

## Excluding a spouse from an estate: how little can you leave?

The vexing question of what limits the law places on a spouse who wants to leave a surviving widow or widower without any inheritance has been addressed in a British Columbia Court of Appeal decision, *Mawdsely v. Meshen (2012) CarswellBC 1508*. The case concerns a common law couple who lived together for 18 years until the wife's death from cancer. The wife, Ms. Meshen, had assets and income greatly in excess of the husband, Mr. Mawdsley. She arranged her affairs, however, so that shortly before her death she transferred virtually all her assets into a trust for her own benefit and the benefit of other family members, including her children from her two previous marriages. She left nothing to Mr. Mawdsley in her will. Mr. Mawdsely contested the transfer of the bulk of Ms. Meshen's wealth into the trust, arguing that it was a fraudulent conveyance designed to defeat his claims as her spouse.

The source of Ms. Meshen's wealth, which amounted to over \$10million, was a business established by her second husband who had predeceased her. She had three children, two from her first marriage and one from the second marriage. The youngest child suffered from health problems. Ms. Meshen's second husband's brother was also involved in the business. Ms. Meshen decided that she wished to settle the bulk of her assets on a trust leaving very little in her estate at death. She included her children and her husband's brother as beneficiaries of the trust. The arrangements to set up the trust were undertaken when Ms. Meshen was terminally ill and aware of her impending death. She also added her daughter as joint owner of bank accounts. At her death her estate had virtually nothing in it. Her will left nothing to her husband.

Mr. Mawdsley was aware of much of the planning and present at meetings with Ms. Meshen and other family members and advisors concerning these arrangements. Ms. Meshen's professional advisors reported after her death that she had showed no concern for the possibility that Mr. Mawdsely might challenge the trust or the will after her death. She told the advisors that she and Mr. Mawdsely had an oral agreement that neither expected to share in the other's wealth.

Ms. Meshen's expectations were not met. After her death, her widower did indeed challenge the transactions. If Ms. Meshen had died with a substantial estate, he would have had statutory claims as her common law spouse against her estate for support which he could have realized against the assets held in the estate. Mr. Mawdsley argued that Ms. Meshen had made a fraudulent conveyance by creating the trust shortly before her death and, thereby, rendering any claim by him against her denuded estate futile. Mr. Mawdsely failed on the technical basis that until Ms. Meshen died, he had no claim against her. They were not separated so he had no claim as a separated spouse and, until her death, he had no claim against her estate. In any case, the court held that Ms. Meshen's belief that Mr. Mawdsely did not want or expect to share in her wealth was honestly held, if somewhat naive.

The court did find that the bank account funds were held in trust for the estate by Ms. Meshen's daughter. That finding restored \$280,000 to the estate. The court also held that in leaving nothing at all to her husband by will, Ms. Meshen had failed in her moral obligations to him. The court ordered the estate to pay the remaining \$280,000 to Mr. Mawdsely. The amount recovered is a mere fraction of Ms. Meshen's wealth but the court took into account the fact that Mr. Mawdsley had a modest income of

his own, had been aware of the arrangements and that he did have an oral agreement with his wife to keep their assets separate.

Whether or not the amount of \$280,000 was reasonable in the circumstances is somewhat irrelevant as that was all the estate had left. On different facts and with a larger estate a widow or widower might have received a larger portion. The outcome could also be quite different if the couple were married and had property claims, with differing outcomes depending on the province of residence. What is most interesting about this decision is the use of a trust to circumvent legislated family law obligations. The Supreme Court of Canada refused to hear Mr. Mawdsely's appeal, so this decision stands as authority, at least in British Columbia on these issues.