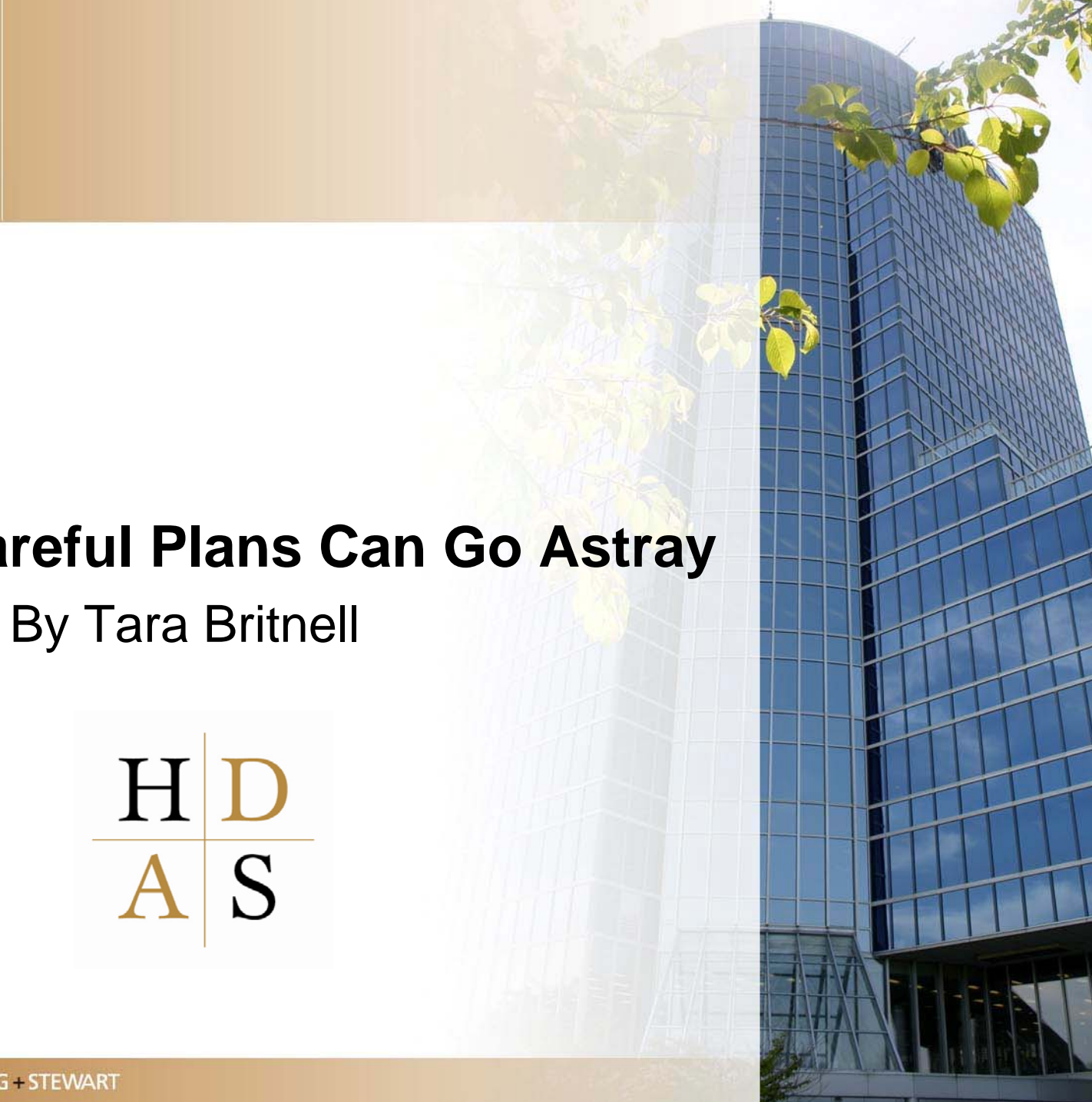




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HAMILTON DUNCAN ARMSTRONG + STEWART*



How Your Careful Plans Can Go Astray

By Tara Britnell



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How Your Plans Can Go Astray Careful



