LEFT OUT OF SPOUSE'S WILL:

Do I Bring a BC Estate Law or Family Law Claim?

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When a will fails to make adequate provision for a surviving spouse, does the surviving spouse bring a claim for division of family assets against the deceased's spouse's estate, or a BC estate law claim for variation of the will? That was the question that arose in *Gibbons v. Livingston*, 2018 BCCA 443. The answer depends on whether the spouses had separated before death or remained spouses at the date of death as defined in the *Wills, Estates, and Succession Act*, SBC 2009, c. 13 (also referred to as "*WESA*"), which governs BC estate law claims.

Mr. Livingston died in 2016. His common-law wife, Ms. Gibbons, was not mentioned in his will, which bequeathed the entirely of Mr. Livingston's estate to his adult son. In 2017, the surviving spouse commenced an action claiming that she was entitled to a variation of her husband's will pursuant to BC estate law. The *Wills, Estates and Succession Act* provides a mechanism for a spouse to apply to vary the distribution of the estate in the deceased spouse's will, if dissatisfied with the provisions of the will (see s. 2 and s. 60). In 2018, a settlement agreement was reached following mediation which gave Ms. Gibbons a boat and a share of the sale of a home which formed the principle asset of the estate.

CAN THE SURVIVING SPOUSE BRING A FAMILY LAW CLAIM AS WELL?

Ms. Gibbons amended her BC estate law claim to include a family property claim under the *Family Law Act*, S.B.C. 2011,

c. 25, alleging that the mediation was intended to deal solely with the question of her interests in the deceased's estate, not her potential claim under the *Family Law Act*. The deceased's estate applied to stay the proceedings. The trial judge granted the application and stayed the surviving spouse's claim, rejecting her argument that the settlement agreement dealt only with her right to adequate provision for her proper maintenance and support, as set out in s. 60 of the *Wills, Estates and Succession Act*, not her entitlement to an interest in family property under the *Family Law Act*.

The wife appealed, saying that the trial judge erred in law by finding that the death of a spouse is not a "separation" within the meaning of the *Family Law Act*. The BC Court of Appeal dismissed the wife's appeal, finding that "separation" under the *Family Law Act* does not include death of one of the spouses. The *Family Law Act* sets out, among other obligations, the legal obligations spouses owe to each other in relation to family property while they are alive. The *Family Law Act* does not define "separation" explicitly, but on its face, speaks of "separation" as an event occurring between living spouses.

Where spouses have not separated, the division of family property upon death is addressed by the *Wills, Estates and Succession Act.* For the purposes of the *Wills, Estates and Succession Act*, "spouse" is defined as (underlining added):

> *2 (1) Unless subsection (2) applies, 2 persons are spouses of each other for the purposes of this Act <u>if they were both alive immediately before a relevant time</u> and*
>
> *(a) they were married to each other, or*
>
> *(b) they had lived with each other in a marriage-like relationship for at least 2 years.*
>
> *(2) Two persons cease being spouses of each other for the purposes of this Act if,*
>
> *(a) in the case of a marriage, an event occurs that causes an interest in family property, as defined in Part 5 [Property Division] of the Family Law Act, to arise, or*
>
> *(b) in the case of a marriage-like relationship, one or both persons terminate the relationship.*
>
> …
>
> *(3) <u>A relevant time for the purposes of subsection (1) is the date of death of one of the persons unless this Act specifies another time as the relevant time.</u>*

As Mr. Livingston and Ms. Gibbons were not separated at the time of his death, Ms. Gibbons had no cause of action for a division of family property under the *Family Law Act*. Ms. Gibbons was a spouse of the deceased, as defined by s. 2(1)(b) of the *Wills, Estates and Succession Act*. Her only recourse was a claim against Mr. Livingston's estate pursuant to s. 60 of *Wills, Estates and Succession Act* (*i.e.*, she would be entitled to a variation of the deceased's will under s. 60 if she could establish that he did not make adequate provision for her and if she has not already settled her *Wills, Estates and Succession Act* claim – check back for next week's post, which will discuss the law of enforceability of settlement agreements in emotionally charged negotiations, including family law contexts and in this BC estate law matter).

In BC estate law proceedings, the notional claim that might have been made out pursuant to the *Family Law Act* is a reference point in assessing the adequacy of the provision made for a surviving spouse but the surviving spouse's claim is not asserted through the *Family Law Act* directly. Put another way, the *Wills, Estates and Succession Act* requires the court to make a comparison between what provisions the will-maker actually made for the surviving spouse and the surviving spouse's nominal *Family Law Act* claim as it stood before the will-maker's death. So, while the *Family Law Act* informs the analysis, there is no independent *Family Law Act* claim available to the surviving spouse when the spouses were not separated at death.

NO "DOUBLE DIPPING"

The definition of "spouse" under s. 2 of the *Wills, Estates and Succession Act* precludes claims by separated spouses. Under the *Wills, Estates and Succession Act*, then, separated spouses have no variation rights because they no longer qualify as a "spouse". Where a spouse dies after separation but before settlement of their rights and obligations under the *Family Law Act*, the surviving spouse can commence an action for property division against the estate of the deceased. The time limits for commencing an action for property division are set out in s. 198 of the *Family Law Act*, which stipulates that such a claim must be brought no later than 2 years after,

> *(a) in the case of spouses who were married, the date*
>
> *(i) a judgment granting a divorce of the spouses is made, or*
>
> *(ii) an order is made declaring the marriage of the spouses to be a nullity,*
>
> *or*
>
> *(b) in the case of spouses who were living in a marriage-like relationship, the date the spouses separated.*

BOTTOM LINE ON BC ESTATE LAW VS. BC FAMILY LAW FOR SPOUSE LEFT OUT OF A WILL

Where spouses have not separated, the division of family property upon death is addressed by BC estate law proceedings under the *Wills, Estates and Succession Act.* However, under the *Wills, Estates and Succession Act* separated spouses have no variation rights because they no longer qualify as a "spouse". Where a spouse dies after separation but before settlement of rights and obligations under the *Family Law Act*, the surviving spouse can commence a family law action against the estate of the deceased, being mindful that the action must be commenced within two years of the date of separation. V

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