

1. I have attached a copy of two further statutes which bear on the issue of wills. One of those statutes is the Wills Act and the other is the Wills Variation Act.

2. **First, the Wills Act.** The statute is only 10 pages to print and it may strike the reader as being a very short statute for such an important subject. But there are two solid reasons for that:-

i) Most of the law surrounding this topic is common law, meaning it has been developed on a case by case basis by the courts, so all of that law, which would fill volumes, is not needed in the statute.

ii) The statute is written for lawyers, without regard to whether members of the general public would understand it or not. This seems kind of arrogant, contrary to the democratic ethos of the age. But there is, perhaps, no field of law where legal clarity is more important. By legal clarity, I mean that the words and phrases used in a will must have a meaning that has been settled by the courts*. So the statute is written to convey precise meaning to drafters of wills who are expected to know what they are doing before they embark on such an important task. As a result they can use short form phrases and words that have a precise legal meaning and are unconcerned as to whether the ordinary member of the public understands.

3. So, in perusing this statute, notice the following:

i) The language is obscure for a reason (see above);

ii) A will must be in writing (section 3); it's no good going to a lawyer saying, "His dying words were, 'I want Gladys to have my complete collection of Perry Como memorabilia.' Sorry Gladys, *that* is not a will.

iii) Section 5, deciphered means, the testator (the person making the will) must sign in the presence of two witnesses who must, themselves, each sign in the presence of the testator and the other witness.

iv) Per section 5, a member of the Canadian Forces on active duty can sign a valid will without witnesses. The reason is plain. Battlefield wills

must be respected.

v) Similarly section 7 makes plain sense. Old enough to get killed for one's country means and should mean old enough to make a will.

vi) Be aware of section 11. In plain English, if you or your spouse is going to be receiving anything under the will then you cannot be a witness to its execution, because, if you are, the gift to you or your spouse under the will, will be void (struck from the will). So, you cannot be a beneficiary and a witness - you must choose. Section 11(2) says that you would be OK and would receive the gift (bequest) under the will so long as there were two other witnesses in addition to yourself, but usually people don't assemble more witnesses than the law requires.

vii) Look at s.14(2). It speaks to one of the issues that came up last evening. It means that even if everybody knows that Harry now hates Sally and cannot even bring himself to speak to her, his will, leaving everything to her remains valid unless he acts in accordance with some aspect of s.14(1) or s.16. Note that while marriage will invalidate a will (see s.'s 14 and 15), a simple separation from one's spouse will not. A judicial separation is an event like s. 57 of the Family Relations Act, which reads:

Declaratory judgment

s. 57 On application by 2 spouses married to each other or by one of the spouses, the Supreme Court may make a declaratory judgment that the spouses have no reasonable prospect of reconciliation with each other.

So, something far more definite than the fact that the spouses are no longer living together and no longer like each other is necessary, and a change in the circumstances that obtained at the time of the making of the will is not enough (per s. 14(2)).

4. Section 24 bears attention. When bequeathing land, if you do not take care to specify otherwise, then the whole interest that you have in the land will be conveyed to the beneficiary. So, if you mean your mother to have a life interest (hers to have but not to sell or borrow against until

she dies) before the property passes to your sister, then you must say so in your will.

Part 2 of the Act- sections 34 to 38, deals with filing a notice of a will with the government. It is a voluntary but sensible means of trying to make life easier for the person who has to determine where the will is to be found and whether a particular will is the last one made. The 'last will' issue is important because every time you make a will, by that act you invalidate all previous wills. So in order for a will to be valid, it must be the last will made by the testator.

5. If the testator owns property all over the country and it is movable property (not land) then the court supervised process of calling in debts, collecting up assets, paying debts, and distributing the net balance of the estate (probating an estate) need only be done once and so long as the will is valid according to the law of one of the places set out in s. 40 (a) to (c). So sayeth B.C.. However B.C. has no jurisdiction to make laws respecting land that lies beyond B.C. borders; and so if you are the executor for your uncle who owned land in 4 provinces at the time of his death, then you have a lot of work ahead of you - 4 probate proceedings to go through.

6. Except as I have set out here, I do not expect you to understand the Wills Act. However if interest drives you to ask questions I would be happy to answer them provided you understand that asking an instructor a legal question is not getting legal advice for you legal problem, or your friend's legal problem. Lawyers never give advice that way, or never should, because the facts, and all the facts, are the necessary **starting place** for any legal opinion. So, remember; No facts = No opinion.

