COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Bennison v. Bennison,* 2025 BCCA 195

Date: 20250613
Docket: CA50008

Between:

Erich Berkeley Adam Bennison, in his personal capacity and in his capacity as the Personal Representative for Brian Robert Bennison, Deceased and Renee Colette Bennison, Deceased

Appellant
(Plaintiff)

And

Kyle Stacey Bennison, in his personal capacity and in his capacity as the Personal Representative of the Estate of Robert Berkley Bennison, Deceased, Kelli Lyn Jamieson, Deanna Marie Jamieson and James Brent Jamieson

Respondents
(Defendants)

Before: The Honourable Mr. Justice Abrioux
The Honourable Mr. Justice Grauer
The Honourable Justice Gomery

On judicial review from: An order of the Supreme Court of British Columbia, dated June 14, 2024 (*Bennison v. Bennison*, 2024 BCSC 1142, Kelowna Docket S137573).

The Appellant, appearing in person:	E.B.A. Bennison
Counsel for the Respondent, Kyle Stacey Bennison:	S. Aidun
Place and Date of Hearing:	Kelowna, British Columbia May 27, 2025
Place and Date of Judgment:	Vancouver, British Columbia June 13, 2025

Written Reasons by:
The Honourable Mr. Justice Abrioux

Concurred in by:
The Honourable Mr. Justice Grauer
The Honourable Justice Gomery

Summary:

The appellant filed an amended notice of civil claim ("ANOCC") in his personal capacity and purportedly in his capacity as personal representative of his father's estate, seeking either (a) a variation of his grandfather's will to make adequate provision for himself and his father's estate or (b) various other relief relating to the will's validity. The judge struck the appellant's ANOCC as disclosing no reasonable claim. Held: Appeal dismissed. The judge correctly concluded that the ANOCC discloses no reasonable claim. The appellant does not have standing to bring a wills variation claim in either his personal capacity or as personal representative of his father's estate, as his father predeceased the testator. Due to the existence of two prior wills, the ANOCC also does not contain the necessary material facts to give rise to an intestacy arising from the invalidity of the will, and so the claims based on the will's validity are also bound to fail.

Introduction

[1] This appeal arises out of a dispute surrounding the will of the late Robert Bennison. Robert had four children to whom, meaning no disrespect, I shall refer to by their first names: Kyle (the respondent), Brian (deceased), Renee (deceased) and Ronald. Both Brian and Renee predeceased Robert. Ronald is not a party to this appeal, and was not named in the claim giving rise to the orders under appeal. The three other respondents—Kelli, Deanne, and James—are Robert's stepchildren. The appellant, Erich, is Robert's grandson, son of Brian.

[2] Erich, who is self-represented, challenges the orders of Justice Hardwick, in which she:

a) dismissed his application, which he brought in his personal capacity and in his capacity as Brian and Renee's representatives, for relief pursuant to s. 60 of the *Wills, Estate and Succession Act*, S.B.C. 2009, c.13 ("*WESA*") (the "wills variation claim") and for "interpretation/clarity as to the validity of the Robert Berkley Bennison [*sic*] will"; and

b) granted Kyle's application, brought in his personal capacity and in his capacity as the representative of Robert's estate, to dismiss Erich's Amended Notice of Civil Claim ("ANOCC") on the basis that it failed to disclose a reasonable claim.

[3] The judge's reasons for judgment are indexed as *Bennison v. Bennison,* 2024 BCSC 1142. Erich challenges the orders on the basis that: (1) the judge erred in finding that he lacked the requisite standing to bring the wills variation claim; and (2) in deciding that no "triable issues" existed in relation to his "application for representation" and his challenge to the validity of Robert's will, including "the various issues surrounding its creation".

[4] For the reasons that follow, I would dismiss the appeal.

Background

[5] Robert's last will was dated July 12, 2019. It contained an attestation clause and appeared on its face to be duly executed. Robert passed away on August 31, 2022, leaving two surviving children, Kyle and Ronald. Probate was granted to Kyle, the named executor, on December 21, 2022.

[6] There were two prior wills, one dated March 11, 2019, the other October 3, 2001. The 2001 will made no provision for Brian, but we were advised at the hearing of the appeal that it apparently contained a bequest to Renee. I say "apparently" because a copy of that will is not in the record. Copies of the March 11, 2019 will and other documents executed that day by Robert, which included a Representation Agreement and a Power of Attorney, are in the record.

[7] Both Brian and Renee predeceased Robert, Brian in 1990 and Renee in January 2012.

