe"). Patty and Joe had dated for 24 years; however, the two lived in separate domiciles, did not have joint bank accounts, and undertook their own separate domestic tasks. Nevertheless, after Patty passed away, Joe sought a declaration that he was Patty's spouse pursuant to the *WESA*. Even though Joe was married to another person, and lived in a separate residence from Patty, the BC Supreme Court found that Joe and Patty were spouses under the *WESA*. In its analysis, it appears that this case interprets the *WESA* definition of what constitutes a spouse very broadly, going further than jurisprudence relating to spouses in other provinces.

Interestingly, the BC Supreme Court in *Robledano v. Jacinto*, 2018 BCSC 152 appeared to implicitly read down Kent J.'s decision in *Connor Estate*. Fleming J., in *Robledano*, held that, pursuant to *Connor Estate*, the fact that two people do not live together "under the same roof" or have joint finances might, without more, militate against a finding of a marriage-like relationship. Fleming J. then went on to explain why, despite living together only part time, the deceased and her girlfriend were in a marriage-like relationship and were spouses under s. 2 of the *WESA*.

One of the tasks for an executor is to determine if a person qualifies as a spouse and if notice under s. 121 of the *WESA* must be given to that person. Determining if parties are spouses has always been challenging. Even where the will identifies a person as a "friend," the court may find the friend to be a spouse: *Griese v. Syvret* 2013 BCSC 1601. It may be difficult in some cases for an executor to make that assessment, given the factual analysis that each case requires. However, if the executor fails to give notice to a person who might qualify as a spouse, then the wills variation limitation period would not start to run if the person is found to be a spouse. A distribution by an executor in those circumstances might not provide the executor with the statutory protection of distribution after 210 days.

IV. Wills Variation Law Under the *FLA*

A. General

The most significant change to the law of wills variation was a result of the former *Family Relations Act*, R.S.B.C. 1996, c. 128 ("*FRA*") being replaced by the *FLA*.

Tataryn v. Tataryn Estate, [1994] 2 S.C.R. 807 remains the leading case guiding the exercise of the court's discretion under s. 2 of the *WVA* (now s. 60 of the *WESA*). The Supreme Court of Canada held that a testator was required to meet the legal and moral obligations that he owed to the claimant spouse or child. In determining the legal obligation owed to a spouse, the court directed that judges have regard to the legal obligations owed by a testator to the surviving spouse under applicable divorce and family law property division legislation.

When the former *FRA* was in force, only married spouses had a right to a division of family assets whereas common law spouses were limited to spousal support under the legislation and to making equitable claims. Now, under the *FLA*, both married spouses and those living in a marriage-like relationship are entitled to the division of family property on an equal footing.

Under the *WVA*, the legal obligations owed to a married spouse as opposed to those owed to a common law spouse differed, as reflected in the different rights under the *FRA* for married and common law spouses. Now spousal claims under the *WESA* are treated in the same manner, regardless of whether the spouse was married to the will-maker or living in a marriage-like relationship with the will-maker, as both have the same family property division rights under the *FLA*. The previous impediment for a common law spouse to seek an outright share of the assets on a variation claim, as was noted by the court in *Picketts v. Hall (Estate)*, 2007 BCSC 133; overturned 2009 BCCA 329, would no longer exist.

Furthermore, for all spouses, whether married or common law, the determination of the legal entitlement pursuant to the *FLA* is an entirely different exercise than that applicable under the *FRA*. The former analysis that was done (for example by the trial court in *Saugestad v. Saugestad*, 2006 BCSC 1839, varied 2008 BCCA 38) is no longer applicable. Rather, the court on a spousal variation claim now applies the provisions under Part 5 of the *FLA* and divides the value of family property, taking into account the various factors (such as excluded property under s. 85) and other provisions (such as family debt under s. 86) that govern property division.

It is now possible under the *FLA*, that a spousal relationship be of considerable length but there is very little property division available to the non-titled spouse because the assets brought into

the relationship by the titled spouse did not increase in value over the course of the relationship. Therefore, the legal obligation owed under the *FLA* may be limited to spousal support but no asset division (which was effectively the situation that governed common law spouses under the *FRA*). This fact may affect how the courts use the moral obligation component of the judicial discretion for a variation. Presumably, that would be a factor that would increase the moral obligation owed by the will-maker to the surviving spouse, notwithstanding that the legal obligation is very limited. Having said that, with the exponential increase of property values in British Columbia and the Lower Mainland and Victoria in particular over the last decade, more often than not the legal obligation owed by the deceased to their spouse would still be significant.

