

CANADA / JUDGMENT

Bautista v. Gutkowski Estate

2023 BCSC 1485

COURT

Supreme Court of British Columbia

DECIDED

25 August 2023

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2023 BCSC 1485 Bautista v. Gutkowski Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bautista v. Gutkowski Estate,

2023 BCSC 1485

Date: 20230825

Docket: S232516

Registry: Vancouver

Between:

Nicolas Bautista

Plaintiff

And

The Estate of Pacita Bautista Gutkowski, Melanie Lim Tunod as Executrix of the Estate of Pacita Bautista Gutkowski, Dolores Bautista Laigo and Rosalie Bautista Olvinado

Defendants

Before: The Honourable Justice MacNaughton

Reasons for Judgment

Counsel for the Plaintiff:

F. Munoz-Job

J. Wu, Articled Student

Counsel for the Defendant Melanie Lim Tunod as Executrix of the Estate of Pacita Bautista Gutkowski:

N. Ahmed

The Defendant Dolores Bautista Laigo, appearing in person:

D. Laigo

The Defendant Rosalie Bautista Olvinado, appearing in person:

R. Olvinado

Place and Date of Trial:

Vancouver, B.C.

August 11, 2023

Place and Date of Judgment:

Vancouver, B.C.

August 25, 2023

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Introduction

- [1] Nicolas Bautista ("Nicolas") is the only son of Pacita Bautista Gutkowski who died in Vancouver, British Columbia, on December 26, 2021 ("Testator"). She left a will dated November 27, 2017 ("Will"). In these reasons, I will refer to the parties by their first names to avoid confusion; I intend no disrespect in doing so.
- [2] Nicolas brings a summary trial application seeking a variation of his mother's Will.
- [3] Under the terms of the Will, the Testator left 25 percent of her estate to Nicolas and divided the remaining 75 percent between her sister, Dolores Bautista Laigo ("Dolores"), and her niece, Rosalie Bautista Olbinado, named in the Will as Rosalie Bautista Olvinado ("Rosalie").
- [4] Nicolas, Dolores, and Rosalie all speak Tagalog, and these proceedings were translated for them. Their affidavits were filed in English, but various attachments were translated.
- [5] The Will named Melanie Lim Tunod as the Trustee and Executor ("Executor"), or, in the alternative, Edwin Lim Tunod. The Executor filed an application for probate with the Vancouver Court Registry, Action P222732. Probate was issued on October 4, 2022.
- [6] On March 27, 2023, Nicolas filed a notice of civil claim seeking a wills variation pursuant to Division 6 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA]. He named as defendants the Testator's estate, the Executor, Dolores, and Rosalie.
- [7] The Executor takes no position with respect to Nicolas' claim. Dolores and Rosalie oppose it on the basis that the terms of the Will reflect the Testator's wishes, due to the estrangement between the Testator and Nicolas, and because they submit that the Will adequately provides for him.

Suitability for Summary Trial

- [8] Nicolas' application is brought pursuant to Rule 9-7 of the Supreme Court Civil Rules. No objection is taken to the suitability of proceeding by summary trial, and I agree that the matter is suitable for summary disposition.

Relationship between Nicolas and the Testator

- [9] In his affidavit made May 11, 2023, in Balaoan, La Union, Philippines, Nicolas sets out the history of his relationship with the Testator. His evidence is supported by the affidavit of Perseveranda Bautista Versola ("Perseveranda"), the Testator's younger sister.

