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# estate litigation

H A N D B O O K

PERSONAL INJURY | ESTATE LITIGATION | PRODUCT LIABILITY | INSURANCE DENIALS

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## Introduction

If you have been excluded from a Will or if you are a **disappointed beneficiary** - either a spouse or a child - then you have a legal right to contest a Will. Unfair treatment in a Will is extremely upsetting and occurs more frequently than you may realize. Knowing your legal rights and having Helpforme in your corner helps you to make informed and rational decisions in a highly emotional estate dispute. We're here to help.

Valid reasons why you have not inherited what you believe is fair might include: family estrangement; undue influences on your parent; sibling benefit inequality; stepfamily issues; parental incapacity; inheritance disputes stemming from a parent's divorce or re-marriage; elder abuse; or Trustee mishandling of an estate, and more. If you feel wronged, it is in your best interests to consult an Estate Litigation lawyer with considerable litigation and dispute resolution experience. **We help you protect what is rightfully yours.**

Helpforme is the Personal Legal Services Group of Hammerberg Lawyers LLP. Hammerberg is one of British Columbia's largest and most vibrant groups of dispute resolution lawyers and a highly-respected law firm, entering its 20th year of legal practice in 2019.

Led by extremely skillful, accomplished and passionate lawyers, Helpforme provides a free consultation. We listen attentively and are empathetic toward your legal and emotional challenges. Helpforme quickly identifies your options so we can help you reach an optimal outcome within legal deadlines. We can also help with a Will if the person who died resided in BC and if they had a connection to British Columbia. In such cases, it may be prudent to speak with a BC-based lawyer, even if the Will was prepared elsewhere. However, if there is no connection to British Columbia then we do not take on cases that relate to estates in other jurisdictions, as the legislation regarding Wills and estates is provincial.

As for legal fees, we take a personalised approach depending on each client's situation. Wherever possible we take claims on a contingency basis.

## Why do you need an Estate Planning or an Estate Litigation lawyer?

1. To protect your interests: There is a limitation period on the amount of time you have to bring your claim. An Estate Litigation lawyer can help you meet these deadlines to protect your claim.
2. To provide guidance: An Estate Litigation lawyer can review your situation objectively to determine whether or not you have a valid claim. Doing so could save you considerable time, expense, and the risk of applying to the Court without success within the time limitation.
3. To alleviate stress: The passing of a loved one is emotionally challenging. It can be demanding and exhausting to assess your claim and take steps to apply to the Court while grieving. An Estate Litigation lawyer can do this work for you so that you can focus on yourself and your family during this difficult time.
4. To ensure proper execution: There are a number of technical requirements to execute a valid Will. It is best to ensure these are met by consulting with a lawyer while you are alive, instead of allowing the Court to determine the validity after you are deceased.
5. To minimize taxes owed: Certain transactions will trigger taxes in estate planning such as property transfers. An Estate Planning lawyer can help you organize your assets so that the maximum amount of money will be available for your beneficiaries.
6. To protect your assets: The best time to hire a lawyer is before there is any possible litigation. Hiring an Estate Planning lawyer can ensure that your assets and Executor are not subject to future litigation.
7. To advise on jurisdictional issues: The Courts of British Columbia will only deal with the assets in Canada. If you own assets in multiple jurisdictions, it is important to consult with an Estate Planning lawyer as these may need to be placed in a second Will, or be disposed of otherwise to avoid tax implications.
8. If you are the Executor of a Will and you need help filing for probate: please contact one of our Wills & Estates lawyers to discuss our services.

