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ESTATE LITIGATION—2009 UPDATE
PAPER 3.1

Wills Variation Act Update

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WILLS VARIATION ACT UPDATE

I. Introduction

In this paper, I will discuss some of the more significant cases that have been decided under the *Wills Variation Act* ("*WVA*") since the last Estate Litigation CLE in November 2007. I have focused on three broad areas in which, in my view, the most interesting developments have taken place. These are the rights of common law spouses, the rights of adult children in blended families, and cases involving disputes between and amongst siblings. This paper is not meant to summarize every *WVA* case that has been issued in the last two years; it merely focuses on some of the highlights.

Generally speaking, the courts have continued to focus on the Supreme Court of Canada's decision in *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 in analyzing the scope of a testator's legal and moral obligation to his or her spouse and children on death. It is still rare to find a *WVA* case that does not extensively quote from the reasons of MacLachlin J. (as she then was) in *Tataryn*. Nonetheless, as has been the case since *Tataryn* was decided in 1994, the same handful of paragraphs from *Tataryn* has been employed by the BC Supreme Court and Court of Appeal to justify vastly different outcomes in various cases depending on the facts.

II. Common Law Spouses

Common law spouses have had status under the *WVA* since 2000 and since then there have been a number of claims brought by common law spouses.[1] However, it was only in the 2007 decision of the BC Supreme Court in *Picketts v. Hall*[2] and the appeal of that decision, decided this year, that the Court has engaged in a substantive analysis of the rights of common law spouses and how they differ from the rights of married spouses under the *WVA*.[3]

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1 See, for example, *Einfeld v. Bellrichard*, 2001 BCSC 92, *Tran v. Novix*, 2003 BCSC 2032, *Green v. Birchard*, 2003 BCSC 1915, and *McCrea v. Bain Estate*, 2004 BCSC 208.

2 2007 BCSC 133.

3 Between the trial and appeal decisions in *Picketts*, the decision was rendered in *Lamoreux v. Kalyk*, 2009 BCSC 584. In that case, the Court sought to distinguish the trial decision in *Picketts* on the basis of the size of the estate and awarded the common law spouse a significant share of residue.

4 In September 2009, the respondents filed an application for leave to appeal to the Supreme Court of Canada. That application is pending as at the date of writing.

Picketts v. Hall, 2009 BCCA 329[4]

Picketts v. Hall is a significant case not only because it constitutes the Court of Appeal's first real consideration of the differences between a common law spouse claim and a married spouse claim under the *WVA*, but also because it involved an estate in excess of $18 million, which by the standard of estates that are generally litigated under the *WVA* is extremely large. It, therefore, gave the Court the opportunity to consider legal and moral obligations in a context where the size of the estate posed no limitation to meeting all legitimate legal and moral claims.

The claim was brought by the deceased's common law spouse of 21 years. Mr. Hall died at age 96, leaving Ms. Picketts, who at the date of death was 75. They both had children from prior relationships. Upon entering the relationship, Ms. Picketts had negligible assets in her own name. The evidence was that Mr. Hall had at one point proposed marriage to Ms. Picketts but never followed through. He did, however, make a promise to care for her financially in the long term. During the course of the relationship, Ms. Picketts quit her retail job at Mr. Hall's request and cared for him in his old age. Mr. Hall was extremely frugal and he and Ms. Picketts did not lead an extravagant life. In fact, Ms. Picketts was given an allowance by Mr. Hall of merely $450 (later increased to $550) a month for groceries and household expenses.

Under the terms of the will, Ms. Picketts was to receive the matrimonial home (which was a condominium in Vancouver with an assessed value of approximately $300,000), personal and household effects, income of $2000 a month (which would be adjusted annually in accordance with the consumer price index) and use of Mr. Hall's Hawaii condominium for up to three months a year, or a portion of the proceeds of sale. The residue of the estate was to be divided between Mr. Hall's two sons.

The trial judge varied the will to give Ms. Picketts the following:

a. during her lifetime, the sum of $14,583.33 per month ($175,000 per year) with an annual adjustment based on the consumer price index;

b. $405,000 for renovations to the matrimonial home;

c. payment by the estate of needed future nursing care costs for Ms. Picketts; and

d. the right to retain the $100,000 paid by the estate for the condominium in Hawaii.