- [10] Dolores and Rosalie have served a response to the summary trial application and a joint affidavit in response. The response and affidavit were not filed and were served on Nicolas' counsel too late to be included in the binder for this application. Nevertheless, I have considered them.
- [11] Attached to the joint affidavit as Annex 3 is an affidavit from Clemencio Bautista, another of the Testator's siblings ("Clemencio"). That affidavit contains hearsay evidence regarding what an aunt told him about what happened when Nicolas lived with her. In addition, it contains Clemencio's evidence about Nicolas' behaviour when he lived in Clemencio's home for a short time.
- [12] Also attached to the joint affidavit is an electronically signed June 30, 2023, "To whom it may concern" letter purporting to be from Yolanda Chatrath, an acquaintance of the Testator. She gives hearsay evidence about what the Testator told her about her relationship with Nicolas.
- [13] Hearsay is not admissible on a summary trial application.
- [14] The Testator was unmarried when she gave birth to Nicolas, her only child, on September 10, 1974, in Balaoan. When Nicolas was three months old, the Testator moved to Canada to work as a nanny. She left Nicolas in the care of his grandparents, Julia Bautista and Catalino Bautista, Sr.
- [15] In an affidavit filed by Nicolas' grandmother, sworn in the Philippines on February 24, 2022, she confirms that Nicolas was the Testator's only child, the Testator was single when he was born, and his father did not register himself as the father or acknowledge him at a later date.
- [16] The Testator provided her parents with financial assistance for Nicolas' living expenses and paid for his education until he was in his second year in college.
- [17] Nicolas first met his mother when he was about seven years old. He says that they bonded and he felt that she loved and cared for him. After her first visit, he saw her every three or four years. When he was a child, his grandparents, aunts, and uncles would take him to the airport to pick his mother up when she flew to the Philippines. As an adult, he did so on his own.
- [18] Nicolas' grandparents recorded taped messages from him and sent them to his mother, and, when he was old enough to do so, he wrote to her. Nicolas says that the Testator rarely replied but, when she did, he kept her replies. He lost her replies when he was told to move out of his grandparents' home. When he was in college, he phoned his mother but, due to the cost, he said his calls were infrequent.
- [19] In his affidavit, Nicolas describes how his mother provided financial assistance to her parents and siblings but says she made it clear to him that she did not have an easy life in Canada. When he was in his second year of high school, he started working at a farm to contribute to the costs of his upkeep so that he did not need to ask for his mother for money. Dolores and Rosalie say that they were a farming family and everyone helped out.

- [20] After high school, at his mother's urging, Nicolas enrolled in a vocational course in drafting, but he found it challenging and left school.
- [21] On a date that is not clear in the evidence, the Testator married Adam Gutkowski in Canada. They had no children.
- [22] Nicolas says that, when he was an adolescent, he socialized with female friends and classmates who visited him at his grandparents' home. He always felt unwanted by his parents but said that he felt happy, was accepted, and had a sense of belonging when he was in the company of friends.
- [23] Nicolas says that his grandparents, some of his uncles, and Dolores did not approve of his activities. Dolores reported his activities to his mother in Canada. This resulted in arguments with his family, including his mother.
- [24] Nicolas says that Dolores was his mother's main source of information about him, and other members of the family, and that she gained his mother's trust. The Testator sent Dolores money when she was alive.
- [25] Nicolas said that his relationship with his mother improved and she came to the Philippines and threw a party to celebrate his 21st birthday.
- [26] Nicolas was married when he was 23, and he and his wife lived with his grandparents. His mother provided money for his wedding. He has a son. To improve the future of his family, Nicolas went to work in South Korea. In 2012, he learned that his wife had an affair, and they separated.
- [27] On his return to the Philippines, he started a small car wash business in Balaoan, but it was unsuccessful.
- [28] In 2013, Nicolas was in an accident, and his mother helped him with some of his medical needs. He describes how he became depressed over his failed marriage and business and that he started seeing his friends again, much to the dismay of his grandparents, who accused him of sleeping with women other than his wife.
- [29] Dolores and Rosalie told the Testator that Nicolas was womanizing, and Nicolas' communication with his mother deteriorated.
- [30] Although Dolores and Rosalie deny that they did anything to keep mother and son apart, Nicolas' belief that they had a financial reason for doing so has some support in Perseveranda's affidavit. In any event, a review of the joint affidavit demonstrates that Dolores and Rosalie did not do anything to try to repair the relationship between the Testator and Nicolas. It is also apparent that they do not think highly of Nicolas.
- [31] The Testator visited the Philippines in 2018, and Nicolas learned that she had financially helped Rosalie open an "eatery". Rosalie denies that she has an ownership in the eatery. When he saw his mother, she was visibly angry with him and did not invite him to family

activities. When Nicolas tried to explain that what Dolores was telling her about him was untrue, the Testator did not believe him and ordered him to leave his grandparents' home. He had nowhere to go. He stayed with a distant aunt for several months until he found a job as a carpenter.