[8] The principal facts are largely not in dispute. Robert and Erich had a strained relationship. Robert's will left 50% of the residue of his estate to Kyle, and the other 50% in shares to his three stepchildren. No provision was made for Ronald.

[9] In June 2023, Erich, acting on his own behalf, filed a notice of civil claim seeking to vary the will, ostensibly on his own behalf as grandchild and as the personal representative of his late father, Brian, and his late aunt, Renee.

[10] In October 2023, Erich filed the ANOCC, in which he sought various relief relating to the validity of the will. He also filed a notice of application seeking a variety of relief, which included:

a) that the will be varied so as to make adequate provision for himself and his siblings;

b) various forms of relief relating to the interpretation of the will and "what the next course of action should be" in the event the will were varied, modified, or rectified.

[11] Part 3 of the notice of application, being the "Legal Basis", included a broad reference to *WESA* and "[o]ther enactments and rules that would/could should be considered in this proceeding".

[12] In November 2023, Kyle filed a notice of application seeking to dismiss Erich's ANOCC. The notice's legal basis refers to both Rules 9-5(1)(a) and Rules 9-6(3), (4) and (5) of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009 (the "*Rules*").

The Chambers Decision

[13] The judge noted that Erich was self-represented and that "as such, the pleadings are not necessarily ideal". However, it was "very apparent…that what Erich [was] seeking to pursue in the amended notice of civil claim is what can be colloquially referred to as a "wills variation action" under *WESA*": at para. 17. Ultimately, the judge found that there were several significant legal obstacles to Erich's claims that necessitated that the ANOCC be dismissed, without leave to amend, under Rule 9-5(1)(a).

[14] Insofar as Robert's capacity was concerned, the judge referred to the fact that there was no formal expert evidence that suggested that he lacked capacity at the material time. She then stated that Kyle's evidence:

> [5] …was directly to the contrary. Specifically, Kyle said that he actually visited his father in July of 2019 and did not notice any cognitive impairment. I accept this to be true, as that is not contradicted by anything but conjecture from Erich.

[15] The judge then decided that Erich had no standing in his own right to bring a wills variation claim because he was not the testator's spouse or child, as required by s. 60 of *WESA*. She also held that, because the right to make a claim under s. 60 of *WESA* vests at the date of death of the testator, neither Brian nor Renee (that is, their estates) had standing to bring a wills variation claim, since they both predeceased the testator. Accordingly, the judge determined that the pleadings failed to disclose a reasonable cause of action, and she dismissed the ANOCC without leave to amend.

[16] The judge also found that Erich had pleaded no facts capable of supporting his claim to have the legal authority to be Brian and Renee's personal representative. In addition, the judge agreed with Kyle that Erich had not complied with the *Rules* in making amendments to his pleadings, but she did not see this issue as being of significance as compared to the other, fatal shortcomings with the pleadings.

Issue #1: Did the judge err in concluding that Erich did not have the requisite standing to vary the will in his personal capacity or as the personal representative of Brian and Renee?

[17] Rule 9-5(1)(a) provides that the court, at any stage of a proceeding, may order that the whole or any part of a pleading be struck out or amended on the ground that it discloses no reasonable claim or defence.

[18] The judge, in my view, correctly summarized the applicable legal framework at paras. 28–30 of her reasons. The test for whether a pleading fails to disclose a reasonable cause of action is whether it is "plain and obvious" that the claim will fail, assuming the facts set out in the pleadings to be true: *Lamarche v. British Columbia (Securities Commission),* 2025 BCCA 146 at para. 43, citing *E.B. v. British Columbia (Child, Family and Community Services*), 2021 BCCA 47 at para. 34. A judge's determination that a claim fails to disclose a reasonable cause of action is a question of law reviewable on a standard of correctness: *E.B.* at para. 31.

[19] The judge's reasoning in finding that Erich had not advanced a reasonable claim under s. 60 of *WESA* was that the provision only provides standing to a

testator's spouse or children: at para. 19. As the grandchild of the testator, Erich had no personal standing to seek a variation of the will pursuant to s. 60: at para. 20, citing *Tomlyn v. Kennedy*, 2008 BCSC 331 at para. 35. Furthermore, even if Erich was entitled to bring claims on Brian and Renee's behalf as personal representative (he has since been appointed as the personal representative of Brian), the judge held that because "the right to make a claim for a wills variation…under s. 60 of *WESA* vests at the date of death", and Brian and Renee having predeceased the testator, "such right was never vested in Brian and Renee. Therefore, unlike Ronald, Brian and Renee do not have legal standing" to vary the will: at para. 21, citing *Currie Estate v. Bowen,* (1989) 35 B.C.L.R. (2d) 46 at para. 29 (S.C.).

