

CANADA / JUDGMENT

## Brown v. Ferguson

2010 BCSC 1890

### COURT

Supreme Court of British Columbia

### DECIDED

17 September 2010

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2010 BCSC 1890 Brown v. Ferguson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Brown v. Ferguson,

2010 BCSC 1890

Date: 20100917

Docket: S092419

Registry: Vancouver

Between:

Marion Faye Brown and Muriel Ferguson

Plaintiffs

And:

Debra Nichols, Executrix of the Will of Sarah Marion Wisted,

the said Debra Nichols, Irene Babineau, Bernice Babineau,

Beverly Joyce Long, and Vickie Lynn Babineau

Defendants

Before: The Honourable Madam Justice Dardi

Oral Reasons for Judgment

Counsel for the Plaintiffs:

I. D. Aikenhead, Q.C.

Counsel for the Defendants:

E. F. Macaulay

Place and date of Trial:

Vancouver, B.C.

July 19-22, 2010

Place and Date of Judgment:

Vancouver, B.C.

September 17, 2010

## INTRODUCTION

- [1] The late Sarah Marion Wisted died at the age of 82 on January 4, 2008. She was a widow and left seven surviving children. Ms. Wisted's surviving children are, from eldest to youngest: the defendants Irene and Bernice Babineau, the plaintiff Muriel Ferguson, the defendants Debra Nichols, Beverly Joyce Long, Vickie Lynn Babineau, and the plaintiff Faye Brown.
- [2] The defendant Debra Nichols is the sole beneficiary and the executrix named in her mother's will dated October 30, 1992 (the "Will").
- [3] Two of Ms. Wisted's other daughters, the plaintiffs Faye Brown and Muriel Ferguson, seek a variation of the Will pursuant to the Wills Variation Act, R.S.B.C. 1996, c. 490 [Act].
- [4] Douglas Long is the father of the plaintiffs, the defendant Ms. Nichols and the defendants Beverly Joyce Long and Vickie Lynn Babineau. Ms. Wisted and Mr. Long also had one son, Stuart Douglas Babineau, who died tragically in 1988. Ms. Wisted never married Mr. Long and they separated in approximately 1968.
- [5] The defendants Irene Babineau and Bernice Babineau are also children of Ms. Wisted but they had a different father. They were raised by their father and they had no contact with Ms. Wisted from the time they were very young children for reasons that were not apparent on the record or explained in a persuasive way at trial. Although this point was not developed in the evidence, apparently there was some limited contact with their mother after they were adults.
- [6] All of the defendants were served, but only the defendant Debra Nichols participated as a party in this litigation. The defendant Ms. Long testified as a witness for Ms Nichols at trial.
- [7] I will first outline the facts, review the relevant legal principles, and then I will address the issues on the merits.

## BACKGROUND

- [8] The majority of the relevant background facts are not in contention.
- [9] Ms. Wisted left the family home in Moncton, New Brunswick, in approximately 1968. When she left her six children were ages 6 to 14 (the "Children"). Ms. Wisted left the family home with no advance notice to any of her Children. They were raised by their father, Mr. Long. He is currently 91 and in frail health. He continues to reside in the family home in Moncton.
- [10] As previously mentioned, Ms. Wisted never married Mr. Long. She used her first husband's surname on the Children's birth certificates, and thus the Children's surname during the currency of their youth was Babineau. After their mother left, having a different last name than their father was a source of some embarrassment for the plaintiffs at school.
- [11] The family lived an extremely modest lifestyle in a small one-and-a-half story home in Moncton. Mr. Long worked as a carpenter and Ms. Wisted worked as a waitress in the evenings. After Ms. Wisted left, Mr. Long increased his weekend and evening work in order to earn extra money to support the family.
- [12] Ms. Wisted returned in 1970 for an approximately two week visit, during which she stayed in the family home with her Children and Mr. Long. She left again for Vancouver in 1970 to be with James Wisted. She never again returned to New Brunswick.
- [13] After her departure and in the period when her Children were living at home, Ms. Wisted would on occasion telephone the family home, send letters and pictures, and send gifts at Christmas. However, it is a critical and uncontroverted fact that Ms. Wisted never provided any financial support for her Children; she made no attempt to send any money or to offer any assistance in their upbringing.
- [14] The evidence demonstrates that this was a fractured, dysfunctional family with a chaotic home-life. Ms. Nichols and Ms. Long became involved with what was described in the evidence as a "wild crowd." Ms. Nichols had a child when she was 16 years old. At the age of 18 she had her second child and married the father of her children. Similarly the defendant Beverly Joyce Long had her first child at age 15; she gave up her second child for adoption. Their sister Vickie Babineau became involved with a disreputable and abusive man who ransacked the family home. The adolescence of Ms. Wisted's only son, Douglas, who was 11 when his mother left, was turbulent and fraught with problems associated with drug-use and petty crime. As referred to earlier, he pre-deceased his mother.
- [15] Ms. Wisted married James Wisted in 1982. In 1979 after selling their home in Vancouver she and Mr. Wisted purchased a home in Langley, British Columbia. Mr. Wisted passed away in 1992. Ms. Wisted continued to reside at the Langley home until she passed away on January 4, 2008.