## First steps when you're considering an estates claim

1. Check your timing: Are you within the time limit of 180 days after Grant of Probate? Section 61 of Wills, Estate and Succession Act prohibits any applications to vary a Will after 180 days from the date probate was granted. If the time limit expires, you will be unable to bring your claim. Other challenges to Wills may have a longer limitation period, but it is important to commence your claim promptly to protect your rights.
2. Contact one of our lawyers: Schedule your free consultation at Helpforme so we can discuss your point of view and assess whether or not you have a valid claim. Call us at 604-269-8500 or Toll Free at 1-888-LAW-5544. We'll review your case and inform you of the best way to proceed.
3. Gather all your evidence: Be prepared to bring all the evidence you've collected to your free consultation so we can help prepare your claim. Types of evidence would include: a copy of the Will (if there is one) and information relating to the deceased, other beneficiaries and assets of the Estate.

## What is Estate Litigation?

*The Wills, Estates and Succession Act* is the legislation in British Columbia that determines the validity of Wills and estates. This act was brought into force on March 31st, 2014. If your current Will was drafted prior to this date, and in accordance with the old legislation, it may be time to revise your Will to ensure its compliance with the new Act.

When a person dies, that person's assets fall into one of two general categories: 1) assets that were the deceased's property and form part of the deceased's estate, and 2) assets that may or may not have been the deceased's property but which do not form part of the deceased's estate. Examples of property that will not form part of the estate include insurance plans or RRSPs with a designated beneficiary. Only property that forms part of the deceased's estate will be distributed under the terms of the Will or under the *Wills, Estates and Succession Act*. Such assets might include the deceased's personal belongings, money in the form of accounts, investments, etc., and real estate. Any assets that were transferred (given or gifted) to someone while the deceased was alive will not form part of their estate unless there were conditions attached to those transfers.

When an individual dies without a Will, this is referred to as dying intestate. The deceased's assets will be distributed by the Court in accordance with the rules in the *Wills, Estates and Succession Act*. There is a defined order in the Act that will determine who shares in what percentage of your assets, based on which descendants you have at the time of death. If you have no successors as determined by the Act, your estate will revert to the provincial Crown. In this

situation, neither the deceased, their family, nor anyone else has a say in how the assets are distributed. In order to realize your wishes after death, it is important to consider estate planning techniques and to prepare your Will.

If the deceased has left a Will, the Court will determine whether the formal requirements of the Will have been met, as illustrated in the *Wills, Estates and Succession Act*. This includes requirements such as the signatures of the deceased and the witnesses. Upon meeting these requirements, the Court will deem the Will to be valid unless someone challenges the Will on one of the permitted grounds. If you are questioning the validity of a Will in British Columbia, you can formally challenge the Will in Court under the *Wills, Estates and Succession Act*.

In order for a Will to be effective the Will-maker must have:

- the mental capability to make a Will;
- intended for the Will to dispose of their assets;
- intended that the Will not take effect until after their death and to be entirely conditional upon their death for it to take effect;
- intended for the Will to be (and it in fact must be) revocable; and
- executed the Will in accordance with the requirements of the *Wills, Estates and Succession Act*.

Sections 36-40 of the *Wills, Estates and Succession Act* set out the formal requirements for a valid Will:

- The Will must be in writing and must be signed by the Will-maker;
- The Will-maker's signature must be witnessed by two (2) or more individuals who are both present at the time of signing by the Will-maker and who also sign the Will,
- The Will-maker must be 16 years of age or older and the witnesses must be 19 years of age or older.

If the estate in question belonged to an Aboriginal person, sections 42-50 of the *Indian Act*, R.S.C. 1985, c. I-5 may apply. Division 3 of the *Wills, Estates and Succession Act* also deals with certain First Nations and Nisga'a property.

It is important to note that section 61 of *Wills, Estate and Succession Act* prohibits any applications to vary a Will 180 days after the Will has gone through probate. This time limit begins after probate is issued in a British Columbia estate. The Executor requires notice of the variation within 30 days of the expiry of this 180-day period. If the time limit expires, you will be unable to bring your claim. Other challenges to Wills may have a longer limitation period, but it is important to commence your claim promptly to protect your rights.