[20] Erich's initial position on appeal was that, notwithstanding the language of s. 60 of *WESA,* he had standing—in his personal capacity as the testator's grandchild and as Brian's personal representative—to pursue a wills variation claim under s. 60. He relies on the fact that *WESA* is, in his view, "completely silent on extinguishing a s. 60 claim by deceased children", and says that insofar as there is case law setting out that the right to bring a s. 60 claim vests upon the testator's death, these cases dealt with spouses, not children, and spouses and children should be treated differently. Specifically, he argues that a deceased child's interest in their parent's estate arises at the time of their birth or adoption and does not vest at the time of the testator's death. Accordingly, he says the judge erred in her consideration and application of *Tomlyn* and *Currie Estate*.

[21] Section 60 of WESA provides:

> **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 a proceeding 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.
>
> [Emphasis added.]

[22] I shall first deal with Erich's argument that s. 60 of *WESA* can be interpreted to include a claim by a testator's grandchild.

[23] The standard of review regarding questions of statutory interpretation is correctness: *N.E.T. v. British Columbia (Attorney General),* 2018 BCCA 380 at para. 23. The starting point for statutory interpretation must always be the words of the statute: *Manns v. Vancouver Island Health Authority*, 2024 BCCA 110 at paras. 15, 17.

[24] While in the leading case of *Bell ExpressVu Limited Partnership v*. *Rex,* 2002 SCC 42, the Supreme Court of Canada acknowledged that the interpretation of a statute involves not only its text, but also its context and purpose, the Court cautioned that resort to external interpretive aids should be limited to cases where the statute itself exhibits "genuine ambiguity" as between multiple reasonable interpretations: *Bell ExpressVu* at para. 29.

[25] The words of s. 60 are clear. There is no ambiguity. The section refers to the "will-maker's spouse or children" and "the will-maker's estate for the spouse or children". Furthermore, I would note that s. 60 of *WESA* has existed in the same terms for many years (previously, as a part of the *Wills Variation Act,* R.S.B.C. 1979, c. 435, which had its origins in the *Testator's Family Maintenance Act*, S.B.C. 1920, c. 94, and which contained the same wording) during which time the Legislature has decided not to expressly include grandchildren in the text of the provision.

[26] At the hearing of the appeal Erich effectively abandoned this ground of appeal, stating that he accepted that he did not have standing to bring a s. 60 *WESA* claim in his personal capacity, since he was Robert's grandchild. In any case, however, I would not accede to this ground of appeal.

[27] I shall now turn to Erich's claim in his capacity as Brian's personal representative. As I shall explain, the fact letters of administration have now been granted to Erich in relation to Brian's estate does not, in my view, assist him on this ground of appeal. I note that Erich has not obtained a similar order with respect to Renee's estate, but that is of no moment.

[28] The issue is as follows: can a wills variation claim under s. 60 of *WESA* be brought on behalf of the estate of a claimant who has predeceased the testator?

[29] In my view, the answer is clearly no; accordingly, the judge did not err in determining that Erich's wills variation claim, brought in his capacity as Brian's personal representative, did not disclose a reasonable cause of action.

[30] Section 150(2) of *WESA* provides that the personal representative of a deceased person may commence or continue a proceeding the deceased person could have commenced or continued. In this case, Erich, the personal representative of his father, Brian, may bring any proceeding that Brian could have brought during his life. This includes any claims that Brian could have brought against his own father, the deceased testator. Had Brian not in fact predeceased the testator, this may have included a wills variation claim pursuant to s. 60 of *WESA,* which Erich could have brought as personal representative of his father's estate. However, it is not in dispute that Brian predeceased the testator. The question then becomes whether Brian could have brought a wills variation claim against Robert during Brian's lifetime.

[31] There is authority for the proposition that the right to bring a variation claim pursuant to s. 60 of *WESA* vests in a testator's spouse or children upon the death of the testator, and not before. *Currie Estate* related to *WESA's* predecessor legislation, the *Wills Variation Act* and stood for the proposition that the executors of a deceased person's estate may apply for a variation of their predeceased spouse's will. In that case, the Court rejected the argument that a statutory wills variation claim is an "*actio personalis*", which would not survive the deceased spouse or child's death; accordingly, the spouse or child's estate may bring such a claim. The Court noted, however, that the right to bring such an action vests at the time of the testator's death: at para. 9, citing *Walker v. McDermott,* [1931] S.C.R. 94.