- [16] From sometime after her move to Langley until approximately 1990, Ms. Wisted operated a small antique store in Langley. It apparently did not earn a great deal of income. It is uncontroverted that her estate and the other assets that devolved outside the provisions of the Will were substantially comprised of the assets that she and the late Mr. Wisted accumulated during their relationship.
- [17] Ms. Nichols moved to Vancouver at the age of 20. Thereafter she has for the most part continued to live in the Lower Mainland of British Columbia.

## The Will

- [18] Ms. Wisted made the Will on October 30, 1992, appointing Ms. Nichols as the executrix, and Ms. Ferguson as the alternate executrix. Ms. Nichols was named as the sole beneficiary. The Will provided that if Ms. Nichols pre-deceased her mother then half of the estate would devolve to the plaintiff, Ms. Ferguson, and half to the children of Ms. Nichols.
- [19] Ms. Wisted provided no written statement as to her reasons for disinheriting her other children. The solicitor who prepared the Will did not testify as Ms. Nichols, as executrix, asserted solicitor-client privilege over his file.

## The Estate

- [20] Ms. Wisted's date of death is the appropriate date at which to assess the value of the estate (*Graham v. Chalmers*, 2010 BCCA 13 at para. 35).
- [21] The gross value of the estate, declared for probate purposes, was \$489,502.31, comprised primarily of Ms. Wisted's home in Langley (the "Langley Property"). The parties have agreed that for the purposes of this proceeding the value of the Langley Property as of the date of death is \$486,000. Ms. Nichols received the entirety of the house contents and her mother's personal effects. Her evidence that the household contents had no commercial value is not contradicted.
- [22] The grant of letters probate was issued to Ms. Nichols, as executrix, on October 28, 2008. She has not provided any form of estate accounting.
- [23] In all likelihood there would be additional expenses properly payable by the estate in the form of probate fees, real estate commission, legal fees relating to the administration of the estate, and the like. While I have not been provided with the precise calculations, it is reasonable to estimate that the aggregate amount of those expenses will be approximately \$25,000, leaving a net estate of approximately \$464,000.
- [24] It is not in dispute that Ms. Nichols also received from her mother, outside the provisions of the Will, funds totalling \$236,186.58.

## PARTIES

### Ms. Ferguson

- [25] Ms. Ferguson is 57 years old and as previously mentioned is the eldest of the Children of Ms. Wisted and Mr. Long.
- [26] According to Ms. Ferguson, during her early home life her parents frequently argued and dragged the Children into their arguments. In the period before she left the family home, Ms. Wisted would on occasion not come home for two to three days at a time.
- [27] Ms. Wisted had a quick temper. On occasion Ms. Ferguson was slapped, beaten and called "a black-eyed bitch" by her mother, which evidence was corroborated by Debra Nichols. As the eldest child, she frequently shouldered the blame for matters that went wrong. From Ms. Ferguson's perspective, Ms. Nichols was clearly Ms. Wisted's favourite daughter; her only son Douglas was also a favourite child.
- [28] As her mother worked evenings as a waitress, Ms. Ferguson assumed a major role in running the household, including preparing breakfast and dinner for the younger children. After her mother left, she helped the younger children with their homework and made sure they were dressed, fed and bathed. She also did the housework including laundry, dishes and scrubbing floors. Ms. Nichols shared the duties in managing the home.
- [29] Ms. Ferguson was 14 when her mother left the family home in the spring of 1968. She cannot recall a note or any call to explain why her mother had left. She found the circumstances of her mother's departure very embarrassing. She describes herself as lonely and hurt; she withdrew from her friends and describes "hurrying home" after school because she did not want to explain the circumstances of her home life.
- [30] She relayed to the Court her recollection of her father Mr. Long driving with the Children to Saint John to find Ms. Wisted. Although her family could see her in an upstairs window, Ms. Wisted stood behind the window and refused to come down to see her Children. It was evident to the Court and I accept that this was clearly a painful occasion for Ms. Ferguson.
- [31] During Ms. Wisted's brief return to the family home in June 1970, Ms. Wisted told Ms. Ferguson that she had come home to stay. During this period of time there were no arguments with Mr. Long. Ms. Wisted nonetheless left after two weeks, indicating that she was returning to B.C. to finalize some matters with Mr. Wisted after which she would return home permanently. Despite her assurances to her Children Ms. Wisted never again returned to New Brunswick.
- [32] In the first ten years after Ms. Wisted left for Vancouver, Ms. Ferguson recalls that Ms. Wisted did sometimes telephone her Children and send them letters, although not on any regular basis. At Christmas time she did usually send them gifts. In the same period Ms. Ferguson sent her mother letters and small gifts. She did not telephone her mother because when she was living at home with her father she could not afford to do so.