One common example of an estate litigation dispute is a claim made by a child or spouse who was excluded from the deceased's Will. A Will-maker has a moral obligation to provide for their spouse and all of their children in their Will, in a manner that is "adequate, just and equitable." If proper provision is not made, it is possible to apply for a Court order varying the Will in that individual's favour. However, such applications are not always successful. A Will-maker may have a good reason to treat their children differently in the Will, for example, if the child is estranged from the Will-maker. The Court may find the Will-maker was justified in their decision to exclude certain children and that the Will should be upheld. Before deciding to vary a Will, the Court will consider a number of factors including the size of the estate, what assets if any were transferred by the Will-maker when he or she was still alive, and the relative financial positions of the children.

### **Common Estate Litigation Terms:**

1. **Executor:** The person appointed to carry out the wishes in a Will.
2. **Trustee:** The person responsible for managing property held in trust.
3. **Estate:** All the money and property owned by an individual at the time of their death.
4. **Testator:** The person who makes the Will (formal term for Will-maker).
5. **Beneficiary:** A person who benefits from the Will.
6. **Intestate:** When someone dies without a Will.
7. **Probate:** The process by which the Court confirms the Will to be valid and appoints the Executor(s).
8. **Grant of Probate:** The legal document authorizing an Executor(s) to manage the deceased's estate in accordance with the provisions of their Will.
9. **Power of Attorney:** A Power of Attorney is a document executed by an individual during their lifetime that gives power to someone else to manage their financial and legal affairs. Powers of Attorney can take effect at different times, depending on how they are drafted (for example, if the individual becomes mentally incapable).

## Different Types of Cases

### Challenges to the Will:

**Challenge the Will based on capacity:** If it can be shown that the Will-maker lacked testamentary capacity, the Will may be found to be invalid. For example, if the Will-maker has been declared as unable to manage their affairs by their doctor due to mental incapacity. Testamentary capacity can be challenged on three grounds:

- At the time of executing the Will, the will-maker did not understand that they were making a will;
- The will-maker did not understand that he or she was intending to dispose of property effective on his or her death; or
- At the time of signing the Will, the will-maker suffered from mental disorder.

This illustrates why it is important to organize your estate before you fall ill so you do not reach a point in illness or mental decline where you are unable to explain your wishes to an Estate Planning lawyer. A mental status examination may be required to determine capacity.

**Challenge the Will based on undue influence:** If someone coerced the Will-maker into making the Will in a way that favours them or their wishes, the Will may be found to be invalid. For example, a child convinces their parent to change their Will on their deathbed to provide them with a higher percentage of the assets.

**Challenge the Will based on unfair distribution of assets:** *The Wills, Estates and Succession Act* confers a moral obligation on individuals to provide for their spouse and children. A child who receives nothing in their parent's Will may apply to the Court to have the assets redistributed so that they are provided for. To vary a Will, you must be an eligible applicant under the *Wills, Estates and Succession Act*. This includes:

- The surviving spouse, of the same or opposite sex;
- The common-law spouse (in a marriage-like relationship for at least two years prior to the death, including same-sex); or
- The child of the will-maker, including adopted children but not step-children.

**Challenge the Will based on improper execution:** There are a number of technical requirements that must be met to make a Will valid. If one of these conditions is not met, the Will may be challenged on this ground. For example, claims can be brought if the Will is not signed or witnessed. Conversely, the Court may choose to uphold the Will, despite the deficiencies, if the Court determines that it accurately reflects the wishes of the Will-maker.

**Challenge the Will based on a constructive trust:** If you have provided unpaid work for the Will-maker and were promised compensation, you may have a claim for the assets in the Will, even if you have not been specifically provided for in the Will itself. This is called a constructive trust or unjust enrichment.

**Challenges the validity of pre-death gifts:** There are a number of ways that individuals may transfer items so that they do not form part of their estate on death, and thus are not subject to the terms of the Will. If assets are transferred incorrectly, or if it is your belief that they were meant to form part of the estate, the pre-death gifts can be challenged as being part of the estate. An adult child may need to defend a transfer made to them by a parent, pre-death, as a gift. This applies to transfers of property or to a joint bank account.