B. Assessment of the Legal Obligations to Spouse

In determining the legal obligation owed to the spouse, the court will consider the spouse's entitlement in a notional separation immediately prior to the will-maker's death. Accordingly, one of the considerations will be the notional division of family property immediately before the will-maker's death under Part 5 of the *FLA*. Under the former *FRA*, family assets subject to division were characterized by how they were used (whether the assets have been "ordinarily used for a family purpose"). Under the current regime, how an asset was used during the marriage is no longer determinative, as on the date of separation, each spouse is entitled to an undivided half-interest in family property.

Under the former *FRA*, a court would likely vary a will to provide the surviving spouse with the minimum amount that he or she would receive had there been property division under the *FRA* during the lifetime of the deceased (*Erlichman v. Erlichman Estate*, 2002 BCCA 160; *More v. More Estate*, 2002 BCSC 920). In respect of the application of this approach to the assessment of the legal obligations under s. 60 of the *WESA*, the following statement from Newbury J.A. in *Kish v. Sobchak*, 2016 BCCA 65 has attracted academic attention:

> [49] I infer that the analysis of legal obligation need not be a detailed or exact one, given the difficulty of drawing a direct analogy between the consequences of a marriage breakdown – which leaves both spouses with needs and obligations – and the death of a spouse. McLachlin J. stated that "there will be a wide range of options, any of which might be considered appropriate in the circumstances." (*Tataryn* at 824.) An action under the *WVA* should not normally become a proxy for divorce proceedings, complete with the elaborate features and special rules applicable to a family law trial.

While some have interpreted the statement of Newbury J.A as signalling a departure away from the notional *FLA* analysis, the Court of Appeal in *Gibbons v Livingston* 2018 BCCA 443 confirmed that the approach to the assessment of the legal obligations under s. 60 of the *WESA* remains unchanged (see in particular paras 21 to 23).

The former cases respecting short marriages and what is required to meet the legal obligation to the surviving spouse need to be considered with caution under s. 60 of the *WESA* (see, for example, *More*, where an award of less than the equal division of family assets under the former *FRA* was considered sufficient, and *Chapman Estate v. Chapman*, [1976] B.C.J. No. 257 (QL) (S.C.), where small inter vivos contributions by the will-maker to the surviving spouse were found to be sufficient to discharge the legal obligation in a short and unhappy marriage). The property division scheme under the *FLA* takes into account short-term relationships, given that it is the

increase in the value of the excluded property that is divisible and original assets brought into the relationship are excluded. However, if the relationship was short and there was a dramatic increase in the value of excluded property during that brief period, the amount of the growth in the excluded property and, consequently, the legal obligation to the spouse in a variation claim may still be high. Whether this will be tempered by the fact of the short relationship remains to be seen, given that there is no ability for reapportionment of the equal division of family property.

The former cases that assessed the legal obligation owed to non-married spouses are of little relevance in the calculation of the legal obligation under s. 60 of the *WESA*. In *Picketts v. Hall Estate*, 2009 BCCA 329, the Court of Appeal confirmed that the legal obligation owed to a common law spouse was limited to spousal support under the former *FRA* and, therefore, the claim was largely founded on the moral obligation owed to a longstanding common law spouse. As such, the court gave some consideration to the entitlement of a common law spouse on an intestacy. With the *FLA*, the common law spouse does not need, in many cases, to rely on the moral obligation to secure a proper variation award. If there has been an increase in the value of the property brought into the relationship and in the value of other excluded property during the common law relationship, the division of that increase would be the legal obligation owed to the surviving spouse. However, the analysis in *Picketts* may still be useful in assessing the moral obligation where the legal obligation calculation under the *FLA* does not result in a significant entitlement to the common law spouse.

