

Submission to
The Ministry of the Attorney General of British Columbia

Regarding the:

***WILLS, ESTATES AND SUCCESSION ACT, S.B.C. 2009,
C. 13 (Bill 4)***

Issued by:

Canadian Bar Association

British Columbia Branch

Wills and Trusts Section (Vancouver)

Bill 4 Special Committee

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PREFACE

The Canadian Bar Association nationally represents over 38,000 members and the British Columbia Branch (the “CBABC”) itself has over 6,400 members. Its members practise law in many different areas and the CBABC has established 72 different Sections to provide a focus for lawyers who practise in similar areas to participate in continuing legal education, research and law reform. From time to time Sections form special committees to review issues of interest to Section members.

The CBABC Wills and Trusts Vancouver Section formed a special committee in March 2010 to review the *Wills, Estates and Succession Act*, S.B.C. 2009, c.14 (Bill 4) (the “Act”) in anticipation of proclamation of the Act. The purpose of the review of the Special Committee was to identify and bring to the attention of the Ministry of Attorney General any issues arising from the drafting of the Act which could potentially be addressed through amendment prior to proclamation of the Act.

The comments expressed in this submission reflect the views of the Wills and Trusts Vancouver Section only and are not necessarily the views of the CBABC as a whole. Where questions or issues set out in this consultation are not considered by the Wills and Trusts Vancouver Section, this does not mean that the Wills and Trusts Vancouver Section, either accepts or rejects these matters, but that the Special Committee or the Wills and Trusts Vancouver Section has no comment on these matters at this time.

The following Wills and Trusts Vancouver Section members participated as members of the Section's Special Committee:

- Emma McArthur, Chair of the Special Committee
- Alfred Field
- Gordon MacRae, Q.C.
- Hugh McLellan
- Catherine Romanko, Chair of Wills and Trusts Vancouver Section

The following other members of the Wills and Trusts Vancouver Section contributed comments for consideration by the Section's Special Committee:

- Rhys Davies, Q.C.
- Amy Francis
- A. John Lakes
- Genevieve Taylor
- Carmen Thériault, Q.C.

Comments were also contributed for consideration by R.C. Di Bella of the Wills and Trusts Victoria Section.

SUBMISSION

BACKGROUND

On October 29, 2009, the Act was given Royal Assent. The Act comes into force by regulation.

SPECIAL COMMITTEE RESPONSE

In response to passage of the Act, the Wills and Trusts Vancouver Section established a special committee of skilled and experienced practitioners to review the Act and to provide submissions to the Ministry of Attorney General.

These submissions outline the issues thought by the Special Committee to be critically in need of amendment.

1. Definitions and Interpretation

“estate” as a deceased person cannot own property, the Special Committee recommends that the words “deceased person” be replaced with the words “person that vests in the personal representative on death” so that the definition reads:

“means the property of a person that vests in his personal representative on death”

“nominee” be amended to include a committee of the estate only and exclude a committee of the person. Many of the references to Nominee throughout the act are connected to financial decision making powers - a committee of the person is not authorized to make financial decisions.

2. Meaning of Spouse, Effect of Adoption and Construction of Instruments

Section 3(3)

The wording of this section seems to imply that a child may have two natural parents in addition to an adopted parent. The Special Committee recommends that the wording of this provision be amended to clarify that the relationship to the child of the natural parent who is not married to the adopting spouse, is terminated by the adoption.

3. Survivorship Rules

Section 8

The Special Committee recommends this provision be amended to provide a time period in which a “conceived” child must be born in order to prevent frozen embryos from qualifying as posthumous births in perpetuity.

4. First Nations’ Final Agreements

Sections 17 (see also sections 18, 27(1), 182)

The Special Committee recommends that these sections specify the form, written or otherwise, in which notice must be given. This amendment would make these sections consistent with other sections which specify form, such as section 15(4)(1) unless this issue will be dealt with in the Rules.

Section 18

See comment regarding section 17 above.

5. Distribution of Estate Where There is No Will

Section 23(2)(e)

The word “parent” in the third and fourth line of the paragraph beginning with “but if there is only a surviving great-grandparent” should be replaced with “grandparent” so that the paragraph reads:

but if there is only a surviving great-grandparent or descendant of a great-grandparent on one grandparent’s side or the other grandparent’s side, ½ to the surviving great-grandparent, if any, or to the descendants on that side, as the case may be, in the same manner as provided in clause (A), and...