### **Challenge the actions of an Executor or Trustee:**

**Challenge the inappropriate conduct of a Trustee or Executor:** Trustees and Executors have an obligation to the Will-maker to refrain from abusing their position of power. An application may be made to the Court, on behalf of the Will-maker, if this trust has been breached, to remedy the situation. For example, if an Executor has not followed the terms of the Will or is misappropriating the assets for their own benefit. Executors or Trustees can be removed by the Court if they are deemed to be unfit for their position. Information regarding the removal of Executors and Trustees can be found in section 142 of the Wills, Estates and Succession Act and section 30 of the Trustee Act.

**Disputes between Trustees:** Often, Will-makers will designate more than one individual to be the Executor of their estate. They may also require the Executors to make decisions unanimously. When Executors disagree on the appropriate course of action, an application to the Court may be necessary to resolve the dispute. A lawyer can help you understand your responsibilities and potential liabilities as an Executor or Trustee.

### **Defensive Estate Planning techniques:**

**Protection for step-children:** There is no moral obligation to provide for step-children in the Wills, Estates and Succession Act. This means that if you pass away, leaving your assets to your spouse, your children from a previous relationship may not be provided for. This can be remedied in a multitude of ways by hiring an Estate Planning lawyer to organize your assets.

**Unequal treatment of children:** You may wish to leave more assets to certain adult children if they are more dependent on you than others. Because unequal division can be varied by the Court, it is important to hire an Estate Planning lawyer to ensure that your assets are divided in accordance with your wishes.

**Probate tax:** When your assets pass through probate, they will be taxed. There are ways to avoid this using various estate planning techniques. This is particularly important for those with high-value assets. For example, you may wish to legally transfer assets out of your possession before you pass, in order to diminish the total value to be taxed in the estate.

**Protect disability benefits:** If a beneficiary of a Will receives a large inheritance from a Will, they may be disentitled from their disability benefits under the Employment and Assistance for Persons with Disabilities Act. This can be an unintended consequence of dying intestate, which is one of the reasons why it is important to consult with an Estate Planning lawyer.

## Challenges to the Will

### Challenge the Will based on capacity:

If it can be shown that the Will-maker lacked testamentary capacity, the Will may be found to be invalid. For example, if the Will-maker has been declared unable to manage their affairs by their doctor due to mental incapacity

Testamentary capacity can be challenged on three grounds:

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- The Will-maker did not understand that he or she was intending to dispose of property effective upon his or her death; or
- At the time of signing the Will, the Will-maker suffered from mental incapacity.

Challenges to a Will based on capacity/testamentary capacity highlight the importance of early Estate Planning before a Will-maker becomes too ill or mentally compromised to communicate their wishes to an Estate Planning lawyer. In such cases, a mental status examination maybe required to determine capacity.

### **Challenge the Will based on undue influence:**

If someone coerced the Will-maker into making the Will in a way that favours them or their wishes, the Will may be found to be invalid. For example, if a child convinces their parent to change their Will on their deathbed to provide them with a higher percentage of the assets.

### **Challenge the Will based on unfair distribution of assets:**

The *Wills, Estates and Succession Act* confers a moral obligation on individuals to provide for their spouse and children. A child who receives nothing in their parent's Will may apply to the Court to have the assets redistributed so that they are provided for. To vary a Will, you must be an eligible applicant under the *Wills, Estates and Succession Act*.

This includes:

- The surviving spouse of the same or opposite sex;
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- A child of the Will-maker, including adopted children but not step-children.

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There are a number of technical requirements that must be met to make a Will valid. If one of these conditions are not met, the Will may be challenged on this ground. For example, claims can be brought if the Will is not signed or witnessed. Conversely, the Court may choose to uphold the Will, despite the deficiencies, if it determines that it accurately reflects the wishes of the Will-maker.