- [32] Nicolas suspects that Dolores and his uncles did not want him to have a close relationship with his mother so that he would not financially benefit from her assets. When his mother gave him gifts, she hid that she was doing so from her siblings and told him not to tell anyone. His evidence in that regard is supported in Perseveranda's affidavit. She says that the Testator asked her to give Nicolas 20 bags of rice to sell at the market, but not to tell the other siblings.
- [33] Nicolas never heard from his mother again, and his relatives did not keep him apprised of his mother's deteriorating health. He text messaged her repeatedly, without response. He did not know she was ill and learned that she had died from Perseveranda. He returned to his grandparents' house and insisted on staying there until his mother's remains arrived in the Philippines. Tensions were high. He signed a contract for the funeral over the objection of Dolores and his uncles. There was also a dispute over the duration of the wake that was held for his mother.
- [34] In her affidavit, Perseveranda says that Nicolas was a good child and that as far as she knows, he tried his best to make his mother happy. She says that her other siblings, particularly Dolores, found fault in most of what Nicolas did. Dolores called the Testator to complain about Nicolas' attitude. Perseveranda believes that her siblings did not want Nicolas and his mother to be close. Despite that, Perseveranda says that the Testator loved her son and was concerned about his well-being.
- [35] Nicolas believes that his mother should have provided more for his needs than she did in her Will because he was her only child, she knew of his financial situation, he had not been a burden to her, and she had financially helped Dolores and Rosalie while she was alive.
- [36] Nicolas says in his affidavit that he is currently unemployed and looking for work as a carpenter. When working, his daily wage is about \$12 a day. The project he had been working on ended in April 2023. He picks up some occasional work. He does not have a home of his own. He lives in a friend's house, which, in the pictures attached to his affidavit, looks extremely modest.

Legal Basis for Varying a Will

- [37] Section 60 of WESA sets out the power of this Court to vary a will:

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 a 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.

- [38] The leading authority on wills variation in British Columbia, albeit decided under an earlier statute, is *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, 1994 CanLII 51. The provision considered in *Tataryn* is worded slightly different than s. 60 of WESA, but the concepts are the same: *Scurek v. Scurek*, 2021 BCCA 178 at para. 7.
- [39] In *Tataryn*, the Supreme Court of Canada said that a court has broad discretion to make orders that are just and equitable in the specific circumstances of the case, and in light of contemporary standards. The statute must be read in light of modern values and expectations in a search for contemporary justice: *Tataryn* at 814-816.
- [40] Certain principles emerge from *Tataryn* and the cases that followed it. As they apply to this case, WESA has two primary statutory objectives. The first is to ensure that adequate, just, and equitable provision is made for spouses and children of a will-maker, and the second is to protect the will-maker's autonomy. The second interest is subordinate to the main objective: *Tataryn* at 815-816.
- [41] The question of whether a will-maker made adequate provision under a will to a spouse or children is measured objectively, assessed in light of current societal legal and moral norms. Legal norms are obligations owed to a spouse or dependent children. Moral norms are obligations "found in society's reasonable expectations of what a judicious person would do in the circumstances by reference to contemporary community standards": *Tataryn* at 821.
- [42] In *Eckford v. Vanderwood*, 2014 BCCA 261, our Court of Appeal summarized the principles from *Tataryn*:
- [37] ... [*Tataryn*], remains the seminal authority. As explained therein, in the context of a wills variation action the court must first determine whether the testator has made "adequate provision" for his or her spouse and children and if it concludes he or she has not, the court must then determine what is adequate, just and equitable. As noted by McLachlin J. these are "two sides of the same coin": *Tataryn*, at 814.
- [38] [T]he Court explained that the main aim of the Act is adequate, just and equitable provision for the spouses and children of testators. The Act also protects testamentary autonomy; however, testamentary autonomy must yield to what is adequate, just and equitable: *Tataryn*, at 815-816.
- [39] The phrase "adequate, just and equitable" is to be viewed in light of current societal norms. In determining what is adequate, just and equitable, the court must consider both legal and moral obligations. The first consideration is a testator's legal responsibilities during his or her lifetime. Maintenance and property obligations which the law would support during the