7. If, as I have argued, you ought to see a lawyer to get a will made, why are there so many 'do your own will' kits out there. There is a tension between making things simple and making things right. The business of going to see a lawyer is fraught with tension and anxiety and the very existence of will kits sends the message that things are not as difficult as we might fear. And, it is not right that the government should tell people that they must use a lawyer. But dispensing with the lawyer is full of risk. There

are unknown unknowns in the making of a will and you will not be there to fix any unintended mistakes if it turns out the meaning is unclear or disputable after you are dead. The whole business of faithfully carrying out the wishes of someone who is no longer alive to see it through, speaks well of us. It is a very civilized tradition. So don't make life unnecessarily difficult for your executor. Get it done right. Finally, I repeat what I said last evening. The legal cost of doing it right is a very small fraction of the cost of litigation arising from getting it wrong.

8. **The Wills Variation Act**, which in some form appears in all the common law provinces, springs from the same impulse to ensure fairness that is represented in the 'unconscionability cases' in contract law. Yes, the testator has the right to dispose of his or her estate as he/she sees fit, but

9. After the interesting additions of sections 1.1 and 1.2, which reflect the continuing concerns of the Nisga'a people after the Nisga'a Final Agreement, section 2 speaks to the heart of the matter. Look after your spouse and children in your will or the party hard done by may ask the court to reapportion your estate.

10. There are, as you might predict, a ton of cases under the Wills Variation Act. Why might you predict that? Well, the wording of section 2 of the Act leaves it to the Court to define 'adequate', 'just' and 'equitable' and so that is exactly what the court has been doing. And, unless everybody who is included in the will agrees that the claimant should now be included, and in what amount, the executor has little option but to contest the claim. Often the included will feel constrained to oppose the claimant in order to respect the choices of the deceased. It is, perhaps, easier to feel that way if you are one of the included. The legal expense for all of this courtroom defence comes out of the estate, so leaving family members (spouse and children) out of a will, or giving them little while the "Society for the Care of Orphaned Fish" gets lots, is asking for trouble, and trouble will diminish the estate in legal fees.

11. In Grigg, Dorothy Grigg, who had loved, looked after, and lived with the deceased (he wasn't deceased then) from 1984 to 1995, and then visited him daily at the extended care home until his death in 1998. She

received a paltry share of his estate (para 14) and would have made a conventional claim under the WVA except that she never married him. And, at that time section 2 of the Act talked about the husband and the wife and not spouse, let alone common law spouse. So, upon a conventional interpretation of the Act, she was not a person with a right to claim. And so she sued for a declaration under section 15 of the Charter, seeking to show that her constitutional right to the equal benefit of the law was infringed, in that common law wives were discriminated against. By way of a constitutional remedy she wanted a definition of spouse that included common-law spouse to be 'read in'. Reading in is a tool in the court's constitutional remedy bag. When a statute would otherwise be found to be unconstitutional and therefore be struck down, a court may save the statute by 'reading in' the phrase or wording that is wanting and necessary to preserve the constitutionality of the statute.

12. Was discrimination on the basis of marital status unconstitutional?

Yes, said the court. Starting at para 34, the court carefully applied a decision of the Supreme Court of Canada, and finding the decision material to the facts before him, he applied that decision. Then he found that the statute, unreformed, could not pass the test required by section 1 of the Charter. Note that he used the fact that the legislature had passed but not proclaimed in force, a law that would have changed the definition of spouse across many statutes, and this was sufficient to persuade him that the legislature itself recognized the injustice in excluding common law relationships from the benefit and protection of the law given to married spouses.

13. Since that case, as you can see, the definition of spouse in section 1 of the Wills Variation Act has been amended to include common law marriages and relationships of 2 years or longer immediately preceding the death.

14. Suppose somebody lived in a romantic but unmarried relationship for 15 years; then, with 4 years to go before he died, he began to mean and started pushing her once in a while. After putting up with it for a full year, and now very sad at how their time to travel together had worked out, she left him. A year later he was getting lost in his own neighbourhood and was moved into an extended care home. With 6 months to go, it was

clear he had dementia. By a will that he made one month after she left him, he left all of his estate to his married sister in Toledo, Ohio.

Question Is she able to claim under the Wills Variation Act?

Question If not, is the Wills Variation Act unconstitutional, and, if so, why so?

Question Is there another way that the will might be attacked and, if so, would it do her any good?

15. So the freedom to dispose of one's estate as one sees fit, is in fact subject to challenge and supervision by the court. You must look after those who loved you and lived with you, those whom you brought into the world. Charity, it turns out, still begins (and ends) at home. I have attached a copy of the Estate Administration Act, because this is where one's ends up if there is no valid will.

Attached:

The Wills Act,

The Wills Variation Act,

The Estate Administration Act, and,

Grigg