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If you have provided unpaid work for the Will-maker and were promised compensation, you may have a claim for the assets in the Will, even if you have not been specifically provided for in the Will. This is called a constructive trust or unjust enrichment.

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There are a number of ways that individuals may transfer items so that they do not form part of their estate on death, and thus are not subject to the terms of the Will. If assets are transferred incorrectly, or it is your belief that they were meant to form part of the estate, the pre-death gifts can be challenged as being part of the estate. An adult child may need to defend a transfer made to them by a parent, pre-death, as a gift. This applies to transfers of property or to a joint bank account.

## Challenges to actions of an Executor or Trustee

### Challenge the inappropriate conduct of a trustee or executor:

Trustees and Executors have an obligation to the Will-maker to refrain from abusing their position of power. An application may be made to the Court, on behalf of the Will-maker, if this trust has been breached, to remedy the situation. For example, if an Executor has not followed the terms of the Will or is misappropriating the assets for their own benefit. Executors or Trustees can be removed by the Court if they are deemed to be unfit for their position. Information regarding the removal of Executors and Trustees can be found in section 142 of the *Wills, Estates and Succession Act* and section 30 of the *Trustee Act*.

### Disputes between trustees:

Often, Will-makers will designate more than one individual to be the Executor of their estate. They may also require the Executors to make decisions unanimously. When Executors disagree on the appropriate course of action, an application to the Court may be necessary to resolve the dispute. A lawyer can help you understand your responsibilities and potential liabilities as an Executor or Trustee.

## Defensive Estate Planning techniques

### Protection for children from another relationship:

It is common practice for spouses to leave all of their assets to one another under their Wills. This can be adequate estate planning if all children in the family are biological or adopted children of both spouses, but can lead to problems in blended families.

For example, consider a couple who remarry, and both have children from previous relationships. The wife may leave all of her assets to her husband in her Will. Upon her death, everything passes to her husband, while her children from her previous relationship are not provided for.

When the husband passes away, he has no obligation to provide for his wife's children (his step-children). This is because there is no moral obligation to provide for step-children under the *Wills, Estates and Succession Act*. The unintended result in this example is that the wife's children from a previous relationship receive no inheritance under either estate. This result can be avoided by hiring an Estate Planning lawyer to address your specific wishes in advance.

### **Unequal treatment of children:**

You may wish to leave more assets to certain adult children if they are more dependent on you than others. Because unequal division can be varied by the court, it is important to hire an estate planning lawyer to ensure that your assets are divided in accordance with your wishes.

### **Probate tax:**

When your assets pass through probate, they will be taxed. There are ways to avoid this using various estate planning techniques. This is particularly important for those with high value assets. For example, you may wish to legally transfer assets out of your possession before you pass, in order to diminish the total value to be taxed in the estate.

### **Protect disability benefits:**

If a beneficiary of a will receives a large inheritance from a will, they may be disentitled from their disability benefits under the Employment and Assistance for Persons with Disabilities Act. This can be an unintended consequence of dying intestate which is one of the reasons why it is important to consult with an estate planning lawyer.

*The materials provided in this handbook are for information purposes only. These materials constitute general information relating to areas of law familiar to our firm lawyers. They do NOT constitute legal advice or other professional advice, and you may not rely on the contents of this handbook as such. Doing so without seeking the advice of legal counsel constitutes a misuse of the information. Helpforme and Hammerberg Lawyers LLP and its partners are not liable for any damage arising from the misuse of any information provided in this handbook.*

*The contents of the handbook do not necessarily represent the opinions of Helpforme or Hammerberg Lawyers LLP. If you require legal advice, you should retain legal counsel so an Estate Lawyer can familiarize himself or herself with the particulars of your specific case and advise you accordingly. Helpforme and Hammerberg Lawyers LLP are pleased to discuss whether we can assist you.*

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