



Does death do us part? Wills Variation Act and duties to certain family members

Did you know that BC law does not allow for complete autonomy in determining how to give away assets in your Will, unlike most other provinces? BC's *Wills Variation Act* ("WVA") provides that if a deceased fails to make "adequate provision for the proper maintenance and support" of his or her spouse or children, the court may alter his or her Will to make whatever provisions the court considers adequate. Wills that may be subject to a successful challenge include those which:

1. treat children differently;
2. give gifts to children and a spouse who is not the parent of the children; and
3. leave assets to charity or strangers.

In many cases, **it does not matter that the deceased had reasons** to make the Will in this way, including being estranged from a child, gifting based on cultural norms, or feeling that family members are capable of supporting themselves.

Fortunately, there are ways to plan around the WVA. Because the WVA generally applies to assets in the deceased's estate, many of these plans involve keeping assets out of the estate, which has the added advantage of avoiding probate tax.

1. Give it away now. If you give something away during your lifetime, the asset does not become part of your estate. However, gifts have on occasion been overturned by the courts when made solely for the purpose of avoiding certain legal obligations to family members or creditors.

2. Own assets jointly. Assets may be owned jointly (including bank accounts and property), with a "right of survivorship". This means the asset passes to the surviving owner outside of the estate on the death of one owner. However, if an asset is transferred to joint ownership solely to avoid legal obligations, this too may be overturned by the courts. Drawbacks of joint ownership include the exposure to creditors of the other joint owner, a deemed disposition of property for income tax purposes, and a loss of control.

3. Give reasons. The Will may include a brief paragraph explaining why a child is excluded (for example). While courts will consider such statements and these do provide some context for an estate plan, a statement alone will not always protect the Will. In some cases, an explanation can actually harm the Will, as courts have interpreted these as supporting a WVA action: for example, if the explanation is not grounded and is unfair.

4. Put assets into a trust. Assets can be removed from the estate and protected from the WVA by transferring them into a trust. A limitless array of options exists for defining how the assets are to be administered in the trust, to suit the wishes of the individual.

These are a summary of some common steps taken to avoid a WVA claim, which may protect the true intentions of the deceased's desired gifts, avoid the costs associated with a challenge being brought against an estate, and provide security and peace of mind.

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