[32] In *Bykerk v. Kapalka Estate,* 2017 BCSC 655, the Court considered a release signed by a daughter in respect of "any and all manner of actions, causes of action, suits, debts, contracts, claims, demands and damages" against her father relating to the subject matter of an ongoing litigation. She did so while her father was alive. After her father died, the daughter brought a wills variation claim. The Court confirmed that the prior release did not bar her from doing so, stating:

> [20] At the time the release was executed Bernard Kapalka was alive. A potential *Wills, Estates and Succession Act* claim against his estate could not arise until he died leaving a will. The release is not a bar to the *Wills, Estates and Succession Act* claim in the Kamloops action.
>
> [Emphasis added.]

[33] This Court has also confirmed that the relevant date for determining whether a testator has not made adequate provision for their spouse or children—and the relevant date for determining what would be adequate, just, and equitable provision in the circumstances—is the date of the testator's death: *Eckford v. Vanderwood,* 2014 BCCA 261 at paras. 49–50, citing *Landy v. Landy Estate* (1991), 60 B.C.L.R. (2d) 282 (C.A.). In the case at bar, Brian had already passed away at the time of the testator's death. None of the cases to which this Court have been referred by Erich involved a wills variation claim on behalf of the estate of a testator's spouse or child who predeceased the testator.

[34] Indeed, the right to receive adequate provision in terms of maintenance and support appears to be one that contemplates, primarily, the needs and proper standard of living for a living person: see *Walker, Tataryn v. Tataryn Estate,* [1994] 2 S.C.R. 807. Notably, in *Tataryn,* the leading authority on the question of "adequate, just, and equitable" provision, the Supreme Court of Canada characterized the entitlement to seek a wills variation pursuant to s. 2(1) of the *Wills Variation Act* (s. 60 of *WESA's* predecessor) as corresponding to a testator's "duty to make adequate provision for the proper maintenance and support of a surviving spouse and children": at 812.

[35] Erich stresses that in *Tataryn,* the Court held that the concept of adequate, just, and equitable provision is not merely concerned with the satisfaction of a claimant's needs, but rather is animated by a testator's broader legal and moral obligations; Erich submits, in effect, that a testator whose child predeceases them owes that child—in point of fact, that child's *estate*—a moral duty to provide for them in their will (which notably, and necessarily, would diminish the amount of the estate available to other actual or potential beneficiaries, including living spouses and

children with personal standing to pursue a claim under s. 60 of *WESA*). I am unable to accept this proposition.

[36] Reading s. 60 of *WESA*, having due regard to its text, context, and purpose, I would conclude that a testator who fails to make provision in their will for the maintenance and support of an individual who is deceased as of the date of the testator's death —and who, by definition, can have no *need* of maintenance and support, precisely because they are deceased—cannot have failed, at law to make adequate, just, and equitable provision for that deceased individual. While it is true that the concept of adequate, just, and equitable provision goes beyond mere need, I simply see no viable basis in the statute or the case law to suggest that testators owe moral or legal obligations to long-dead children (in this case, Brian having passed away approximately 30 years prior to the testator) when distributing their assets.

[37] Given my interpretation of s. 60 of *WESA* and the authorities to which I have referred, I can see no reviewable error in the judge's conclusion that Erich had no standing to bring a wills variation claim regarding his grandfather's will in his capacity as personal administrator of the estate of his father, Brian. Brian's entitlement to bring a wills variation claim never vested, and so could not pass to his estate. While a wills variation claim may be brought by the estate of a deceased person, it must be the case, in my view, that such a claim could have been brought by that deceased when they were alive: *WESA s.* 150(2). The same reasoning would apply to the claim putatively brought on behalf of Renee's estate, Renee having predeceased the testator by approximately ten years.

[38] I would not accede to this ground of appeal

Issue #2: Did the judge err in dismissing the claims relating to the validity of the will?

[39] Erich sought several forms of relief relating to the validity of the will, which the judge summarized at para. 2 of the reasons. I commence by observing that the legal basis advanced in respect of this relief is not clear.

[40] The judge's reasons focussed on Kyle's application to have the ANOCC dismissed. For the reasons I have outlined, she correctly found, pursuant to Rule 9-5(1)(a), that the ANOCC did not disclose a reasonable claim with respect to the wills variation issue. As I will explain, it is unclear whether the judge dismissed the portions of the ANOCC that concerned the validity of the will on the basis of Rule 9-5(1)(a) or Rule 9-6, which pertains to summary judgment.