testator's lifetime should be reflected in the court's interpretation of what is "adequate, just and equitable". The court should also consider the testator's moral duties towards a spouse and children. While there is no clear legal standard by which to judge moral duties, the jurisprudence suggests that subject to such considerations as the size of the estate and the absence of circumstances that may negate such moral obligations, a testator should make provision for both a spouse and children. Tataryn recognizes that in any particular situation there may be a number of ways of dividing the assets which are adequate, just and equitable, and provided the testator has chosen an option within the range, the will should not be disturbed: Tataryn, at 823-824.

...

- [50] In order to make the determination under both the first and second stage, it was necessary for the Court to select the relevant date for determination. The Court in Landy reviewed numerous authorities which had discussed the point and concluded that the date to be used in determining whether a testator has made adequate provision for the proper maintenance and support of a dependent is the date of death of the testator, that being the last chance that the testator had to make a proper will. In determining whether the testator had made adequate provision, a court should take into consideration the circumstances existing and reasonably foreseeable to the testator as of that date.
- [51] In regards to the second stage of the two-step process, the Court held that in determining the provision that the Court thinks adequate, just and equitable in the circumstances, the Court was entitled to take into account not only the circumstances existing and reasonably foreseeable at the date of the testator's death but in addition any substantial change in circumstance that may have occurred between the date of death and the trial in the circumstances of a person who may be entitled to make a claim or indeed a beneficiary.
- [43] In Hall v. Hall, 2011 BCCA 354 at para. 39, our Court of Appeal wrote that a testator will not generally have a legal duty to an independent adult child unless the child contributed to the estate. As to a moral obligation toward adult children, "these are tenuous, but may justify entitlement if the size of the estate is adequate and the circumstances do not negate such an obligation": Hall at para. 39; Tataryn at 820-823. A testator's moral duty to adult children is assessed from the perspective of a reasonable testator, that is, a "judicious parent": Tom v. Tang, 2023 BCCA 221 at para. 39, referring to Bell v. Roy Estate, 75 B.C.L.R. (2d) 213 at para. 38, 1993 CanLII 1262 (C.A.). A moral duty may be negated where the testator has just cause, consisting of objectively valid and rational reasons, to disinherit the adult child: Tom at paras. 36, 39, 51.

[44] In this case, there was no legal duty on the Testator to provide for Nicolas once he became an adult. As a child, the Testator had a legal obligation to support him, and it is not clear on the record that she did so to the extent required. Nevertheless, the issue now before me is whether she had a moral obligation to do so at the time of making her Will. The Testator recognized that she had such a moral obligation by providing for a 25% interest in her estate to Nicolas.

[45] The value of the Testator's estate is set out in the statement of assets, liabilities, and distribution filed by the Executor with her probate application. The estate consisted of a home in New Westminster with an assessed value in 2021 of \$563,000, and various bank accounts and investments, totalling \$373,050.50, for a total value of \$936,050.50. At the hearing, counsel for the estate told me that the home had been sold for \$590,000 and after the usual closing costs, he held \$552,669 in his trust account. The total in the estate account is \$328,000, for a total value of \$881,119.

[46] As explained by Justice Ballance in *Dunsdon v. Dunsdon*, 2012 BCSC 1274, in cases decided after *Tataryn*, courts have considered a number of factors as informing the existence and strength of a testator's moral duty to independent adult children. The same considerations are also relevant to determining what constitutes adequate, just, and equitable provision in the circumstances of the case: paras. 131, 134. The factors were set out at para. 134 and include:

- relationship between the testator and claimant, including abandonment, neglect, and estrangement by one or the other;
- size of the estate;
- contributions by the claimant;
- reasonably held expectations of the claimant;
- standard of living of the testator and claimant;
- gifts and benefits made by the testator outside the will;
- testator's reasons for disinheriting;
- financial need and other personal circumstances, including disability, of the claimant;
- misconduct or poor character of the claimant;
- competing claimants and other beneficiaries.

