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## Estate Litigation Issues for Charities

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*Miller Thomson Seminar:  
Charities & Not For Profit Update  
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# Contested Wills

- Is the will valid?
  - Challenges to testamentary capacity
    - Did the will-Maker possess the mental capacity to independently understand and appreciate the nature and extent of his/her assets and what he/she wanted to do with them upon death?
    - The role of the medical expert
    - The role of the lawyer
    - other witnesses –family members, friends, banker, caregiver, etc.
  - Undue influence



# Wills Variation Proceedings

- The new *Wills, Estates and Succession Act* (ss. 60-72)
  - The bad news for charities – more challenges to wills due to larger estates and blended families

## Maintenance from Estate

**60.** Despite any law or enactment to the contrary, if a will-maker dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the will-maker's spouse or children, the court may, in an action by or on behalf of the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the will-maker's estate for the spouse or children.



# Wills Variation Proceedings

- Objective analysis of whether wills should be varied; i.e., did testator make just, adequate and equitable provision for spouse (including common-law and same-gender spouse) and children, given the size of the estate and other factors?



# Wills Variation Proceedings

## Evidence

**62.** (1) In an action under section 60, the court may accept the evidence it considers proper respecting the will-maker's reasons, so far as may be determined,

(a) for making the gifts made in the will, or

(b) for not making adequate provision for the will-maker's spouse or children,

including any written statement signed by the will-maker.

(2) In estimating the weight to be given to a statement referred to in subsection (1), the court must have regard to all the circumstances from which an inference may reasonably be drawn about the accuracy or otherwise of the statement.



# Wills Variation Proceedings

- Factors which may determine position of charities
  - Residual beneficiary or legatee?
  - Investigation of reasons for will-maker's distribution, including family background and relationships
  - Size of estate – is there enough to go around?
  - Relationship of charity with testator will-maker



# Wills Variation Proceedings

- How can charities assist in bringing about resolution of a WVA claim?
  - Ideally positioned to broker a settlement due to lack of emotional involvement
  - Mediation



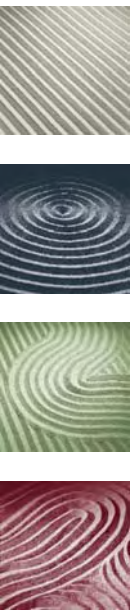
# Wills Variation Proceedings

- What is the true size of the “estate”?
  - Investigation of *inter vivos* transactions
    - Joint tenancies in real property
    - Joint bank accounts
  - Financial abuse by person holding power of attorney
  - Negligent advice re: investments
  - Obtaining important information re: will-maker’s affairs
    - See re: *Martin Estate* 2009 BCSC 1407



# Other Issues

- When charities compete with charities
- The peculiar problem with religious charities – “due” or “undue” influence?
- Media relations – damage control



# Contesting Executor's Accounts - An Inconvenient (and costly) Truth

- Re: *Harris Estate* – an object lesson
  - Executor's fees and legal expenses - attempting to obtain a fair result for residual charitable beneficiaries
  - Is it worth the delay, expense and uncertainty?