[41] As articulated in his factum, Erich's position is that the judge erred:

a) in failing to fully address the validity of the will in her reasons, and in failing to address or apply the appropriate legal test for determining testamentary capacity (citing *Geluch v. Geluch Estate,* 2019 BCSC 2203);

b) in failing to address the testator's "delusion" that "Brian was never his Child", concerns about capacity relating to the testator's recent brain surgery, as well as certain suspicious circumstances surrounding the will's creation, which Erich submits give rise to questions about undue influence (i.e., "rapid changes" in the testator's "distribution schemes and representation" in Kyle's favour, following a visit by Kyle); and

c) in concluding, implicitly, that there were no genuine triable issues relating to the validity of the will.

[42] It appears that the judge dismissed Erich's application regarding the validity of the will on the basis that such matters could not be germane to whether the ANOCC disclosed a reasonable claim. This is because she stated:

> [34] While I understand the emotion underlying Erich's claim, the reality is that for the reasons I have articulated above it cannot proceed and must be struck in accordance with R. 9-5(1) as failing to disclose a reasonable cause of action. Erich simply does not have standing in his personal capacity as a grandson of the Deceased, and does not have capacity as purported by the undocumented representative of his late father and late aunt. It is clear from the evidence, without further review, that they predeceased him.
>
> [35] This is not a defect in the pleading that can be cured by an amendment.
>
> [36] Accordingly, I dismiss the relief sought by Erich and grant the relief sought at paragraph 1 of Kyle's application, namely the dismissal of the

> amended notice of civil claim filed by Erich on October 20, 2023. The language, on its face, might sound redundant, but having regard to the fact that there is cross-relief sought, I think that is necessary in the order.
>
> [Emphasis added.]

[43] Noting, however, her evaluation of both Kyle and Erich's affidavits (at para. 5) and the fact that Kyle's notice of application referred to Rule 9-6, it is also possible that the judge proceeded pursuant to Rule 9-6. A failure to engage properly with the requisite test on a summary judgment application is an error in principle, subject to review on a standard of correctness: *Rooney v. Galloway,* 2024 BCCA 8 at para. 168. The test for determining whether summary judgment is appropriate requires the judge to determine whether there are any triable issues in dispute; the judge in this case did not do so.

[44] However, in my view, it is not necessary to consider whether, if the judge proceeded under Rule 9-6, she did so in error. This is because Erich's ANOCC does not raise a reasonable claim with respect to the validity of the will, and so should be struck pursuant to Rule 9-5(1)(a). Robert executed the will that is the subject of these proceedings on July 12, 2019. It contained an attestation clause and appeared, on its face, to be duly exercised—as such, it is presumed to be substantively valid: *Vout v. Hay*, [1995] 2 S.C.R. 876. However, even if Erich's claims about the validity of the 2019 will had any prospect of success at trial, this, in my view, would not assist him.

[45] In the written argument he provided to the judge, Erich also challenged the validity of the March 2019 and October 2001 wills. However, there is no plea of material facts relating to the validity of either of those wills in the ANOCC. Even if both the March and July 2019 wills were ultimately found to be invalid, the 2001 will would remain presumptively valid and it contains no bequest to Brian. Since the ANOCC does not plead any material facts regarding the validity of the 2001 will, Erich's as-of-yet unarticulated claims (as Brian's personal representative) regarding that will would necessarily be dismissed, pursuant to Rule 9-5(1)(a), as failing to disclose a reasonable claim. And even if Erich had standing to advance a claim on behalf of Renee's estate, which he does not presently have, the gift to Renee under

the 2001 will would have failed, as she predeceased the testator in 2012, and would pass either to alternative named beneficiaries, her descendants (of which there were none), or to the named beneficiaries in the will in proportion to their interests: *WESA*, s. 46.

[46] Accordingly, based on what is pleaded in the ANOCC, there is no possibility that an intestacy of Robert's estate could result, and thus there is no prospect of Erich, as Brian's personal representative, benefitting from the distribution of the estate pursuant to Part 3, Division 1 of *WESA.*

[47] It follows that the judge committed no reviewable error in dismissing the ANOCC pursuant to Rule 9-5(1)(a).

Disposition

[48] I would dismiss the appeal.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Mr. Justice Grauer"

I AGREE:

"The Honourable Justice Gomery"