[47] Justice Ballance explained that the "considerations tend to overlap and are not approached in isolation as independent, air-tight categories": *Dunsdon* at para. 135. I will refer to these considerations as guiding my analysis in this case.

Relationship between the Testator and Nicolas, Including Abandonment, Neglect and Estrangement by One or the Other

[48] Nicolas was born in 1974 and, over the course of his life, until his mother's death in 2021, he spent very little time with her. That was because of her decision to move to Canada when he was three months old. She abandoned him and, despite making a life for herself in Canada, did not petition to have him join her. She did, however, provide for his support by giving money to her parents, who were raising Nicolas along with his aunts and uncles.

[49] At times, the Testator and Nicolas had a close relationship, but as he became an adult, the Testator disapproved of the lifestyle she was told that he was leading. Despite his attempts to explain that she was being misled, she chose to believe other members of her family over him. That estrangement was her choice not his. His numerous attempts to reach out to her by text and email were met with silence.

[50] As set out above, in about 2018, the Testator told him to move out of his grandparents' home, when he had nowhere else to go.

[51] In his messages to the Testator in October 2020, Nicolas wrote, as translated:

Hello, Ma. As your child, I will humble myself.

Whatever huge mistake I have made, hope you can forgive me.

It is not too late for us to fix our misunderstanding. Hope you listen to my plea, but if you do not want to I cannot do anything.

Just please always take care wherever you go. GOD BLESS YOU ALWAYS (emojis)

You should set it so we can bond when you come home

[52] The Testator did not respond.

[53] I find that in the circumstances of this case, it was Nicolas who reached out to his mother and she who chose not to accept his plea for a reconciliation. In *McBride v. Voth*, 2010 BCSC 443, Ballance J. wrote:

[132] The modern judicial trend indicates that the court will enquire into the role played by the testator in the estrangement or relationship breakdown, and where it is seen to be largely the fault of or at the insistence of a testator, it will likely not negate a testator's moral duty, and may even enhance it. The weight of the authorities also indicates that the court may discern a moral duty as a means of rectifying the testator's childhood neglect of the children:

- [54] In this case, the Testator did not provide enough money to support Nicolas when he was an adolescent, and, as a result, he worked part time on a farm to contribute to the cost of his upbringing. It is not clear, however, what resources the Testator had available to her at the time. The record does not disclose when she ceased working as a nanny or when she married Mr. Gutkowski.
- [55] The Testator did not petition to have Nicolas join her in Canada once she was financially able to do so.
- [56] I accept Nicolas' evidence that he felt abandoned by his mother and unwanted by his father. I also accept that he had difficulty with the strictness in which he was brought up. In their joint affidavit, Dolores and Rosalie agreed that Nicolas was brought up strictly, but they say that it was a way to show him how they cared about him. His family does not appear to have taken into account Nicolas' feelings of abandonment and rejection.
- [57] The absence of an explanation from the Testator, and her silence in response to Nicolas' attempts to reach out to her after their estrangement, enhances her moral duty to Nicolas.
- [58] I note that she wrote her Will in November 27, 2017, at the height of her anger towards Nicolas. Had she responded to his plea to give him an opportunity to tell her his side of the story and to work on their relationship, they might have connected before her death four years later.

Size of the Estate

- [59] Since the grant of probate, the Testator's real estate has been sold. The solicitor for the estate has cash of \$881,119 on hand. The executor fee is expected to be about 3 percent. After reasonable executors' compensation and expenses, counsel for the estate estimates that there will be approximately \$850,000 available for distribution to the beneficiaries.
- [60] The estate is certainly large enough to sustain a reasonable redistribution without depriving Dolores and Rosalie of a healthy residual share.

