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WILLS & ESTATES

R. Trevor Todd is one of the province's most esteemed estate litigation lawyers. He has spent more than 40 years helping the disinherited contest wills and transfers – and win. From his Kerrisdale office, which looks more like an eclectic art gallery than a lawyer's office, Trevor empowers claimants and restores dignity to families across BC. Although his work is renowned, Trevor is not a suit n' tie stuffy lawyer type. He is, in fact, the very opposite. He is an outspoken advocate for the disinherited. He is a world traveller (70 countries and counting) who is approachable, creative, and a fan of pushing buttons, finding needles in haystacks, and doling out advice for free. He is a mentor to young entrepreneurs and an art buff who supports starving artists the world over. He has an eye for talent and a heart for giving back. Trevor is deeply committed to his clients and his craft. He is a Past President of the Trial Lawyers Association of BC, a regular contributor to legal publications, and a sought-after public speaker.

REVOCATION OF WILLS POST-WESA

The introduction of the *Wills, Estates and Succession Act* (WESA) on March 31, 2014, made a few significant changes to the law of British Columbia relating to the revocation of wills.

Those changes are effected by section 55 of WESA, which is discussed below. One of the most significant changes is that marriage of the will-maker after the execution of a will no longer revokes a will. Previously, the largely unknown fact that marriage revoked a will had created much hardship in estate law over a long period of time.

Another significant change relates to section 58 of WESA—known as the "curative" provision for otherwise defective wills—which is also discussed below.

It should be stated at the outset that section 58 may well dramatically alter the common law of revocation, as stated below, if it is applied in the same sweeping manner that the courts have used it to "cure" defective wills. To date there have been no reported cases on how the courts will apply section 58 to remedy "defective" revocations, but I anticipate that the effects will be striking.

SECTION 55 WESA

Section 55 WESA reads as follows:

55(1) A will or part of a will is revoked only in one or more of the following circumstances:

(a) by another will made by the will-maker in accordance with this Act;

(b) by a written declaration of the will-maker that revokes all or part of a will made in accordance with section 37;

(c) by the will-maker, or a person in the presence of the will-maker and by the will-maker's direction, burning, tearing or destroying all or part of the will in some manner with the intention of revoking all or part of it;

(d) by any other act of the will-maker, or another person in the presence of the will-maker and by the will-maker's direction, if the court determines under section 58 that

(i) the consequence of the act of the will-maker or the other person is on the apparent face of the will, and

(ii) the act was done with the intent of the will-maker to revoke the will in whole or in part.

(2) A will is not revoked in whole or in part by presuming an intention to revoke it because of a change in circumstances.

PRE-WESA LAW—VOLUNTARY REVOCATION

Under British Columbia law prior to WESA, voluntary revocation of a will could be accomplished by any of the following:

(1) by executing a subsequent will or codicil (which typically contains a clause revoking previous wills);

(2) a written declaration of the will-maker that declares an intention to revoke a will and is duly executed in the same prescribed manner as a will;

(3) by burning, tearing or otherwise destroying the will by the will-maker or by someone in the presence and by the direction of the will-maker.

The execution of a subsequent will or codicil is by far the most common method of revoking a will.

When a testamentary document is valid and contains a revoca-

tion clause, there is a very heavy onus on anyone attacking the will attempting to argue that the revocation clause was not intended to be operative: *McCarthy v Fawcett* (1945), 1 WWR 70 (BCCA).

Drawing a line through the signature and adding the words "I hereby revoke this will" was held to be of no legal effect in *Bell v. Matthewman* (1920), 49 OLR 364.

A letter properly attested by two witnesses and addressed to the bank manager who held the original will on deposit stating "will you please destroy the will already made out" was held to have effectively revoked the will in *Re Spracklan* (1938), 2 All ER 730.

With respect to the destruction of a will, there must be both the act of destruction as well as the intention to destroy the will and any "symbolic" destruction will not suffice. Partial tearing of the will which leaves the words legible does not necessarily show an intention to revoke. There must be such an injury with intent to revoke that it destroys the entirety of the will to have an effective revocation: *Re Shafner* (1956), 2 DLR (2d) 593 (NSCA).

THE COMMON LAW PRESUMPTION OF DESTRUCTION

Often in estate disputes the original of a will cannot be found and an attempt is made to probate a copy, giving rise to the legal issue as to whether the original had been destroyed or simply lost.