C. Family Property and Excluded Property

In order to understand how a court considering a wills variation claim might assess the legal obligation owed to a spouse under the *FLA*, estate practitioners should be familiar with that statutory regime. Under the *FLA*, "family property" (being property owned by either or both spouses at the time of separation in which at least one spouse has a beneficial interest) is subject to *prima facie* equal division. Certain property is excluded from division under the concept of "excluded property". In the case of assets that fall within "excluded property", only the growth in the value of the excluded property during the relationship is subject to division. The original value of the assets brought into the relationship remains with the owning spouse as excluded property. The list of what constitutes excluded property also includes gifts, inheritances, insurance proceeds, and property held in a trust in which a spouse is a beneficiary and where the trust was settled by some person other than the spouse and the property was not contributed to by the spouse. The court, under the *FLA*, has the limited ability to divide excluded property in some defined circumstances, being:

1. where the family property or family debt is located outside British Columbia and cannot be practically divided; or
2. where it would be "significantly unfair" not to divide, given the duration of the relationship between the spouses and the spouse's direct contribution to the preservation, maintenance, improvement, operation, or management of excluded property. The Court of Appeal in *Azanchi v. Mobrhan-Shafiee*, 2021 BCCA 55 at para. 51 found that "[s]ignificant unfairness represents a high threshold for setting aside [a separation] agreement." By implication, the threshold for court-ordered division based on significant unfairness would likely be equally high. Further, under the new provision,

there must be a direct contribution by the claiming spouse to the excluded property itself and not just a general contribution to the benefit of the spouse owning the excluded property.

As a result, there may be circumstances where the legal obligation does not provide adequately for a spouse on a variation claim and the court will need to resort to the moral obligation to increase the amount given to the surviving spouse (e.g., *Philp v. Philp Estate*, 2017 BCSC 625).

Spouses may enter into agreements to divide property in a different manner than is provided for in the *FLA,* but the court has the jurisdiction to vary those agreements if they are "significantly unfair". As noted by the Court of Appeal in *Azanchi*, the test for a court to vary a property division agreement on grounds of significant unfairness presents a high threshold. At a minimum, it appears to be a more stringent test than was the case with marriage or cohabitation agreements under the former *FRA*. In addition, the Court of Appeal in *Azanchi* held at para. 52 that, "despite significant unfairness, an agreement should not be set aside if, for example, the parties have relied heavily on its terms in making their lifestyle choices, or have deliberately risked having to live with an unfair agreement because they placed a high value on certainty."

As for the impact of such agreements and their variability and enforceability under the *FLA* on wills variation claims brought by spouses (married or common law), in *Brown v. Terins*, 2016 BCSC 42, the court held that a cohabitation agreement ought to receive consideration, but even an agreement that is fair, solemn and well-considered is unlikely to be a complete answer to a wills variation claim.

V. Blended Family Cases Since 2014

The cases involving blended families since the *WESA* came into force on March 31, 2014, have been relatively few. They are reviewed under the headings used below.

A. Second Spouse v. First Children

In *Eckford v. Vanderwood*, 2014 BCCA 261, affirming 2013 BCSC 1729, the testator divided his estate, worth approximately $283,000, by giving 40% each to his two adult children from a previous marriage and 20% to his mother. The testator's common law spouse received nothing under the will but did receive the testator's half interest in their home by right of survivorship, which half interest was worth approximately $155,000.

The plaintiff spouse became disabled after death and sought a variation. At trial, the judge dismissed the claim, finding that adequate provision had been made for the spouse through the joint tenancy. She appealed on the basis that the court failed to take into account her change in circumstance and increased need.

The court dismissed the appeal, holding that in deciding whether a testator made adequate provision, it is the circumstances existing and reasonably foreseeable at the death of the testator that are relevant. The court found that the spouse's decline in health after the testator's death was not reasonably foreseeable. In view of the competing interests of the testator's children and mother, given the small size of the estate, the trial ruling was upheld.

In *Brown v. Terins*, 2016 BCSC 42, the testator left the residue of his estate to his two adult children from a previous marriage. The testator's common-law spouse, who resided with the testator in his Kitsilano home, received nothing under the will and brought an action seeking it be varied pursuant to s. 60 of the *WESA*.

The Kitsilano home had belonged to the testator's parents, and the testator owned it free of mortgage when the plaintiff spouse moved in around 2001. Early in the relationship, the plaintiff and testator entered into a cohabitation agreement, each agreeing to execute wills leaving their estate to their own issue. However, the plaintiff continued to live in the testator's Kitsilano home after the testator's passing, despite the will providing it to his children.