At trial, the focus of the reasoning was whether or not Ms. Picketts, as a common law spouse, had a legal or moral entitlement to a share of property or whether, because she was a common law spouse and therefore would not be entitled to a division of property under the *Family Relations Act* ("*FRA*"), her claim was limited to maintenance.

The trial judge held that as a common law spouse, Ms. Picketts was limited to maintenance from the estate and had no right to a portion of residue. The trial judge quoted extensively from *Nova Scotia v. Walsh*, 2002 SCC 83 and ultimately held that the decision of Mr. Hall and Ms. Picketts not to marry was significant and that consequences must flow from that decision. One of those consequences is that, since there is no division of property for common law spouses under the *FRA*, there is no legal obligation to provide anything other than maintenance to a common law spouse on death under the *WVA*. With respect to the moral obligation, according to the trial judge, to seek to obtain a portion of residue for a common law spouse under the moral obligation was:

> ... an effort to attain morally, what Ms. Picketts could not achieve legally. It is not a proper approach and it does not honour the decision by this couple not to marry, even if Ms. Picketts found that decision disappointing.[5]

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5 *Pickets* (B.C.S.C.), para. 103.

On appeal, the Court of Appeal disagreed with this reasoning. Specifically, the Court of Appeal distinguished the matrimonial property legislation in *Walsh*, which actually excluded common law spouses, from the *WVA*, which does not distinguish between married and common law spouses in its definition of "spouse."

While the Court of Appeal agreed that there was no basis for finding a legal obligation to give a common law spouse a share of residue in this case, the particular circumstances of the case dictated that "the moral obligation is more important that the legal obligation."[6]

The Court of Appeal went on to invoke the distribution of an intestate estate under the *Estate Administration Act* ("*EAA*"). In earlier decisions, the BC Supreme Court and Court of Appeal have frowned upon the notion that the *EAA* should be referenced as a benchmark of what is adequate, fair and equitable under the *WVA*.[7]

With respect to the moral obligation, the Court held at para. 62:

> It seems to me that it is also not a viable option for the Court to approve a disposition that substantially prefers the moral claim of adult independent children to those of a long term caring and dedicated spouse.

The Court analyzed the facts, including the absence of a legal obligation to the two sons, the length of the relationship, the agreement of Ms. Picketts to give up her career, the necessity of Ms. Picketts to dip into her savings to pay the couple's living expenses, the lengthy period of care Ms. Picketts provided, the promise that Mr. Hall made to provide for Ms. Picketts and the size and liquidity of the estate. The Court of Appeal placed particular emphasis on the promise made by Mr. Hall and held that it could not be construed as being limited to the provision of maintenance. Ultimately, the Court of Appeal held at para. 65:

> Ms. Picketts is entitled to administer her own financial affairs without being dependent on the estate. She is also entitled to a measure of testamentary autonomy of her own so that she can pass her own estate to whomever she wishes.

In all the circumstances the Court awarded Ms. Picketts $5 million plus the family home, personal and household effects and the settled amount for the Hawaii condominium.

III. Rights of Adult Children in Blended Families

While *Tataryn* remains the focus of the legal analysis in blended family cases, there are some discernable developments that have arisen in recent years. Possibly the most apparent is the court's consideration of contributions made by a first spouse, who predeceased the testator, as being a significant factor mitigating in favour of a moral obligation to adult children.

Saugestad v. Saugestad, 2008 BCCA 38

In *Saugestad*, the plaintiff and the testator had been married for 11 years. The plaintiff was 58 years old. She received nothing under the testator's will as the entire estate passed under the will to the testator's two adult children from his first marriage. While the plaintiff did not receive a bequest

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6 *Pickets* (C.A.), para. 53.

7 See *Hecht v. Hecht* (1991), 42 E.T.R. 295 at paras. 94 – 96, *Bates v. Bates*, [1982] 4 W.W.R. 1993 (C.A.) and *Hutton v. Lapka Estate* (1991), 62 B.C.L.R. (2d) 374 (C.A.) at para. 37. It is not clear, however, whether the Court of Appeal, in invoking the *EAA* in this portion of the reasons, is grounding the legal obligation to a common law spouse in the intestacy provisions of the *EAA* or merely pointing out in *obiter* that Ms. Picketts would have done much better if Mr. Hall had died without a will.

under the will, she did receive the family home by right of survivorship (with an assessed value of $335,000) and she was the recipient of the deceased's pension in the amount of $1,350 a month and his RRSP.

