ESTATE PLANNING IS ABOUT MORE THAN JUST A WILL

One of B.C.'s experienced estates and trusts litigation lawyers explains why upholding your estate plans after you pass isn't as simple as it seems.

On the surface, estate planning looks straightforward. You draft a will, sign a marriage agreement (more common in blended family situations), or create a trust… and you take comfort in having taken the steps to put your affairs in order expecting your wishes as recorded to be followed when the time comes.

But making sure those wishes are respected isn't always that simple, according to Jacy Wingson, QC, an experienced estate litigator.

"A lot of people assume that once a will or a marriage agreement is signed things are set in stone, but because of the way these agreements interact with current legislation, that's not always the case," says Wingson, a Queen's Counsel and partner at McQuarrie Hunter LLP, an established regional law firm based in Surrey.

According to her, these documents cannot be viewed in isolation and when the law is applied, it can lead to unanticipated and unexpected consequences. The application of the law to a family's particular situation, can lead to litigation which can result in changing the wishes set out in the will. That's why Wingson recommends that you retain estate planning professionals in order to guide and advise you so that your wishes for the future of your estate are much less likely to be successfully challenged.

"What I've learned over the past 25 years is that things aren't always as they seem when it comes to estate planning," she says. "To understand how things actually work you must delve into the facts to properly consider how the law applies to those facts. And, she adds: "Just as each family is different so too each case is different and the law is applied to the unique facts of each case." This brings the personal element to practising law in this area that Wingson finds engaging and fulfilling.

In British Columbia, estate planning, and following death, estate administration, are legislated by the BC *Wills, Estates and Succession Act,* which came into force on March 31, 2014. The outcome of previous cases also often affects the decisions Judges make in disputes about wills or other estate planning transactions that come before them.

According to Wingson, there are two main ways in which the application of the law to the particular facts of a case can alter or vary someone's estate plans.

Why a will may not survive

The first issue to be considered is whether the will in question is valid.

"There are a number of reasons a will may be found to be invalid by a court," says Wingson. "These can include grounds based on: formal invalidity of a will (when the rules as to format are not met and the will cannot be saved by the new legislation); undue influence (when someone improperly influences the writing of another person's will); or lack of testamentary capacity (when someone doesn't have the mental capacity to make a valid will)."

Regardless of the grounds, if a judge declares that a will is invalid, it's as if it had not been made. Therefore, if there was a previous will, that one will take its place, and if no other will was ever made, then legislation determines what happens to your estate.

"If a challenging party can show that any of these things occurred, there's a good chance that the will – if it does not truly reflect the person's free will and wishes – will be thrown out," Wingson says.

Wills variation

The second way in which a will can be challenged can be far more contentious and has nothing to do with validity.

"Wills variation challenges occur when a will is valid, meaning that all procedures were followed correctly and the capable, independent will-maker knew exactly what he or she was doing, but a surviving spouse or child believes that the will is not fair," explains Wingson.

Surviving spouses (married and common law couples, including same-sex spouses) and children (including adopted children but excluding step-children) are the only people who can make a wills variation claim.

"Blended families, where assets built up during the first marriage of one of the spouses are claimed by the surviving second spouse after death, add yet another dimension to wills variation claims" says Wingson.

In those cases, even when a marriage agreement was signed when the parties got married or started their common law relationship, the person's estate plan can still be challenged by the surviving spouse.

"Even though at some point they might have signed a marriage agreement saying they weren't going to make a claim against the estate, if sufficient time has passed, the court, looking at the circumstances of the relationship over the years, can find that the marriage agreement is no longer fair."

How to make sure your wishes are followed

Consulting your professional advisors in order to properly explore and document your wishes, and regularly reviewing and revising your estate plans (including wills, any marriage agreements and trusts), are the best ways to ensure that your wishes for your estate are actually followed after you pass.

Wingson recommends all estate plans be regularly reviewed and updated (and for marriage agreements - every three to four years), to successfully avoid any challenges to their validity or fairness, or at least to be in the best position to successfully defend such challenges.

"If people regularly consult with their lawyers and estate planning professionals to properly prepare their documents and regularly review their estate plans, they'll most likely be fine," she says. "And if by any chance someone's will or estate plan is contested, that's when I come in to dig deep to get to a successful resolution of the dispute."

McQuarrie