After dismissing the plaintiff's arguments with respect to the validity of the cohabitation agreement, the court found that on a hypothetical separation, the testator's legal obligation to the plaintiff would be 20% of the increase in value of the Kitsilano home during their marriage-like relationship (approximately $300,000). While the court found that the moral obligations the testator owed to the plaintiff were smaller than that owed to his children given the economic independence and benefits she obtained by living with the testator, it nonetheless concluded that by making no provision for the plaintiff the testator acted outside of the range of testamentary autonomy entitled to deference. Given this, the court found that the plaintiff was entitled to an amount of $500,000 from the residue of the estate prior to distribution to the children, and that she was entitled to reside in the Kitsilano home rent-free for two months from the date of the court's decision, at which point she was required to yield possession.

In *Wong v. Chong Estate*, 2016 BCSC 953, the claim of a second spouse, who was in poor health and of modest means, warranted a variation of the will to provide him with the entirety of the estate (which was comprised of an asset that had been previously held in joint tenancy with the spouse prior to the will-maker's severance of title) which was otherwise gifted to the adult, financially independent child, who had received significant assets outside of the will from the parent.

In *Kuzyk v. Czajkowski*, 2016 BCSC 1109, both spouses were in a second marriage. Both parties had adult children from previous marriages. The deceased's will named his three children as the beneficiaries of his estate. Prior to marriage, the parties had entered into pre-nuptial agreement where both parties agreed that their respective children would inherit the assets each owned prior to the marriage, free from any claim by the other. The plaintiff wife argued she did not understand the pre-nuptial agreement (most of which evidence the court rejected). The plaintiff also argued that she did a lot for the deceased during the last few years of his life (mainly caregiving). The court found that throughout their life, the deceased and the plaintiff conducted their affairs in accordance with the pre-nuptial agreement. Still, the court found that the deceased owed a legal obligation to provide for the plaintiff's support for the balance of her life and while she remained in their home, particularly in the context of their traditional relationship. This obligation was "akin to spousal support". The court noted that a "modest amount" would satisfy the deceased's moral obligation, and varied the will to provide the plaintiff $150,000.

In *Hagen-Bourgeault v. Martens*, 2016 BCSC 1096, the deceased left the residue of her estate to her second husband. Her plaintiff daughter from her first marriage, a 25 year old single mother of two, received no direct provision under the will except that the residue would be held in trust upon the second husband predeceasing the deceased. Should that occur, 50% would become payable to the plaintiff at age 30 and the remaining 50% at age 35.

The estate consisted of an entitlement to annuity payments under a settlement agreement from a motor vehicle personal injury claim, having a value of approximately $2,200 monthly until 2025. The husband argued it was the deceased's intention that any provision out of the estate for the plaintiff go through him, at his discretion.

The court found that the needs of the plaintiff outweighed all of the second husband's claims. The plaintiff daughter was dependent on social assistance, had no savings, and obtained groceries from the food bank once a month. Considering the impact the estate would have on the lives of each, in the court's view what was adequate, just and equitable was for the entire residue to go to the plaintiff. The surviving husband had demonstrated no financial dependence on the deceased during their short time together, and it did little to the deceased's intention to make an immediate full reapportionment in the plaintiff's favour.

In *Philp v. Philp Estate*, 2017 BCSC 625, the couple were married for 31 years. It was a second marriage for both of them and there was no child of the marriage. The deceased died leaving an estate largely comprising of a hobby farm property, which the court found had a value of $677,000 at date of death. The deceased's will provided the plaintiff husband with the right of occupation on the property, income generated from the residue of the estate and a discretionary interest in the capital of the residue of the estate (i.e., the trustee has the discretion to pay to the husband out of the capital of the estate). The deceased had five children, all of whom were financially independent adults. After the deceased's death, the husband's mental capacity declined significantly and he was living in a private assisted living facility with 24/7 care by the time of the trial of the action. The court found that there was no legal obligation owed to the spouse, but that the moral obligation owed was significant given the contributions made by the husband to the farm property, the horse business operated on the property and the deceased's care. The court found that the farm property had deep meaning and value to the children. The court awarded the plaintiff a lump sum payment of $300,000, while leaving the remaining provisions under the will unchanged.