6. Spousal Home

Section 27(1)

See comment regarding section 17 above.

Sections 33, 34 and 35

The scheme outlined under these sections creates many of the same, and some additional, issues as life estates. The Special Committee is of the opinion that this new scheme will create interpretation issues and uncertainty, especially with regard to the following undefined terms: “ordinarily resident”, “significant financial hardship”, “connection to the family home”, “connection with the community or members of the community”. The Special Committee also notes that a life interest is not among the options available to the court pursuant to subclause (2). These changes were not recommended by the Report.

7. Making a Will

Sections 37(1)(b) and 39(1)

The Special Committee recommends that the defined term “will-maker’s signature” replace references to “signature of will-maker”.

8. Legal Effect of a Will

Section 42(3)

This provision mirrors s. 26(1) of the existing *Wills Act*, but s. 26(2) of the existing *Wills Act* has been omitted. The Special Committee is of the view that the exception under 26(2) is important and was recommended by The British Columbia Law Institute report entitled “Wills, Estates and Succession: A Modern Legal Framework” (“the Report”) and recommends that section 42(3) be amended to include the exception found in s. 26(2) of the existing *Wills Act*.

Section 43(4)

- (a) The Special Committee recommends that the words “or his or her spouse” be added as follows:
- “On application, the court may declare that a gift to a person referred to in subsection (1) is not void and is to take effect, if the court is satisfied that the will-maker intended to make the gift to the person even though the person or his or her spouse was a witness to the will.”
- (b) The Special Committee also recommends that a time frame be specified in which the application referred to must be brought.

Section 44

The language in this section has changed from s. 21 of the existing *Wills Act* which applied to property which was intended to be gifted by the will but lapsed. The wording in s. 44 applies to “all property not disposed of in “the will”. This provision would preclude a testator from having multiple wills in other jurisdictions. We suggest the words “governed by that will” be added as follows:

If a will does not give or otherwise dispose of all of the will-maker’s property governed by that will, the property that is not the subject of a gift or otherwise disposed of in the Will...

Section 46(1)(b)

This section provides that it will apply if a gift cannot take effect “for any reason” which would include gifts that fail as a result of a pre-condition not being met. For example: “\$10,000 to my brother if he takes my cats”. If the brother refuses to take the cats, the gift will fall to the brother’s descendants. The Special Committee questioned whether this was the intended consequence of this provision.

Section 48

The Special Committee recommends that this provision be amended to clarify whether “proceeds” are gross proceeds or net proceeds.

Section 52

- (a) The proposed Probate Rules provide a procedure for dealing with probate actions. The Special Committee recommends that the reference to “an action” in this section be amended to clarify whether an action by notice of claim will be required or whether an action by application under Probate Rule 91 will be sufficient.
- (b) The words “or to uphold the gift” appear to be redundant and this category is not included in the first sentence where the provision specifies that the claim be either that the will or a provision of the will is the result of some form of undue influence.

9. Altering, Revoking and Reviving Wills

Section 53(3)

There is a presumption of law that if the will-maker pays the debt during her lifetime, after making the will, a legacy of to the creditor adeems (Feeney, *The Canadian Law of Wills*, loose-leaf, paragraph 15.100 note 1; *Williams on Wills* (7th ed., p. 473 n. 16)). This presumption is not addressed in this provision and will continue to apply. It is not clear if this presumption was overlooked or intentionally excluded.

Section 55(1)(d)

As the subsection is currently worded, a will may only be revoked by an order under section 58 where the will has been destroyed. However, section 58 presumably would apply to revocation of a will in circumstances other than where the will has been destroyed. The Special Committee recommends that subsection (d) be amended to provide for two separate methods of revoking a will:

1. by an order of the court under section 58; or
2. if the court determines that the consequence of the act of burning, tearing or destroying all or part of the will in some manner is apparent on the face of the will, and the will-maker intended to revoke all or part of the will.

The Special Committee also notes that if a will is completely destroyed by fire it may not be apparent “on the face of the will”.

10. Curing Deficiencies and Rectification of Wills

Section 58

- (a) The word “record” is defined in the *Interpretation Act* to include “documents”. Therefore, the Special Committee recommends that references to “documents” in section 58 be deleted or replaced as appropriate.
- (b) The Special Committee recommends that section 58 be amended to expressly provide that extrinsic evidence is admissible in relation to rectification. Section 59(2) expressly provides this which would appear to limit section 58 to not include extrinsic evidence.
- (c) In subsection 58(3)(c) we believe that the word “intention” should read “instrument”. If this is changed, the word “the” should be replaced with “a” so that the subsection reads: “as a testamentary instrument of the deceased”.