The estate was substantial. It included a condominium in Boca Raton, a 1/2 interest in a condominium at Whistler (the other half was held by the plaintiff), a ½ interest in a condominium on Nelson street in Vancouver (the other half being owned by the plaintiff), about $1 million in investments and an inheritance from the testator's mother's estate.

The trial judge[8] awarded the plaintiff a cash legacy of $29,000 and life estate in the testator's 1/2 interest in the downtown condominium. The plaintiff appealed to the BC Court of Appeal. On appeal, the trial judge's order was amended to give the appellant the testator's 1/2 interest in the downtown condominium outright subject to her assuming the remaining mortgage. Otherwise, the judgment was affirmed.

In discussing whether the portion of the inheritance from the testator's mother's estate received after the death of the testator should be considered a notional family asset and subject to a claim by the appellant, the Court of Appeal emphasized the notional and atypical character of the *FRA* analysis under the *WVA*. The Court of Appeal held that it was proper to consider issues of intergenerational equity between a surviving spouse, at or near retirement with no children, and adult children from a deceased spouse's first marriage. The adult children's circumstances were more deserving of moral claims of the estate than the appellant's wish to continue a generous lifestyle and purchase luxury items:

> Simply because the appellant and the testator had indulged in an expensive lifestyle that encroached on capital assets does not legally obligate the estate to sustain that indulgence where the appellant is otherwise financially secure.[9]

The Court of Appeal went on to hold that a moral claim in favour of the children arose from the fact that the testator's first wife, who had died and left her estate to the testator, had contributed significantly to the testator's estate. The moral claims of the children arose out of "the unquantified benefits received by the testator from his first wife during their marriage and his receipt of her estate."[10] The Court of Appeal held that the first wife could reasonably expect that those benefits would devolve to her sons.

Saugestad can be contrasted with *Picketts* for its emphasis on the moral claim of adult children over the moral claim of a spouse. It is arguable that, while both of these cases turn on their own particular facts and are not irreconcilable, each substantially prefers one or the other side of a blended family. I expect *Saugestad* will find its way into the briefs of most future counsel acting for adult children, just as counsel for spouses will almost certainly cite *Picketts* in future cases.

Waldman v. Blumes, 2009 BCSC 1012

In *Waldman v. Blumes*, the testator had married the defendant shortly after the death of his first wife, when he was in his seventies and the defendant was in her thirties. He had two children from his first marriage who were about the same age as his second wife. The testator and the defendant enjoyed a 21 year marriage before the testator died and they went on to have two children, who were teenagers at the date of death of the testator. The testator's will left the entirety of his $1.8 million estate to his second wife.

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8 2006 BCSC 1839.

9 *Saugestad* (C.A.) para. 30.

10 *Saugestad* (C.A.) para. 38.

The Court was required to balance the legal and moral claims of the defendant spouse and the minor children from the second marriage against the moral claims of the adult children from the first marriage. The claims of the minor children made the case different from an ordinary second spouse v. children from first marriage contest. The Court held that the most significant obligation that the testator had was to his wife, followed by his dependant sons. The Court did find that the testator had some moral obligation to provide for the plaintiffs, particularly because (as in *Saugestad*) the plaintiffs' mother had contributed to the acquisition of assets that made up the estate. However, the moral obligation only gave rise to a variation in the amount of $75,000 each for the two adult children, a relatively small variation given the size of the estate.

Sikora v. Sikora Estate, 2009 BCSC 195

In *Sikora*, the Court considered a claim for a variation of a will brought by adult children from a prior marriage where the bulk of the estate was left to the testator's second spouse. The will in this case left a small bequest to one son, the family home and other assets to the spouse, and the residue to the remaining three sons. Because the only asset in the estate with a significant value was the family home, the residue left to be divided amongst the three sons was about $11,000. The Court varied the will, giving each son an interest as a tenant in common of the family home, subject to a life interest in favour of the spouse.

