Posted on: March 27, 2014

WILLS, ESTATES, AND SUCCESSION ACT (WESA)

March 27, 2014

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Richards Buell Sutton Wealth Preservation Newsletter

Background

March 31 of 2014 ushers in a new era for Wills and Estates in BC, as the *Wills, Estates and Succession Act* takes effect. The legislation is better known by its acronym WESA.

Each province has its own laws in respect of Wills and Estates. While WESA brings BC more in line with some other provinces, each province continues to operate independently.

Currently, there are vast numbers of laws that collide to create the rules governing Wills and Estate. Many of these haven't been systematically updated for over fifty years. They therefore aren't cohesive and contain some concepts that don't reflect contemporary values. Because there are so many different sources that form the law in this area, it is extremely difficult for non-lawyers to navigate (and even for the under-caffeinated lawyer). By consolidating the significant majority of the law under once piece of legislation, WESA aims to provide more accessible information to people.

As with any legislative changes, not everything is being heralded as a success, but there are certainly some key changes. This article will set out some of the aspects that will be, hopefully, of interest to most:

- who is a 'spouse' and the effect of marriage on a Will
- who can challenge a Will (wills variation issues)
- intestacy
- estate administration highlights

Marriage and Spouses

The concept of who is a spouse has been broadly updated to dovetail with other legislation and reflect

modern Canadian society. A 'spouse' will include:

- Married spouses
- Common law spouses
- Same-sex spouses

Just as importantly, WESA sets out when someone cease to be a spouse for the purposes of bringing an application to vary spouse's Will. Who can apply to vary the distribution set forth in a Will is canvassed in more detail below, but importantly any spouse can challenge his/her spouse's Will. In BC, this had led to scenarios where there are a multiple spouses claiming against a deceased's Will.

For example, where Mary and Scott are married but have been separated for fifteen years and each one also has a common law spouse after separation, under the pre-WESA scheme they technically have two spouses who can challenge their Wills. WESA tidies this up by stating that if married spouses separate, they cease to be 'spouses' for the purposes of WESA (there can be an exception if there is a reconciliation). Therefore Mary and Scott would cease to be considered each other's spouses and the only spouse each would have at death is their common law spouse. It's anticipated that documenting the end of the spousal relationship will be important in assisting spouses in minimizing (and hopefully avoiding altogether) litigation surrounding whether someone is or is not a spouse of someone who has died.

It's also a quirk of existing law that when two people marry, their Wills are revoked. This concept stems from an era where it was inconceivable that people would cohabitate prior to marriage, much less have made provision in their Wills for a spousal person other than one to whom they were married. This is therefore updated by WESA such that marriage will no longer revoke a Will.

That being said:

- if you marry before WESA takes effect, your Will is still revoked and WESA does not revive a Will that was revoked by virtue of marriage; and
- if your Will doesn't make reasonable provision for a spouse, your Will should be revised to reflect the new spousal relationship to manage the likelihood of a successful challenge to your Will.

Wills Variation

There are only two classes of people who can challenge a person's Will (meaning that they can apply to the Supreme Court of BC to have the terms of the Will varied in his or her favor): spouses and children. This is not new to WESA, and is carried over from the current legislation.

As mentioned above, WESA has introduced provisions that stipulate that married spouses who are separated cease to be considered spouses, and so cannot challenge each other's Wills.

'Children' includes natural and adopted children. There is no age requirement or dependency requirement, with the effect that adult, independent children can challenge a parent's Will. WESA introduces specific provisions addressing the rights of children conceived with assisted reproduction and surrogacy. 'Children' does not extend to step-children unless they have been legally adopted. The right to challenge a parent's or spouse's Will cannot be contracted out of.

While this isn't a result of WESA, the scope of who is considered a child poses challenges for blended families. If, for example, Sarah and Graham marry and each has two children, Sarah's children can challenge her Will as can Graham, and Graham's children can challenge his Will as can Sarah. However, Graham's children cannot challenge Sarah's Will and Sarah's children cannot challenge Graham's Will. The effect is that blended families must balance legal estate obligations between spouses and children.

For blended families who join their families together, particularly when their children are quite young, it's common for the spouses to want to leave everything to each other and, alternatively, equally amongst all the children of the family unit because they consider themselves a single family. Consider how the wills variation issues could impact this:

- if the surviving spouse later cuts out the deceased spouse's children from his/her estate, those children don't have an immediate tool to recover their 'portion' of their parent's estate who passed first; and
- if surviving spouse remarries or enters into a common law relationship, that new spouse will have a claim on the surviving spouse's estate and the surviving spouse will need to balance this against any intention to provide for all the children of the family unit.

