

Daniel S. Parlow

dparlow@kornfelldlp.com

d: 604.331.8322

WILLS VARIATION AND THE BLENDED FAMILY: ADULT CHILDREN BEWARE!

by Daniel S. Parlow, Kornfeld LLP, Vancouver, B.C.

Assistance of my former colleague Audrey Tait is gratefully acknowledged.

Claims by opposing members of blended families¹ are among the most common estate disputes of modern times.² Relatively few contemporary cases involve disputes solely among members of a single immediate family.

Various writers have observed that no discernible trends have emerged since the Supreme Court of Canada's landmark wills variation decision in *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807; [1994] S.C.J. No. 65. For the reasons noted below, I do not concur with this view.

Counsel are often confronted with claims on behalf of surviving children who believe strongly that they are entitled to the lion's share of the deceased's estate. This entitlement is felt to arise from such factors as: the length of the original marriage relative to the most recent; the contribution to the current estate by the children's first-deceased parent; and the financial wherewithal of the surviving spouse³.

The purpose of this paper is to demonstrate that, with the exception of cases in which the testator and spouse had entered into a pre-nuptial agreement, where the *Wills Variation Act*⁴ is invoked the surviving spouse is most likely to come out well ahead of the testator's original dependent children. In my view, it is important for estate counsel to appreciate this reality in assessing the relative merits of their clients' potential claims, and for wills counsel to advise clients having regard to this reality.

"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."

Relevant *Tataryn* Principles

The trend in favour of surviving spouses was predictable on a reading of various principles set out in the *Tataryn* decision. These are:

1. Marriage is, among other things, an economic unit which generates financial benefits (the "Economic Unit" Principle).
2. An adult dependent child is entitled to such consideration as the size of the estate and the testator's other obligations may allow (the "Availability" Principle).
3. Legal claims are to be given priority over moral claims (the "Legal Over Moral" Principle).

We shall see that, when taken together, these principles pack a powerful punch in favour of spouses and against adult children. Their subsequent application has resulted in strongly favourable treatment of surviving spouses. Somewhat ironically, the *Tataryn* dispute itself did not contain the complicating factor of multiple marriages or blended families.

Consideration of the Principles in *Tataryn*

1. The “Economic Unit” Principle

It is apparent from *Tataryn* that a testator’s most prevalent familial obligations are in favour of spouses and minor childrens. At paragraph 29 (S.C.J), McLachlin J. stated:

The first consideration must be the testator's **legal responsibilities** during his or her lifetime. The desirability of symmetry between the rights which may be asserted against the testator before death and those which may be asserted against the estate after his death has been noted by the dissenting member of the British Columbia Law Reform Commission in its 1983 report on the Act, Report on Statutory Succession Rights (Report No. 70). Mr. Close argues (at p. 154):

A person is under a legal duty to support his or her spouse and minor children. If this duty is not observed then it may be enforced through the courts. **That a testator's estate should, therefore, be charged with a duty similar to that borne by the testator in his lifetime is not troublesome.**

[Emphasis added]

At paragraph 30:

...Where provision for a spouse is in issue, the testator's legal obligations while alive may be found in the *Divorce Act*, R.S.C., 1985, c.3 (2nd Supp), family property legislation and the law of constructive trust: *Pettkus v. Becker*, [1980] 2 S.C.R. 834; *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38; *Peter v. Beblow*, [1993] 1 S.C.R. 980. Maintenance and provision for basic needs may be sufficient to meet this legal obligation. On the other hand, they may not. Statute and case law accepts that, depending on the length of the relationship, the contribution of the claimant spouse and the desirability of independence, each spouse is entitled to a share of the estate. **Spouses are regarded as partners.** As L'Heureux-Dubé J. wrote in *Moge v. Moge*, [1992] 3 S.C.R. 813, at p. 849:

...**marriage is, among other things, an economic unit** which generates financial benefits The [Divorce] Act reflects the fact that in today's marital relationships, partners should expect and are entitled to share those financial benefits.

[Emphasis added]

2. The “Availability” Principle

The court’s articulation of most dependent children’s claims fell under the rubrick of moral rather than legal duties. At paragraph 31, McLachlin J. wrote:

For further guidance in determining what is “adequate, just and equitable”, the court should next turn to the testator's moral duties toward spouse and children...

...most people would agree that an adult dependent child is entitled to such consideration **as the size of the estate and the testator's other obligations may allow.** While the moral claim of independent adult children may be more tenuous, a large body of case law exists suggesting that, **if the size of the estate permits** and in the absence of circumstances which negate the existence of such an obligation, some provision for such children should be made...