Contributions by Nicolas

- [61] There is no evidence of any contribution by Nicolas to his mother while she was alive or to her estate. He was not able to make any financial contribution to her. Nicolas did try his best to help his mother when she visited the Philippines.
- [62] After Nicolas learned of his mother's death, he arranged for her funeral and remained at his grandparents' house for the wake despite being unwelcome in his grandparents' home. His aunts, uncles, and cousins did not advise him that his mother was in ill-health, and Nicolas only learned of his mother's death after the fact from Perseveranda.

Reasonably Held Expectations of Nicolas

[63] Nicolas believed that he would inherit from his mother. After his mother died, he wrote to the Executor asking about his share of the estate and saying that he would fight for his right. I accept that Nicolas believed that he should inherit, but I find that this is not a persuasive factor in this case. Due to their limited contact and estrangement, Nicolas and his mother never discussed estate planning and whether she would benefit him in her Will. There is no evidence on which I could find that he was led to expect anything.

Standard of Living of the Testator and Nicolas

[64] It appears, from the value of the estate and the fact that she owned a home in British Columbia, that the Testator overcame her early struggles in Canada. She eventually did well financially. She was married and able to provide money to Dolores and Rosalie during her lifetime. She contributed to Nicolas' wedding and provided him medical assistance after his accident in 2013.

[65] Nicolas has not fared as well. Although he is a carpenter, he works on a contract basis and experiences periods of unemployment. He is currently working part time when it is available. He earns just over \$12 a day when employed. He does not own a home but lives in a friend's home. He has a son. The picture of the home he is living in shows it to be modest accommodation.

Gifts and Benefits Made by the Testator Outside the Will

[66] The Testator provided some support for Nicolas while he was a child, but it was not enough to support him, and he began working while in high school. Since then he received some gifts from his mother, for example, on his 21st birthday and for his wedding. She paid for some of his medical needs; she also arranged for Perseveranda to give him some rice to sell at a market.

[67] It is not disputed in the affidavit filed by Nicolas, and in Dolores and Rosalie's joint affidavit, that while the Testator was alive, she sent money and provided gifts to family members in the Philippines. Apart from her contributions to the cost of Nicolas' upbringing and some sporadic gifts thereafter, the majority of the Testator's gifts during her lifetime went to other family members, including Dolores and Rosalie.

[68] The Testator's Will only disposes of her Canadian assets. In the Will, the Testator states her intention to deal separately with her Philippine assets. I have no evidence about whether there were any such assets or, if there were, who benefitted from them. I understand from Rosalie's submissions that she moved into the grandparents' home to look after her grandmother and still resides there.

Testator's Reasons for Disinheriting

- [69] It is apparent that the Testator was angry with Nicolas when she wrote her Will.
- [70] Despite preparing her will with the assistance of counsel, the Testator did not explain, in writing, why she preferred her sister and her niece over her son.
- [71] In their joint affidavit, Dolores and Rosalie purport to give some reasons, but their evidence is hearsay. Annexes 4 and 5 to their joint affidavit are letters from two of the Testator's friends in Canada about what the Testator told them about her relationship with Nicolas. They, too, are hearsay and should have been provided in the form of affidavits, the content of which could have been the subject of cross-examination. One of the letters is only electronically signed.

Financial Need and Other Personal Circumstances, Including Disability, of Nicolas

- [72] Although Nicolas is employed when work is available, he does not live an affluent lifestyle. He lives in a friend's home. He has demonstrated financial need. He advised his counsel that he owes money to friends. Dolores said in submissions at the hearing that Nicolas' son, who works overseas, provides Nicolas with an allowance and that Nicolas has a car, but that was not in evidence.
- [73] Although financial need is only relevant to Nicolas, as he is the only person towards whom the Testator owes a moral duty, I note that, as set out in their joint affidavit, Dolores, her husband, and children all appear to be financially stable. Rosalie is employed, runs a small business, and lives in what was her grandparents' home.