There is therefore considerable ongoing debate about the lack of improved treatment for blended families when it comes to wills variation matters, and careful planning continues to be necessary.

Intestacy

Intestacy is where a person dies without a Will; significant improvements have been made in respect of how assets will be distributed in these circumstances.

The two most notable changes under WESA are that a) the distribution between spouses and children is updated to reflect different divisions where the surviving spouse is not also the parent of the children, and b) there is now a possibility that, in the absence of a Will, the government could receive the assets of an

estate. The first change tries to balance the needs of spouses and children in blended families. The second change introduces, ironically, what was often commonly believed to already be the law.

While the distribution scheme on intestacy is more detailed than this article can capture, below are the highlights of the changes.

CURRENT LAW	WESA
a) To spouse, if only a spouse.	a) To spouse, if only a spouse.
b) To children, if no spouse.	b) To children, if no spouse
c1) Where there is a spouse and one child $65,000 to the spouse, and ½ of the residue to the spouse and ½ to the child; spouse entitled to household assets and life estate in home	c) Where there is a spouse and descendents, household furnishings to spouse.
c2) Where there is a spouse and 2 or more children $65,000 to the spouse and 1/3 of the residue to the spouse and 2/3 divided between the children; spouse entitled to household assets and life estate in home	c1)Where descendents are those of both the deceased and the spouse, $300,000 to spouse. If not, $150,000 to spouse. The spouse is entitled to ½ of the residue and the descendents are entitles to ½ of the residue.
	c2) Spouse may acquire spousal home within 180 days of the Grant in satisfaction of all or part of the spouse's entitlement.
	...
	h) To the government, subject to the *Escheat Act.*

Estate Administration Highlights

Estate administration is the process of dealing with a person's estate after death, including making an application to the Supreme Court of BC to acknowledge the Will and executor, or appoint an administrator where there is no Will. Where there is a Will, the process is commonly called the probate process. Where there is no Will, it's commonly called the administration process.

In either case, the person who steers the process is called the Personal Representative. This term includes both executors and administrators.

Here are some of the highlights of the changes WESA introduces to estate administration process.

- Standardized forms will be used for all probate and administration applications. The government's goal is to increase the ability of non-lawyers to use and understand these forms and the court process. We'll leave it to you to evaluate whether that's been successful.
- Wills need to comply with WESA's signing and witnessing requirements to be valid

(unchanged from the current legislation). WESA, however, now gives the Court discretion to recognize as valid a document that doesn't meet these requirements.

This has several possible effects. On one hand, it will likely allow Wills that weren't properly signed due to inadvertence or declines in health to be treated as valid. For example, if I am ailing and I write up my Will but then before I can sign it I pass into a coma, this mechanism will now allow my estate to apply to the Court to have this Will recognized as legitimate even though it's not compliant with WESA's technical requirements.

On the other hand, this means that personal representatives will have to be even more diligent in looking at the records of a deceased to determine if a document (electronic or hard copy) constitutes a testamentary record, and personal representatives may have to contend with people alleging certain records should override a valid Will.

For example, even if I have made a valid Will, someone could show up with an email where I have set out that it is my intention to make certain distributions of my assets on my death and allege that that email should be treated as a testamentary record in lieu of my Will.

What people communicate about their wishes on death will therefore become increasingly important, even casual communications. This could lead to increased litigation.

- For a beneficiary to inherit under WESA, the beneficiary must survive the deceased by five days. Good drafting will usually include a longer period, such as thirty days, for certain types of beneficiaries.
- The Court can correct errors in a Will where the Will doesn't reflect the deceased's intention, such as due to a drafting error. For example, if a Will says it is dividing an estate in four parts and then only deals with three of them, if there is clear evidence of what the intention of the deceased was, the Court will likely be able to 'fix' the Will to follow that intention for the fourth part.

One of the themes amongst WESA's changes to the administration of estate is that additional discretion is given to the Court. While this has some clear advantages, it will still be preferable to have well-ordered and documented affairs so that the discretion of the Court need not be relied upon to cure any problems; any application to the Court can be costly and time consuming, making prevention preferable to a cure