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WILLS VARIATION ACT

[RSBC 1996] CHAPTER 490

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Definitions

1 In this Act:

"court" means the Supreme Court;

"executor" includes an administrator with will annexed;

"Nisga'a citizen" has the same meaning as in the Nisga'a Final Agreement;

"Nisga'a Final Agreement" has the same meaning as in the *Nisga'a Final Agreement Act*;

"Nisga'a law" has the same meaning as in the Nisga'a Final Agreement;

"Nisga'a Lisims Government" has the same meaning as in the Nisga'a Final Agreement;

"probate" includes letters probate and letters of administration with will annexed.

"spouse" means a person who

- (a) is married to another person, or
- (b) is living and cohabiting with another person in a marriage-like relationship, including a

marriage-like relationship between persons of the same gender, and has lived and cohabited in that relationship for a period of at least 2 years.

Will or cultural property of Nisga'a citizen

1.1 (1) As provided in paragraph 118 of the Nisga'a Government Chapter of the Nisga'a Final Agreement, the Nisga'a Lisims Government may commence an action under this Act in respect of the will of a Nisga'a citizen that provides for the devolution of cultural property.

(2) In any judicial proceeding under this Act in which the validity of a will of a Nisga'a citizen, or the devolution of the cultural property of a Nisga'a citizen, is at issue, the Nisga'a Lisims Government has standing in the proceeding as provided in paragraph 117 of the Nisga'a Government Chapter of the Nisga'a Final Agreement.

(3) In a proceeding described in subsection (1) or to which subsection (1) or (2) applies, the court must consider, among other matters, any evidence or representations in respect of Nisga'a laws and customs dealing with the devolution of cultural property as provided in paragraph 119 of the Nisga'a Government Chapter of the Nisga'a Final Agreement.

(4) As provided in paragraph 120 of the Nisga'a Government Chapter of the Nisga'a Final Agreement, the participation of the Nisga'a Lisims Government in a proceeding described in subsection (1) or to which subsection (2) applies must be in accordance with the applicable Rules of Court and does not affect the court's ability to control its process.

(5) In this section, "**cultural property**" has the same meaning as in paragraph 115 of the Nisga'a Government Chapter of the Nisga'a Final Agreement.

Will or cultural property of treaty first nation members

1.2 (1) If the final agreement of a treaty first nation so provides, the treaty first nation may commence and may intervene in an action under this Act in respect of a will of a treaty first nation member of the treaty first nation if the will provides for the devolution of cultural property.

(2) If the final agreement of a treaty first nation so provides, in any judicial proceeding under this Act in which

(a) the validity or variation of a will of a treaty first nation member of the treaty first nation, or

(b) the devolution of cultural property of a treaty first nation member of the treaty first nation is at issue, that treaty first nation has standing in the proceeding.

(3) In a proceeding described in subsection (1) or to which subsection (2) applies, the court must consider, among other matters, any evidence or representations in respect of the applicable treaty first nation's laws or customs dealing with the devolution of cultural property.

(4) The participation of a treaty first nation in a proceeding described in subsection (1) or to which subsection (2) applies must be in accordance with the applicable Rules of Court and does not affect the court's ability to control its process.

(5) In this section, "**cultural property**", in relation to a treaty first nation, has the same meaning as in the final agreement of the treaty first nation.

Maintenance from estate

2 Despite any law or statute to the contrary, if a testator dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's spouse or children, the court may, in its discretion, in an action 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 testator's estate for the spouse or children.

Time limit and service

- 3** (1) An action must not be heard by the court at the instance of a party claiming the benefit of this Act unless
- (a) the action is commenced within 6 months from the date of the issue of probate of the will in British Columbia or the resealing in British Columbia of probate of the will,
 - (b) a copy of the notice of civil claim has been served on the executor of the will, and
 - (c) if there are minor children of the testator, or if the spouse or a child of the testator is mentally disordered, a copy of the notice of civil claim has been served on the Public Guardian and Trustee.
- (1.1) An action in respect of the will of a Nisga'a citizen must not be heard by the court at the instance of a party claiming the benefit of this Act unless a copy of the notice of civil claim has been served on the Nisga'a Lisims Government.
- (1.2) An action in respect of the will of a treaty first nation member of a treaty first nation in relation to which section 1.2 (1) or (2) applies, other than an action commenced by the treaty first nation, must not be heard by the court at the instance of a party claiming the benefit of this Act unless a copy of the notice of civil claim has been served on that treaty first nation.
- (2) If the Public Guardian and Trustee is served with a copy of the notice of civil claim under subsection (1), the Public Guardian and Trustee is entitled to appear, to be heard and to any costs that the court orders.