Misconduct or Poor Character of Nicolas

- [74] In their joint affidavit, Dolores and Rosalie describe Nicolas as being rude, disrespectful, and cruel to his mother. They also outline their belief that he is not of good character.
- [75] Attached to their affidavit are what purport to be two letters from individuals who say that they knew the Testator in Canada. The letters report that the Testator was concerned about her son's aggressive behaviour. In the letter at Annex 4, Ms. Chatrath says that the Testator's relationship with her son was an ongoing stressor in her life and she had to disown him for her own safety. The letter is not sworn evidence and is hearsay. There is no evidence that Nicolas was a threat to his mother's safety. The letter is also inaccurate because it said that the Testator had decided not to include Nicolas in her Will and planned to give all of her assets to other family members. As set out, the Will did not entirely disinherit Nicolas.
- [76] Dolores and Rosalie's evidence is in stark contrast to that of Perseveranda, who describes that she knows Nicolas to be a good person. Given the limitations of Dolores and Rosalie's evidence, and that Perseveranda has no financial interest in the outcome of this proceeding, I prefer the evidence of Perseveranda.

[77] On the evidentiary record before me, I cannot find that Nicolas engaged in misconduct or is of poor character.

Competing Claimants and Other Beneficiaries

[78] In this case, Nicolas is the Testator's only child. He is the only beneficiary who has a moral basis for his claim. Dolores and Rosalie are the Testator's sister and her niece. The Testator had no legal or moral obligation to them.

[79] There are no other competing claimants in this case.

Conclusion

[80] Based on my finding that the various considerations point to a moral obligation towards Nicolas, I am varying the Will to ensure that it makes adequate, just, and equitable provision for Nicolas while, at the same time, interfering as little as possible with the Testator's autonomy and expressed intention as set out in her Will.

Appropriate Level of Adjustment

[81] Nicolas submits that I should vary the Will to give him 80 percent of the estate value and divide the remaining 20 percent between Dolores and Rosalie.

[82] In *Enns v. Gordon Estate*, 2018 BCSC 705 at para. 109, in assessing the extent to which the Will should be varied, Justice Branch gave weight to the lack of competing moral claims to the estate. He reviewed a number of other cases in which an adjustment was made: para. 111.

[83] While other cases are helpful, each case must be decided on its own facts. Not surprisingly, I was unable to find any case that was similarly factual. I did not find *Jung v. Poole Estate*, 2021 BCSC 623, directly applicable as, in that case, out of spite and bitterness after losing a custody battle, the father excluded his twin daughters from his estate.

[84] A case that bears some similarities to the present circumstances is *Wilson v. Watson et al*, 2006 BCSC 53. *Wilson* involved an estrangement with a minimal level of contact between the testator, Ms. Walsh, and her child, Mr. Wilson. The testator's reasons for disinheriting her child were relatively vague and possibly derived from stubbornness.

[85] In *Wilson*, the testator left roughly a quarter of her estate to each of her friends and neighbours, three percent to her niece, and one percent to Mr. Wilson: para. 3.

[86] Ms. Walsh and Mr. Wilson were estranged despite Mr. Wilson's attempts at reconciliation. Ms. Walsh was firm that Mr. Wilson had "treated [her] with great disrespect": paras. 12-20. For example, Ms. Walsh claimed that she disinherited Mr. Wilson because he broke the law by some involvement with drugs, which was found to be incorrect: para. 20. The court ultimately concluded that Ms. Walsh owed a moral duty to Mr. Wilson and did not make adequate provision for him in her Will: para. 22. The court ordered that Mr. Wilson be

entitled to 50 percent of the estate with the remaining 50 percent to the defendants (those without moral claims): para. 22.

[87] Having considered the submissions, I conclude that 60 percent of the Testator's estate should go to Nicolas and the remaining 40 percent should be shared between Dolores and Rosalie. That division is, in my view, appropriate to adequately, justly, and equitably provide for Nicolas, who is without a home of his own and in financial need, while still respecting the Testator's wishes to provide for her sister and niece.

[88] The Executor is entitled to her reasonable expenses and fees out of the estate and for the costs of her attendance at the hearing.

"MacNaughton J."

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