Wills Variation Act

There is a general common-law principle that a person making a Will should be free to arrange for the distribution of his or her assets upon death. In British Columbia the Wills Variation Act poses a significant statutory exception to this common-law principle of testamentary freedom.

The Wills Variation Act was originally intended to ensure that dependent spouses and children were not left destitute if the family's primary income earner died without making adequate provisions for them. In order to accomplish this goal the Wills Variation Act provides that when a person dies leaving a Will and that person does not make adequate provision for the maintenance and support of his or her surviving spouse and/or children then such spouse and/or children may bring an application to have the Court order the provision that it thinks adequate, just and equitable in the circumstances. Recently, our Courts have interpreted this provision broadly. It should be noted that a "spouse" includes a person who is living and cohabitating with another person in a marriage like relationship, including a marriage like relationship between persons of the same gender, and has lived and cohabitated in that relationship for a period of at least two years. Also, only the natural or adopted children of the Deceased have a right of action under the Wills Variation Act. Stepchildren have no such right of action.

The Wills Variation Act imposes a time limitation on commencing an action to vary a Will. Qualified persons must commence an action to vary the Will within six months of the date of grant of probate. There are very few exceptions to this time limitation.

There have been a significant number of Court decisions relating to the Wills Variation Act. The Courts must consider the unique fact patterns of each case in order to determine what is adequate, just and equitable in the circumstances. The flexible language of this statute allows our Courts a great deal of discretion to make orders which are just and equitable in the specific circumstances and in light of contemporary standards and morals.

When planning your estate you must be aware that all assets that fall into and form part of your estate at the time of your death may be subject to a wills variation action. The Wills Variation Act presently contains no anti-avoidance provisions and therefore it is possible to formulate an estate plan so as to avoid the application of the Wills Variation Act in part or in whole. These types of plans must be carefully considered using the advice of RDM Lawyers' legal professionals.

The information provided in this document is not intended to be legal advice but rather to provide answers to a number of questions that we are commonly asked. If you have other questions, please call us and one of our lawyers or experienced staff will be happy to help you.