In *Boyd v. Shears*, 2018 BCSC 194, the court considered the adequacy of provision to a surviving spouse in the context of a 34 year marriage where the will-maker left her estate residue to be split between her three children (from a previous marriage). The will-maker left a cash gift of $20,000 to her husband and stated that she did not make any greater provision because the plaintiff would be entitled to one-half of her pension. However, the deceased had actually selected a pension option under which the plaintiff was not entitled to any benefits after her death. The only significant asset in the will-maker's estate was her home valued at approximately $1.6 million. The plaintiff was 83 years old and surviving on his own pension income of approximately $2,000 per month. All parties agreed that the will failed to make adequate provision for the plaintiff. All of the parties except one agreed a just and equitable variation would give the plaintiff 40% of the residue (giving up the cash gift), with the balance to be shared amongst the will-maker's children. The court found that the agreement that had been reached by all of the parties, other than K.S., appropriately addressed the will's failure to make adequate provision for the plaintiff and that the matters raised by K.S. did not provide any legal or factual basis for a different conclusion.

In *Klotz v. Funk*, 2019 BCSC 817, the deceased left behind the plaintiff (her third and final husband of 20 years) and three adult children from two previous marriages. Her estate consisted of a half

interest worth approximately $357,000 in the house she lived in with the plaintiff and a $2,500 Canada Pension Plan death benefit.

Upon discovering she had a terminal illness, the deceased had severed the joint tenancy to the house and become tenants in common with the plaintiff. She then prepared a will that left the plaintiff with her interest to the house, on the condition that if the plaintiff either consented to the sale of the house, failed to pay operating costs for the upkeep of the house, or passed away, her interest would transfer equally to her three children.

The plaintiff sought an order to vary the will. The court declined to do so, finding that the will met the deceased's legal and moral obligations to the plaintiff. In so finding, the court looked to what the plaintiff's interest in the house would have been at notional separation under the relevant family law regime, and found that the plaintiff's interest would have been at near equal to the provisions of the will. With respect to the deceased's moral obligations, the court found that the plaintiff could enjoy the house for as long as he desired and had effectively been given a life interest to it. The court found that the deceased had placed her wishes for the plaintiff's well-being before the interests of her three children.

B. First Children v. Second Children

There have not been many cases within this context since the introduction of the *WESA.* For this reason, one has to look back to the older decisions, from which it appears that the court's approach to determining competing claims among a will-maker's children is still not definitive. Some cases have held that, absent relevant reasons for an unequal division, there is a reasonable expectation that adult children will share equally in their parents' estate (*Ryan v. Delahaye Estate*, 2003 BCSC 1081; *Laing v. Jarvis Estate*, 2011 BCSC 1082). Therefore, where the will-maker divides his estate equally among his children, the courts are likely, "as a rule of thumb", to consider such distribution to be *prima facie* fair (*Chernecki v. Vangolen*, 1996 CanLII 2046 (BC CA); *Vielbig v. Waterland Estate*, 1995 CanLII 2544 (BC CA)).

In *McBride v. Voth,* 2010 BCSC 443, the court stated that the starting point in variation claims by children against their siblings is that, barring any valid and rational reasons expressed in the will, adult independent children should share equally in their parents' estates. This proposition has been applied and followed in some subsequent cases.

In *Werbenuk v. Werbenuk Estate*, 2010 BCSC 1678, a son was the sole beneficiary of his father's estate. There was no provision for the four daughters of the deceased who were sisters to the son. One of the daughters, Ms. Derksen, was the only child from the testator's first marriage. In his will, the testator explained that he disinherited three of his daughters on the basis that two of them, Patricia and Lorraine, had already received between $20,000 to $30,000 each from him while he was alive, and because his "third daughter" had nothing to do with him while he was alive. He did not give reasons for disinheriting Ms. Derksen.

The court found that all four of the testator's daughters had been involved in his life to varying degrees. On the face of the evidence at trial, the court rejected the testator's assertion that he had given Patricia a $20,000 gift. Although it was established that Lorraine benefited from a $30,000 gift from the testator, the court found that she contributed and cared for her father's needs the most, especially as his health deteriorated. Accordingly, the court held that the

testator's reasons for disinheriting his daughters were untrue and irrational, and that he failed to consider his daughters' respective needs and overlooked their contributions to his well-being.