The two factors that appear to have been most persuasive to the Court in allowing the children's claim were the economic self sufficiency of the spouse (who was in a superior financial position to the adult children) and the fact that, at the time the will was made, the testator owned other property. Had he died with the same property holdings he had at the time he made the will, two of the children would have received a significant share of his estate as residual beneficiaries. The Court was also persuaded by the fact that the testator and the spouse kept their finances separate and the fact that the spouse made no provision in her will for the testator.[11] The Court considered also the bleak upbringing the sons had and the fact that they made contributions to the family business when they were children for which they were never compensated.

B. (K.D.M.) v. Taylor, 2008 BCSC 1498

There are relatively few *WVA* cases that arise involving infant plaintiffs so it is always interesting to see how courts deal with these claims.[12] In the *Taylor* case the testator left his entire $400,000 estate to his common law spouse. The testator, after the will was executed, had a brief relationship with a woman who was not his common law spouse and the plaintiff was the product of that relationship. The plaintiff was two years old at the date of death. The testator never met the plaintiff, but knew of his existence and made voluntary support payments to him. The spouse had a net worth of approximately $1 million derived principally from her relationship with the testator. The Public Guardian and Trustee, acting as litigation guardian for the plaintiff, sought 90% of the estate on behalf of the plaintiff. The defendant took the position that the plaintiff should receive a variation of the will, but such variation should be limited to 25% of the residue of the estate. In assessing the legal obligation to the spouse, the Court considered the fact that the spouse had made contributions to the testator's business and accepted that the law of constructive trust would have imposed some obligation on the testator vis a vie the spouse. However, since she was not a dependant spouse (and appeared to

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11 This raises an interesting practice point. Query whether a spouse's will is even relevant and producible in a *WVA* proceeding. If the issue is whether or not the deceased made adequate just and equitable provision for his spouse, why does it matter whether the spouse provided for him in her will? Presumably, if she didn't and she died first, he would also have an opportunity to claim under the *WVA* but it is not clear why this should preclude, or even be relevant to, her claim to vary his will.

12 Some examples of cases involving minor claimants are *L.A.C. v. Koller Estate*, 2004 BCSC 30, *Handlen v. Handlen Estate*, 2001 BCSC 1528, *Lansing v. Richardson*, 2002 BCSC 856, and *Morphy v. Mohr*, [1998] B.C.J. No. 71 (S.C.).

earn income in excess of the testator) her legal claim was not particularly strong. As to the plaintiff, the Court rejected the defendant's argument that the legal obligation to the infant plaintiff could be quantified with reference to the *Child Support Guidelines*. With respect to moral claims, the Court found that the moral claim of the infant child took priority over the moral claim of the spouse. The Court, therefore, awarded the plaintiff a 65% share of the estate.

IV. Disputes Between Siblings

There have been some recent interesting cases dealing with the apportionment of an estate amongst adult children. These cases, among other things, revisit the discussion of whether an equal distribution amongst children is *prima facie* fair, even if *inter vivos* gifts resulted in one child being substantially favoured.

Doucette v. Doucette Estate, 2009 BCCA 393

This case involved two separate actions that were heard together at the trial level: a *WVA* action and an action commenced by the executors to recover for the estate funds in a term deposit held jointly by the testatrix and one of the *WVA* claimants. There were four children in the family. Two siblings, Wayne and Joslin, received $5,000 each under the will. The other two siblings, Louie and Diane, received respectively, a house valued at $420,000 and the residue of the estate (the size of which depended on the Court's findings about whether $424,000 in joint assets were held on a resulting trust for the estate). The testatrix owned four GICs which she held jointly with each of her children except Wayne. In his *WVA* action, Wayne took the position that the funds in the GICs were subject to a resulting trust.

The trial judge[13] held that all the joint assets, totaling $424,000 were held on a resulting trust for the estate. With respect to the *WVA* claim, the trial judge, relying on the evidence of "estrangement, poor treatment and disability," held that the testatrix failed in her moral obligation to both of the claimants. He ordered the following distribution scheme: Louie: 35%, Diane 25%, Joslin 25%, and Wayne 15%. The trial decision was appealed by Diane and Louie.

On appeal, the Court of Appeal made a number of interesting findings. The first related to the joint GICs. The trial judge had held that one of the factors mitigating in favour of a finding of resulting trust was the fact that two of the children were unaware of the jointures that they shared with their mother. The Court of Appeal found the opposite: that the secrecy surrounding the joint accounts was a factor suggestive of an intention to gift.[14] The Court therefore granted the appeal on this ground and ordered that the GICs were beneficially owned by the children in whose names they were held.