11. Variation of Wills

Section 71

This provision previously provided that the court could make an inquiry and vary an order only “If the court has ordered periodic payments, or that a lump sum be invested for the benefit of a person”. The new provision allows variation of orders even where outright distributions were ordered which the Special Committee predicts will be unworkable and will lead to uncertainty. The Special Committee recommends that this provision be amended to track the old language.

12. Designation Requirements

Section 85

- (a) “A person entitled to benefit under a benefit plan” would include a beneficiary of a plan. The Special Committee recommends that the above captioned words be replaced with “a participant under a benefit plan”.
- (b) The Special Committee recommends that the words “alter or revoke” be added to subparagraph (3) following the words “may make” so that 85(3) reads:

A person granted power over financial affairs under:

- (a) section 8[*enduring power of attorney*] of the *Power of Attorney Act*, or
- (b) a committee acting under the *Patients Property Act*

may make, alter or revoke a designation under this section only if expressly authorized to do so by a court and the designation is not made in a will.

- (c) The Special Committee recommends that subsection (3) be amended to provide that court authorization not be required where the action taken is expressly authorized in the instrument.
- (d) The Special Committee recommends that subsection (3) be subject to section 90 in order to allow consistent designation changes without a court order, as recommended by the Report.

13. Application for Grant of Probate or Administration

Sections 121 (along with sections 137 and 141)

In combination these sections impose a liability on executors that is contrary to the recommendations of the Report. The Special Committee is of the opinion that it is not in the best interests of the public to impose such a liability on personal representatives where reasonable efforts have been made to ascertain persons to whom notice is required to be given. The Special Committee recommends that section 121 be amended to parallel sections 109(15) and (17) of the Report.

14. Grant of Probate or Administration

Section 133

- This section seems to prevent a will-maker from using more than one will to dispose of property. The Special Committee recommends that the words “governed by that will” be inserted following the words “...or otherwise dispose of the deceased person’s estate...”
- This section is inconsistent with s. 136 which “gives the personal representative exclusive authority to administer the estate or that part of the estate to which the representation grant applies in accordance with its terms”. S. 133 precludes the possibility that there will be a part of the estate to which the representation grant will not apply.

Section 137

See comment regarding section 121 above.

15. Revocation of Grant of Probate or Administration

Section 141

- The language in subsection (1): “revoke a grant of probate” is inconsistent with the language in subsection (2): “if an executorship is terminated”.
- Subsection (2) is limited to an executorship despite subsection (1) providing that the court must not revoke a grant of probate or administration.
- The Special Committee recommends that subsection (2) be amended to provide:

“If a grant of probate or administration is revoked, the authority to act passes as if the person had never been appointed executor.

- See comment regarding section 121 above.

16. Discharge, Removal and Substitution of Personal Representatives

Section 158(3)(g)

This section appears to allow a court to pass over a person otherwise entitled to be a personal representative if they are a committee under the *Patients Property Act*. The Special Committee recommends that subsection (g) be amended to read:

“has a committee under the *Patient’s Property Act*”.

The Special Committee also notes that subsection (b) appears to already contemplate the court passing over a person who is incapable and suggests that subsection (g) as amended may be redundant.

17. Insolvent Estates

Section 170

- (a) The Special Committee recommends that subsection (b) be amended to include compensation set by will, regulation or contract. The Special Committee also notes that the reference to section 88 may be intended to be a reference to section 89.
- (b) The Special Committee recommends that subsection (c) be amended to clarify whether all legal expenses or only those legal expenses incurred in relation to the administration of the estate are included in this provision.

18. Other Matters and Regulations

Section 182

See comment regarding section 17 above.

Section 183

The term “representative” is not a defined term in either the proposed Act or the *Interpretation Act*. The Special Committee suggests that the use of this term will cause an interpretation issue: it is not clear who, if anyone, would qualify as a “representative” under this section. The Special Committee recommends that “representative” be replaced with “personal representative” which term is defined in the *Interpretation Act*.

CONCLUSION

We hope that our recommendations for improvement or clarification are helpful. We would be pleased to provide further information. Any communications can be directed to:

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