[Emphasis added]

3. The “Legal Over Moral” Principle

If the subordination of such moral claims was not made clear enough by these *dicta*, it is clearly apparent from the following at paragraph 32:

How are conflicting claims to be balanced against each other? **Where the estate permits**, all should be met. Where priorities must be considered, it seems to me that claims which would have been recognized during the testator's life -- i.e., **claims based upon not only moral obligation but legal obligations -- should generally take precedence over moral claims.**

[Emphasis added]

Variation Claims by Spouses

Considering the clarity with which the *Tataryn* principles were enunciated by a unanimous court, a surprisingly large number of spouses have had to challenge testamentary dispositions under the *Act* to get their just desserts. Exceptions arise primarily in cases of prior separation with payout and fair prenuptial agreements.

The following are but a few examples of challenges by successful spouses:

In *Tigchelaar v. Tigchelaar Estate*, [1995] B.C.J. No. 820, the testator had left his assets, consisting mainly of his one-half interest in the family home and \$27,000 in cash, to his adult children from his first marriage. The second wife, who was registered owner of the other one-half interest, successfully applied to have these valuable assets transferred to her absolutely.

Based largely on the Economic Unit Principle, the court awarded the testator's one-half interest in the will to the second wife. The primary factor dictating this result was that the will did not contemplate, as it should have, the fact that the survivor's pension would be less than the joint pensions while the cost of maintaining the survivor in the same home would be almost as much as it had cost to maintain both of them. Nor did the will contemplate the day when the second wife might need to find alternate, more costly accommodation and care.

Interestingly, although purporting to apply the testator's legal duty, the court did not cite any statute or clearly articulate the principle of law supporting that duty.

The courts in both *Glanville v. Glanville*, [1998] B.C.J. No. 2960 (C.A.) and *Erlichman v. Erlichman Estate*, [2002] B.C.C.A. 160 came to the aid of surviving spouses, although these are difficult cases to reconcile. In both cases, the testator's underlying legal obligation was clearer: the testator, having family assets registered entirely in his name, had left some portion of them in trust for the surviving second wife with a gift over to adult children or grandchildren thereafter to whom the testator had no legal duty.

In *Glanville*, the court of appeal reined in a relatively more generous trial judge, but the net result still favoured the applying spouse. The testator had left a life interest in the matrimonial home and joint bank account to his surviving spouse, which the judge increased to a 50% interest outright in the home. On appeal, this outright interest was converted into an obligation on the residual beneficiaries to pay all taxes, insurance and repair costs on the home out of their remainder interest. In a strongly worded dissent,

Esson J.A. would have awarded the widow full title to the entire matrimonial home subject to some legacies payable to other beneficiaries upon sale or transfer.

Five years later in *Erlichman*, the court of appeal went the extra step of awarding the widow, based on the Economic Unit Principle, a one-half interest outright although the estate was so large that she did not need the entire interest to sustain herself. Family property laws were the main justification cited by the court.

Glanville and Erlichman are both important lessons for counsel giving clients advice on wills. Husbands who attempt to control their wives too tightly after death risk being reined in by the courts at serious cost to all involved.

Westman (Guardian ad litem of) v. Westman Estate, [2000] B.C.J. No. 347 was much to the same effect as *Erlichman*. Again, the husband had attempted to discharge his obligations to his third wife by setting up a trust for her maintenance and benefit. Again, and without considering necessity as determining factor, one-half of the entire estate was awarded to the third wife based on family property legislation.

In *Bronke v. Lyseng*, [2000] B.C.J. No. 2774, the testator's obligations went beyond a family property split based on the actual needs of the spouse. By the will, the third wife would have been left a life interest in the matrimonial home, leaving the residue to his daughter from a previous marriage. Although the testator's moral claim to his daughter was recognized, given the value of the estate, it had to be subordinated to his claim in favour of the widow. The daughter's legacy of the residue of the matrimonial home was reduced such that she was left only the residue of one-third thereof. In the end, all three *Tataryn* principles were applied, collectively again in favour of the widow. The wife's need, exceeding her entitlement under family property legislation, trumped the daughter's moral claim.

Green v. King Estate, [2003] B.C.J. No. 2929 exemplifies the application of the *Tataryn* principles to common-law spouses with similar effect. The court fashioned a remedy comparable to what Esson J.A. would have awarded in *Glanville*. Again the testator had named his two adult children from his first marriage as beneficiaries of his will. In this case, the will was varied to give the common-law widow effectively about a two-thirds share in the house with a choice whether to sell or keep it subject to payout of the children's interests. The court did not find that the widow required these funds to sustain herself and, in fact, held that her debts were paid off and she enjoyed a steady income.