If an original duly-executed will that was in the possession of the will-maker is not propounded upon death and the executor fails to prove that the original was merely lost and not destroyed, then there is a common-law presumption that is rebuttable by sufficient evidence that the will-maker destroyed the will for the purpose of revoking it: *Sigurdson v Sigurdson* (1935), 4 DLR 529 (SCC) and *Kumar v Kumari,* 1993 CanLII 1033 (BCSC).

The evidence necessary to rebut the presumption of revocation need not be such as to amount to a positive certainty but only such as to produce moral conviction: *Re Matt Estate* (1954), 11 WWR (NS) 28 (Man CA) .

The *Sigurdson* case (cited above) stated that the evidence to rebut the presumption of revocation must be clear and convincing to satisfy the court that the will had, in fact, been lost and not destroyed by the will-maker with an intention of revoking the will.

WHETHER THE PRESUMPTION APPLIES – FACTORS CONSIDERED BY THE COURT

Some of the factors the court will consider in deciding whether the presumption of revocation applies and, if so, whether it has been rebutted, were enumerated in *Haider v Kalugin,* 2008 BCSC 930, as follows:

- whether the deceased will-maker continued to have good relations with the named beneficiaries in the copy of the will up to the date of death;
- whether the terms of the will were reasonable;
- the nature and character of the in taking care of personal effects—e.g. orderly vs hoarding;
- statements made by the deceased to either confirm or contradict the terms of the copy will;
- whether the deceased understood the consequences of having a will and the effects of an intestacy;
- were the deceased's personal papers stored carefully or haphazardly.

The presumption of revocation does not apply where the original will cannot be traced to the possession of the will-maker (*Brimicombe v Brimicombe Estate,* [2001] NSJ No. 157 (NSCA)). For example if the original was stored at the drafting lawyer's office and the will was lost while there, the presumption would not apply.

SECTION 58 WESA

Section 58 WESA reads as follows:

58 (1)In this section, "record" includes data that

(a) is recorded or stored electronically,

(b) can be read by a person, and

(c) is capable of reproduction in a visible form.

(2) On application, the court may make an order under subsection (3) if the court determines that a record, document or writing or marking on a will or document represents

(a) the testamentary intentions of a deceased person,

(b) the intention of a deceased person to revoke, alter or revive a will or testamentary disposition of the deceased person, or

(c) the intention of a deceased person to revoke, alter or revive a testamentary disposition contained in a document other than a will.

(3) Even though the making, revocation, alteration or revival of a will does not comply with this Act, the court may, as the circumstances require, order that a record or document or writing or marking on a will or document be fully effective as though it had been made
   (a) as the will or part of the will of the deceased person,
   (b) as a revocation, alteration or revival of a will of the deceased person, or
   (c) as the testamentary intention of the deceased person.

(4) If an alteration to a will makes a word or provision illegible and the court is satisfied that the alteration was not made in accordance with this Act, the court may reinstate the original word or provision if there is evidence to establish what the original word or provision was.

Section 58 makes a dramatic change to the law of revocation given that even where the document attempting to revoke a will is defective, if the court finds that the will-maker intended to revoke the will, under section 58(3) the court can "cure" the defect so as to give legal effect to that intention.

The potential impact of the "curative" provisions of section 58 was illustrated in *Horton v Bruce,* 2017 BCSC 712. In that case the court remedied only the revocation clause and not the distributive clauses of a subsequent "draft" will that had been signed by the will-maker but not witnessed by two witnesses in the presence of each other. The legal effect of the imposition of section 58(3) was to cause the will-maker to die intestate.

The court in *Horton v. Bruce* relied upon a Supreme Court of Canada decision, *Bell Express Vu Limited Partnership v Rex* 2002 SCC 42, as authority to interpret section 58 as giving it the power to cure only a part of a document or a writing deemed to be a will and not the entire document.

CONCLUSION

The effects of WESA will be dramatic upon the law of revocation of wills. Section 55 abolished the revocation of a will by any marriage that takes place after March 31, 2014.

The effect of full section 58 has yet to be recognized. However, the application of that section in *Horton v Bruce* leads me to believe that it will be liberally applied to remedy any defective revocation where the court concludes that the will-maker intended to revoke a will but failed to do so in a manner that the common law previously demanded. V