With respect to the variation of the will, the Court of Appeal upheld the trial judge's conclusion about the responsibility of the testatrix for the estrangement between her and the claimants and that the claimants were in circumstances of need. These factors gave rise to a moral obligation to provide for the claimants in the will. The Court of Appeal also upheld the trial judge's determination that the reasons expressed for the dispositions in the will were based on facts that were not accurate and thus not valid.

While the Court of Appeal upheld the trial judge's findings with respect to the *WVA*, because of the finding that the GICs did not form part of the estate, it was necessary for the Court of Appeal to amend the trial judge's order. The Court of Appeal held that the testatrix fulfilled her duties to Diane and Joslin by way of the GICs that they received. The Court ordered that the house (the only asset of

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13 2007 BCSC 1621.

14 As the focus of this paper is the *WVA*, I have not discussed this aspect of the case in any detail but it does form the bulk of the Court of Appeal's reasons.

significant value left in the estate) be sold and the proceeds distributed 70% to Louis and 30% to Wayne. In terms of numbers, this would have left the children with roughly the following distribution: Diane: $230,000, Joslin: $150,000, Louie $280,000, and Wayne $120,000.

Neither the trial judge nor the Court of Appeal expressed any concern about deference to the scheme set out in the will, although the Court of Appeal's distribution more closely resembles the scheme of the will (insofar as Diane and Louie are clearly preferred over Joslin and John, unlike the trial judge's distribution which treated the favoured Diane and the disfavoured Jocelyn the same). The Court of Appeal also apparently had no hesitation "disinheriting" one of the preferred beneficiaries, Diane, by leaving her nothing from the estate as a result of the generous gifts she received by way of jointures. This reasoning can be contrasted with *Inch v. Battie*, discussed below, wherein the Court found an equal distribution under the will to be fair even where one sibling received the majority of the testatrix's assets by way of *inter vivos* gifts.

Inch v. Battie, 2007 BCSC 1249

This case predates the Court of Appeal's decision in *Doucette*. The testatrix in this case made *inter vivos* transfers of most of her assets to her daughter, and then divided her estate equally under her will between her two children. The estate had value of $87,000, with term deposits going to the daughter by right of survivorship in the amount of $123,000, another term deposit going to another relative in the amount of $50,000 a bank account going to the daughter by right of survivorship in the amount of $21,000 and an additional term deposit that was cashed out and paid to the daughter just prior to death in amount of $50,000.

While the daughter was closer to the testatrix than the son, the son and the testatrix were not estranged.

The plaintiff son argued that the will did not make adequate provision for him because most assets of value were transferred out of the estate by *inter vivos* gifts. As in *Doucette*, the Court first had to determine which assets if any were held on a resulting trust for the estate. The Court considered *Pecore* and held that while the presumption of resulting trust applied to all the accounts, it was rebutted for all the accounts except the $21,000 chequing account held jointly between the daughter and mother.

Interestingly, Mr. Justice Wilson considered whether there were valid and rational reasons for the *inter vivos* gifts. He held that there were, because they were made as a result of complaints made by the plaintiff to the Health Authority and Senior's Outreach because the plaintiff believed that his sister was exercising undue influence over his mother. The mother was so angry that she put accounts in joint tenancy with her daughter that had previously been in joint tenancy with the son.

Despite the fact that the Court held that it was appropriate to consider assets passing outside the estate in determining adequate and equitable provision for the plaintiff, the Court ultimately seemed to rely on the principle stated in *Vielbig v. Waterland Estate*, [1999] B.C.J. No. 170 (C.A.), which is that an equal distribution of estate assets between children is *prima facie* fair.

It is possible that, in light of the more recent decision of the Court of Appeal in *Doucette* that the proposition in *Inch v. Battie* that an equal distribution under the will is *prima facie* fair, irrespective of *inter vivos* gifts, is no longer applicable. *Doucette* may signal that the courts are moving in the direction where they will give a beneficiary who is preferred by way of *inter vivos* gifts a lesser share or no share of the estate in order to equalize gifts falling inside and outside the estate.