In cases involving common-law relationships, it is reasonable to expect the Economic Unit Principle and the Legal Over Moral Principle to be applied in a different manner, the legal obligations arising more upon rights in trust and statutory support obligations than from statutory property division rules. Nevertheless, at the end of the day, *Green* demonstrates that the common law spouse's rights may well prevail to much the same extent.

Variation Claims by Children

In stark contrast, variation claims of adult children under the *Act* have been largely unsuccessful.

In *Mann v. Canada Trust Co.*, [1996] B.C.J. No. 1253, the court allowed only a minor variation in regard to two children of the first marriage who had each been left \$50,000 of an \$848,000 estate despite the court's finding, at paragraph 15, that the estate was, "...of sufficient size to properly satisfy the legal obligations he owes to his widow...and the moral obligations owing to both [the widow] and his two children". The small increase was due to a historical accident in the size of the estate and the testator's subjective perception of his moral duty toward his children. Interestingly, the second wife's need did not appear to play a large role in the decision. She enjoyed a considerable income, anticipated a pension upon retirement, and held some \$150,000 in her own name.

Munro v. Munro Estate, [1996] B.C.J. No. 1038 involved a more modest estate (less than \$200,000). The deceased's children from a previous marriage were not well off and most of them applied for a portion of the estate based in part on their need and on the short duration of the second marriage (two years). The court's assessment of their position is instructive, at paragraph 15: "I take it that they regard this major part of their father's estate as their rightful inheritance; and that is the reason behind those who are plaintiffs commencing this action..."

In denying the children's claims, the court applied collectively the Availability Principle and the Legal Over Moral Principle, at paragraph 27: "Did he have any moral duty toward them? The answer to this depends, it seems to me, upon the size of the estate. Here, it is not large." And at paragraph 28: "In my view, there is no room in it to provide for any moral claims of the children."

In *Russell v Lidstone*, [2001] B.C.J. No. 1542, the testator's daughter challenged his disposition of one-half of his small (\$100,000) estate to a live-in companion. It was held on summary trial that the deceased had discharged his duties to both individuals.

Morphy v. Mohr, [1998] B.C.J. No. 71 is an extreme example of the application of the *Tataryn* principles against the (minor) child of a former marriage. In this case, the testator had left his 14-year-old daughter only \$2,500 of a \$320,000 estate. It seems obvious that the bequest was grossly insufficient to discharge his duties toward her, yet it was increased to only \$25,000 being "her maintenance requirements during her minor years", in other words, his legal duties.

This case is most striking since the majority of the estate was left to the wife in trust with a residual interest largely to charities (in fact, two of the six equal residual beneficiaries renounced). In this case, having specifically found that the child had discharged her burden of showing that the reasons acted upon by the testator in leaving her such a small sum were false or unwarranted, the court could easily have varied the will to take into account a moral duty by providing the daughter with a share of the residue.

Cases Involving Separations and Prenuptial Agreements

The factors in cases involving separations and prenuptial agreements turn in large part upon the terms of those relationships and agreements and are beyond the scope of this paper. Although there remain cases in which the courts are obviously sympathetic to surviving spouses, there is not the same pattern of clear preference for surviving spouses over adult children.

Conclusion

The strong preference for the claims of surviving spouses over children of former relationships provides guidance both to estate litigation counsel advising on potential claims and to wills counsel advising testators. Given the high cost of litigation relative to the size of many estates, a decision by dependent adult children to challenge the testamentary disposition of their deceased parent should be reached only after very serious consideration - in addition to costs - of both the chances of winning and the amount they may reasonably expect if successful.

From a wills drafting perspective, it is submitted that at least as much attention be paid to the need to provide sufficiently for surviving partners than to the reasons for "disinheriting" (or "underinheriting") adult children.

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End Notes

1 By “blended family” disputes I refer to situations in which the deceased had one or more children (biological or adopted) prior to entering the relationship she was in at death.

2 Indeed, a large majority of the British Columbia Court of Appeal cases which have considered *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807; [1994] S.C.J. No. 65 have involved blended families.

3 I use the term “spouse” to include common law spouses, both in opposite and same-sex relationships, as required by *Grigg v. Berg Estate*, [2000] B.C.J. No. 36 (S.C.); reconsidered at [2000] B.C.J. 1080.

4 R.S.B.C. 1996, c. 490, as amended. S. 2(1) of the *Act* provides as follows:

“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.”

5 Since minor children are the subject of relatively few wills variation cases, they are not a focus of this paper.