The court analyzed the claim of each child based on their relationship with the testator and their financial need. Beginning with the proposition that each independent child should have an equal share in the estate, the court awarded the child with the least financial need 15% of her father's estate, and the child with the most financial need 23% of her father's estate. The remaining children each received a share between 20-22% of the estate. The court took care to ensure that after accounting for financial need, the children would receive as similar amounts as possible.

Laing v. Jarvis Estate, 2011 BCSC 1082 is unique in that it deals with a dispute between a deceased's biological and adopted children. Nevertheless, the outcome was that each child was to be given an equal share in the estate. Here, the plaintiff was the adopted daughter of the will-maker, whose only significant asset was a residence, which was sold for $281,500. The deceased left everything to her natural son.

The court noted that the will did not provide an explanation for why the plaintiff was excluded. The court did refer to the notes taken by the lawyer who prepared the will, which stated that the plaintiff had had no contact with the deceased "in years", and had been advanced "lots of money" by the deceased. However, on the face of other evidence presented at trial, it was established that the will-maker and the plaintiff remained in contact over the years, often by telephone. As such, the court found that there was no valid or rational reason for the deceased to disinherit the plaintiff. The court directed that both children were to receive an equal half share in the estate.

In *Gray v. Gray*, 2012 BCSC 1310, the testator had an estate worth about $790,000. He left $10,000 to each of the three children from his first marriage, and the remainder to his son from his second marriage. Two sons from the first marriage applied to have the will varied, while the other child from the first marriage settled separately. Both brothers lacked significant assets at the time of trial. One suffered from mental illness and lived in a group home, and the other struggled financially. Both brothers were estranged from the testator at the time of death whereas the son from the second marriage had a strong bond with the testator.

The court noted that in this case, the testator was responsible for his estrangement from his children from the first marriage. The sons of the first marriage had attempted to develop a relationship with their father. Each son made trips to visit his father as the father moved around Nanaimo, Victoria, and Gabriola Island. In contrast, the father never made an effort to visit any of children from his first marriage.

Based on these circumstances, the court found that the estrangement did not negate the testator's moral duty to provide for his children, and that the testator should have actually rectified the lack of emotional and financial support provided to them over the years. Accordingly, the court varied the will, directing that adequate provision would require that half the estate go to the son of the second marriage, and the other half of the estate divided equally amongst the two sons from the first marriage, in addition to the $10,000 they already received.

In *Scott-Polson v. Lupkoski*, 2013 BCCA 428, affirming *Scott-Polson v. Henley*, 2013 BCSC 247, the mother had nine children (six from her first marriage and three from her second). Of an estate worth $775,000, she gave the three children from her second marriage each a quarter share, with the remaining quarter share split six ways between the children from the first marriage. In

her will, the mother explained that she wished to give a significantly greater share of her estate to the children of her second marriage at the expense of the entitlement of the children of her first marriage because most of her wealth was acquired during her second marriage and from her second husband's assets.

In evaluating the moral claim of the children of the second marriage for adequate provision, the court applied the analytical framework set out in *Hall v. Hall,* 2011 BCCA 354, namely, whether the deceased's reasons for unequal distribution were valid and rational. On the face of the evidence presented at trial, it was well established that the deceased's wealth was indeed mostly acquired during her second marriage and from her second husband's assets. Accordingly, the court upheld this reason for the unequal distribution made by the will and dismissed the claim for the six children, except that an additional bequest was given to a disabled child who had special needs.

In *Boer v. Mikaloff*, 2017 BCSC 21, the court found that a child adopted by other parents after birth, but who was named as beneficiary under the birth mother's will, cannot seek relief under s. 60 of the *WESA*.

In *Williams v. Williams Estate*, 2018 BCSC 711, the deceased transferred most of his assets into joint accounts and joint tenancy with his son, Brent, and made a will leaving all of his estate to Brent, to the exclusion of his other son, Ron. In addition to challenging the jointures, Ron sought a variation of his father's will. Ron and Brent were two very different individuals who never got along. Brent did not pursue post-secondary education, and worked for most of his life for CN Rail, rising ultimately to the position of train conductor. He was married at one time, but at the time of his father's death had been divorced for over 30 years. He had no children. He lived in a home in Surrey that he had owned for many years. Brent was dedicated to his father. Ron attended university and had been a chartered accountant since he was certified in 1975. He had lived in Saskatoon since that time, was married, and had four adult children. Ron worked as an accountant, university professor, and consultant. Between himself and his wife, they owned a cabin at Christopher Lake and two houses in Saskatoon. At the time of his father's death, Ron's salary was approximately $150,000 and his assets were in the range of $2 million. He described himself as good at sports and at school, and that he was perceived as the "golden boy." In his testimony, he put a strong emphasis on the values of prudence, process, and transparency.