- The Wills Variation Act
- Jointly held assets



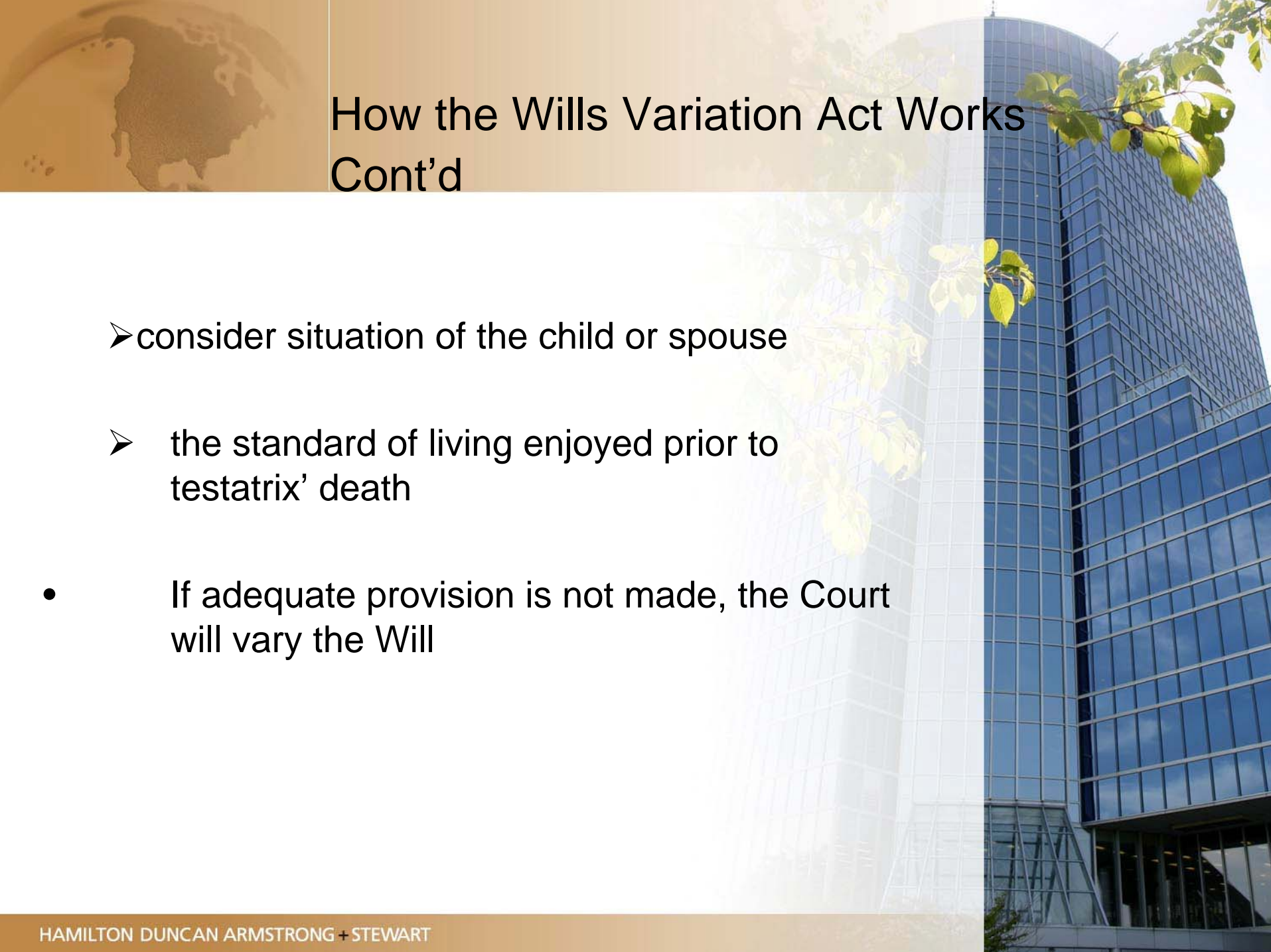
Wills Variation Act: What Is It?

- Testamentary freedom gives way to protection of the family
- If the Court is satisfied that the testator did not make adequate provision for the maintenance of spouse and children, then the Court may intervene.
- Remedy is available only to a spouse and children.
- 6 month limitation period

How the Wills Variation Act Works

- The Court decides if the testatrix has made “adequate provision for the proper maintenance and support” for her husband or children
- How the Court determines “adequate provision”
 - take the viewpoint of a judicious spouse or parent





How the Wills Variation Act Works Cont'd

- consider situation of the child or spouse
- the standard of living enjoyed prior to testatrix' death
- If adequate provision is not made, the Court will vary the Will

Variation of the Will

- Court will award what it thinks is “adequate, just and equitable in the circumstances”
- Legal obligations take priority
 - to a spouse
 - to minor children
- Then moral obligations
 - dependent spouse or dependent adult child
 - even an independent adult child to some degree





Variation of the Will Con't

- Size of estate is important
- Examples of what the Court will do:
 - Change life estate to absolute ownership
 - Vary percentage of estate each beneficiary receives
 - Award part of the estate to children or spouse cut out of the Will
 - Will consider what the claimant has received from the testator outside of the estate.

Impact on Estate



- Financial impact can be significant
- The emotional cost is arguably greater than the financial cost



Practical Strategies to Minimize Impact

- Have no Will, no estate, no children and no spouse
- Reduce your estate
 - inter vivos gifts
 - trusts
 - jointly held assets
 - designated beneficiary
- Explanatory memorandum
- Can't contract out of the Act, but marriage and separation agreements are helpful



Jointly Held Assets

- Can be a useful device – but can also cause a lot of problems
- Right of survivorship passes title to the surviving party after death
- There are good reasons for holding assets jointly
 - to transfer assets outside of the Will
 - for convenience, to assist an elderly or disabled person



Potential Problems

- Arise because of the right of survivorship
- Right of survivorship means the joint title holder takes the property on death – but the problem is that the testator may not have intended this to happen
- Or the testator may have intended this to happen as part of his estate planning – but someone is able to persuade a court to set aside the transaction, and the property falls into the estate to be distributed under the Will

How the Problem Arises



- Legal title versus beneficial title determined by intention
- Beneficiaries under the Will can challenge the survivor's title to the property



What Will Guide the Courts

- The Court is trying to determine the testator's intention
- “Ordinary rule”: where the funds or property are provided entirely by the deceased, the funds or property revert to the donor upon a “resulting trust”
- “Presumption of advancement”
 - the ordinary rule is superseded when the transfer involves two spouses, or a parent and dependant child
 - The presumption may be rebutted by evidence of the donor's intention

What Will Guide the Courts Con't

- “Presumption of undue influence” – used when both parties have contributed money or property, so the ordinary rule doesn’t apply
 - Undue influence is when one person has the ability to dominate the will of another, whether through manipulation, coercion, or outright but subtle abuse of power.
 - The court will assume that certain relationships inherently give one of the parties this power
 - Presumption is rebuttable





Practical Strategies

- These are difficult issues to litigate, and therefore expensive
- The best strategy: document your intention so the court doesn't have to try to figure it out
- Deed of Gift
- Declaration of Trust
- If you take a joint asset on survivorship, don't spend it too quickly

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Conclusion



- It's worth the time and expense now to avoid costly litigation for your heirs in the future.