Representative action

- 4** (1) If an action has been commenced on behalf of a person, it may be treated by the court as, and so far as regards the question of limitation is deemed to be, an action on behalf of all persons who might apply.
- (2) Within 10 days after the filing of a notice of civil claim, a plaintiff in an action must register a certificate of pending litigation in the approved form under the *Land Title Act* against the land sought to be affected in the land title office in which the title to the land is registered.

Evidence

- 5** (1) In an action under section 2 the court may accept the evidence it considers proper of the testator's reasons, so far as ascertainable,
- (a) for making the dispositions made in the will, or
 - (b) for not making adequate provision for the spouse or children,
- including any written statement signed by the testator.
- (2) In estimating the weight to be given to a statement referred to in subsection (1), the court must have regard to all the circumstances from which an inference may reasonably be drawn about the accuracy or otherwise of the statement.

Court may make order subject to conditions

- 6** The court may
- (a) attach the conditions to an order under this Act that it thinks fit, or
 - (b) refuse to make an order in favour of a person whose character or conduct, in the court's opinion, disentitles the person to the benefit of an order under this Act.

Lump sum or periodic payments

- 7** In making an order the court may, if it thinks fit, order that the provision for the testator's spouse or children is to consist of a lump sum or a periodic or other payment.

Payments fall ratably on estate

- 8** (1) Unless the court otherwise determines, the incidence of the payments ordered falls ratably on the whole estate of the testator.
- (2) If the authority of the court does not extend or cannot, directly or indirectly, be made to extend to the whole estate, subsection (1) applies to as much of the estate as is located in British Columbia.

Power to release part of estate

- 9** (1) The court may exonerate a part of the testator's estate from the effect of the order after hearing those of the parties that may be affected by the exoneration that it considers necessary.
- (2) For the purposes of subsection (1), the court may direct any executor or trustee, or appoint any person, to represent any of those parties.

Power of court to allow commutation

- 10** (1) The court may at any time set a periodic payment or lump sum to be paid by a legatee or devisee, to represent, or in commutation of, the proportion of the sum ordered to be paid that falls on the portion of the estate in which the legatee or devisee is interested, and may exonerate that portion from further liability.
- (2) The court may direct
- (a) how the periodic payment must be secured,
 - (b) to whom the lump sum must be paid, and
 - (c) how a lump sum must be invested for the benefit of the person to whom the commuted payment was payable.

Effect of order

- 11** On an order being made under this Act, the portion of the estate comprised in it or affected by it must be held subject to the provisions of the order, but the order does not bind land unless it is registered as a charge against the land affected in the land title office in which the title to the land is registered.

No distribution until 6 months after probate

- 12** (1) Until 6 months have passed from the issue of probate of the will in British Columbia or the resealing in British Columbia of probate of the will, the executor or trustee must not distribute any portion of the estate to beneficiaries under the will except
- (a) with the consent of all persons who would be entitled to apply, or
 - (b) if authorized by order of the court.
- (2) Until the period referred to in subsection (1) has passed, a title passing by devise to a beneficiary must not be registered in a land title office unless under a similar consent or order, except subject to the liability of being charged by an order made under this Act.

Mortgage in anticipation of order invalid

- 13** (1) A person for whom provision is made under this Act must not anticipate that provision.
- (2) A mortgage, charge or assignment of any kind of or over that provision made before the order of the court is of no effect.
- (3) A mortgage, charge or assignment made after the order of the court is made is of no effect unless made with the court's permission.

Court may cancel or vary order

- 14** If the court has ordered periodic payments, or that a lump sum be invested for the benefit of a person, the court may

(a) inquire whether at any subsequent date the party benefited by its order has become possessed of or entitled to provisions for that person's proper maintenance or support, and into the adequacy of those provisions, and

(b) cancel, vary or suspend its order, or make another order that is just in the circumstances.

Appeal to the Court of Appeal

15 A person who considers himself or herself prejudicially affected by an order made under this Act may appeal to the Court of Appeal.

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