After hearing all of the evidence, the court found that there was little evidence that was in direct conflict on the main issue: the father's stated intentions with respect to his estate. On this basis, every issue was decided in Brent's favour. The court held that despite the one-sided nature of the outcome, "this decision was not based on any poor reflection of the plaintiff but rather a testament to the strength of character of his father. Furthermore, the choices he made, while not necessary, were reasonable ones for someone in his circumstances and deserve the respect of the court.

VI. Avoiding Variation Claims with Inter Vivos Trusts

Given that the will is subject to variation, solicitors may be inclined to recommend that an inter vivos trust be used as the succession vehicle. This may be even more the case where there is a blended family and potential for a dispute amongst the family members may be increased.

The law has been relatively clear that it is possible for a will-maker to use an inter vivos trust to prevent a wills variation claim by an adult child. The courts have long stated that an adult child has no claim until after the parent's death and therefore, the parent can arrange his/her affairs such that there are no assets remaining in the estate for a variation without committing a fraudulent conveyance of his/her assets: *Hossay v. Newman* (1988), 22 E.T.R. (2d) 150 (BCSC).

Since *Hossay* (where a trust was not used as the alternate planning vehicle), there have been a number of more cases that have upheld the use of a trust that has had the ultimate effect of precluding a variation claim by stripping the estate of any or any significant assets.

In *Mordo v. Nitting et al*, 2006 BCSC 1761, the mother used a number of planning methods, including an inter vivos trust, to preclude a successful challenge by a son who was the target of disinheritance. The son sought, inter alia, to set the trust aside on the basis that the transfer out of the assets from the mother's estate was a fraudulent conveyance by her as it defeated his variation claims. The Court upheld the trust on the basis, inter alia, that the transfer of the assets to it did not violate the *Fraudulent Conveyance Act*, R.S.B.C. 1996, c. 163 ("*FCA*").

In applying *Hossay*, the Court held that estate planning to avoid a moral claim due to an independent adult under the then *WVA* does not offend the *FCA* and transactions made to further such estate planning are not fraudulent conveyances.

In *Mawdsley v. Meshen*, 2012 BCCA 91, affirming 2010 BCSC 1099, the common law wife used an alter ego trust to effect her estate plan. The trust arrangements were made with the knowledge of the common law husband of 18 years. The couple had no children together and the female spouse had three children from two prior marriages. Her wealth was largely from her second husband, with whom she had one child.

She transferred some assets to her children through joint tenancy title; she gave them some outright gifts and she also made them beneficiaries, along with another family member, of the trust into which she settled her business interests. No provision was made for the common law spouse of any assets by any mechanism.

The surviving spouse sued after death to set aside the trust on the basis that it defeated his variation claim and therefore constituted a fraudulent conveyance, to defeat any future wills variation claim by him. In its analysis, the court emphasized that without the intent to defraud someone, as required by section 1 of the *FCA*, the transaction cannot be characterized as a fraudulent conveyance:

> **Fraudulent conveyance to avoid debt or duty of others**
>
> (1) If made to delay, hinder or defraud creditors and others of their just and lawful remedies
>
> a) a disposition of property, by writing or otherwise,
>
> b) a bond,
>
> c) a proceeding, or
>
> d) an order
>
> is void and of no effect against a person or the person's assignee or personal representative whose rights and obligations by collusion, guile, malice or fraud are or might be disturbed, hindered, delayed or defrauded, despite a pretence or other matter to the contrary.

The trial judge held that the impugned transactions, including the trust, were not a violation of the *FCA*, as the deceased spouse held no intention to defeat any claim by the surviving spouse. Rather, the deceased did not believe that her spouse would advance any claim and therefore, nothing was done with a fraudulent "intention", which is a necessary requirement to find a violation of the *FCA*.

Interestingly, the court did find that the deceased spouse had failed to meet the moral obligations owed to the surviving spouse. What passed under the will was all awarded to the surviving spouse on the variation claim, although it was not a significant amount of her entire assets.

On appeal, the court considered whether a spouse has standing under the *FCA* to challenge the transfer of assets into an inter vivos trust – in other words, is a spouse a "creditor or other" under s. 1 of the *FCA*? The trial judge did not find it necessary to decide this question, given her conclusion that the deceased did not hold the intention, when she engaged in the planning, to defeat or hinder any claims by the plaintiff. The Court of Appeal held that "creditors and others" in the *FCA* does not include a person who has no claim at the time of the transfer in question. As a variation claim does not arise until the testator's death, then spouses and children are not within the ambit of the persons who get the protection of the *FCA*.

There were some facts in this case that did not favour the plaintiff's claim, including: the deceased and the plaintiff had an agreement between them that they would retain their respective assets and money on their death to provide as they wished; the plaintiff was aware that he was not being provided for in her estate, as he was present for her estate planning; and the plaintiff never questioned her planning.

In *Easingwood v. Cockroft,* 2013 BCCA 182, affirming 2011 BCSC 1154, the creation of the trust was done, not by the testator, but by his attorneys under an enduring power of attorney following the testator's incapacity. The power was general and gave the attorneys the same powers as the testator would have if competent. Again, as in *Mawdsley*, the planning through the use of the trust precluded the surviving wife from effectively pursuing her variation rights as little assets remained in the will on death.

In this case, the surviving wife was aware of the trust planning done by the attorneys and she and the testator had a marriage agreement that provided that they would each retain their assets brought into the marriage and would relinquish any claim to the other's estate. By his death, they had been married for 26 years.

The attorneys justified their creation of the trust on a number of bases, including: there was a real likelihood that one of the attorneys might die before the father, which would have rendered the power of attorney inoperative; they acted on legal and tax advice in settling the trust and its terms; they did not deprive the testator of his assets during his lifetime and they effectively followed, in the trust, his intended testamentary plan that he had set out in his will. In particular, there was a term in the will that would allow for a "top up" of funds to support the house trust that was given to the spouse in the will.

The court upheld the attorneys' creation of an inter vivos trust that took immediate effect (even though some of the trust terms did not arise until the testator's death) on the basis that they acted in accordance with their fiduciary duties to act in the best interest of the testator. They followed his expressed wishes for the disposition of his estate on his death and the trust

prevented the possible invalidity of the power of attorney and permitted a proper and orderly management of the incapable testator's affairs during his lifetime.

The Court of Appeal accepted that the *Mawdsley* decision put to rest the plaintiff's ability to attack the trust under the *FCA*. The plaintiff, on appeal, argued that the settlement of the trust was beyond the powers granted to the attorneys but this was not accepted on the facts of this case, where the trust served the testator's interests. The Court of Appeal did leave open the possibility that certain inter vivos trusts created by attorneys could be challenged:

> [54] In reaching this conclusion, I do not put an *inter vivos* trust, fully created, as one beyond challenge by those who consider themselves aggrieved by its creation. Where, for example, a trust created by an attorney has the effect of adding beneficiaries not named in a will, or avoiding a gift established by a will, or disposing of assets where the principal has chosen not to make a will and the estate would be divided as provided in an intestacy, the trust may well be challenged, e.g., under the rubric of the attorney's duty to conform to the intentions of the principal. That is, the issue of breach of fiduciary duty would loom large. All of these questions are live questions, requiring the determination of facts in a particular case.
>
> [55] My conclusion on the issue of the validity of an *inter vivos* trust such as this, created by an attorney, putting the principal's assets into the trust, is simply that there is no rule in law prohibiting that creation. Further, as commented in cases such as *Mawdsley*, and *O'Hagan v. O'Hagan*, 2000 BCCA 79 (CanLII), 2000 BCCA 79, 183 D.L.R. (4th) 30, tax planning including "estate freezes" may be prudent and, in the large sense, in the best interests of the principal.

It still remains an open question as to whether an inter vivos trust can be used by a testator to defeat the claims of a spouse, where there is no marriage agreement and no potential *FLA* claim at the time of the settlement of the instrument.