- [33] During high school years Ms. Ferguson was acutely aware of the family's financial problems. Although they were always fed, clothing was minimal and there were no "extras." She described an incident when her sister Joyce took a curtain off the window and wore it as a skirt to school.
- [34] Ms. Ferguson went to university for one year but never returned because of a lack of funds and the problems at the family home.
- [35] In 1972 at the age of 20 Ms. Ferguson travelled by train to visit her mother in Vancouver. She paid for the trip with the funds she had saved by working. Ms. Ferguson wanted to see her mother and who she was; she wanted a relationship with her mother, not pain and animosity. She stayed with her mother and Mr. Wisted for one or two weeks and according to Ms. Ferguson it was a pleasant visit. After the visit they continued to exchange cards, letters and gifts.
- [36] After Ms. Ferguson left home at approximately age 21. Ms. Ferguson telephoned her mother in Vancouver three or four times a year; however on occasion she telephoned her mother more frequently. While the frequency of the exchange of correspondence, gifts and photographs between them was roughly equivalent, Ms. Wisted never telephoned Ms. Ferguson.
- [37] Ms. Ferguson invited her mother to her wedding in Nova Scotia in 1977. She telephoned her and sent her a written invitation. Ms. Wisted did not attend nor did she even respond to the invitation but she did send a wedding gift. Ms. Ferguson invited her mother to spend time with her when she had her first child in 1980, but Ms. Wisted did not make the trip. She did however send a gift for her new grandchild. In 1983 when Ms. Ferguson had her second child she invited her mother to visit her and sent her pictures of her baby. Once again Ms. Wisted did not make the trip out to the Maritimes.
- [38] In 1982 Ms. Ferguson connected with Ms. Wisted's parents, whom the family had only seen once since Ms. Wisted's departure. Ms. Ferguson described her visit with them as a very warm experience. This contact occurred shortly before her grandparents died unexpectedly in an automobile accident. Ms. Ferguson tried to persuade her mother to return to New Brunswick to attend her parents' funeral, but Ms. Wisted did not attend nor even respond to Ms. Ferguson.
- [39] In August of 2007 Ms. Nichols advised Ms. Ferguson that their mother had terminal cancer. Ms. Ferguson and her sister Ms. Brown made efforts to coordinate a visit to see their mother in Vancouver but they could not coordinate their scheduling. In the end Ms. Ferguson travelled to Vancouver with her husband and had what she described as a very good and generally pleasant visit with her mother. She and her husband stayed with Ms. Wisted at her home in Langley for approximately a week. This trip to British Columbia must be considered in the context of Ms. Ferguson's evidence that because of her financial circumstances--she had not worked while raising her children--she and her husband had rarely travelled.

- [40] During this 2007 visit Ms. Ferguson described her mother as very talkative. When Ms. Ferguson asked her mother why she had left the family home, Ms. Wisted indicated that she did not want to discuss the matter. However, she did tell Ms. Ferguson that she had left Mr. Long because he was abusive. Ms. Ferguson asked her if he was abusive why she would leave six children with him. Ms. Wisted replied that it was because the Children would be better off with him. Ms. Wisted refused to allow Ms. Ferguson to explore the matter any further.
- [41] Ms. Ferguson had previously attempted to discuss with her mother some of the emotional difficulties Ms. Ferguson had experienced and to ask her why she had left her six Children behind, but Ms. Wisted steadfastly refused to discuss past problems.
- [42] I accept Ms. Ferguson's evidence that she suffers from low self-esteem, depression, anxiety and "issues with trust." She also described for the Court the anorexia she suffered at age 19. In approximately 2005 she was treated for clinical depression. She was prescribed medication and attended counselling with a therapist. She no longer sees the therapist but currently remains on medication.
- [43] With respect to her personal circumstances, she has been married for 33 years. She has two adult sons; she and her husband continue to provide financial assistance to one of her sons. She currently earns \$42,000 a year as a communications officer. Her husband earns approximately \$75,000 per annum and has a pension through his employer. While she has no pension, she has investments including RRSPs totalling \$127,000. She and her husband also own a home with no mortgage that has an assessed value of \$195,000.
- [44] Ms. Ferguson was a credible witness. She responded to questions carefully and did not exaggerate or embellish her evidence. She was not shaken in cross-examination. I have no hesitation in concluding that her mother's treatment of her had a profoundly negative emotional impact upon her. Nonetheless, recognising the very real constraints of the geographical separation and her limited financial resources, through her own efforts as an adult she came to accept her mother and developed a positive and respectful, albeit somewhat distant relationship with her.

### **Ms. Brown**

- [45] Ms. Brown is 49 years old and the youngest of Ms. Wisted's children. Although she was only 6 years old when her mother left the family home, she has a vivid memory of that traumatic event. She describes a chaotic reaction among the Children with much distress and many tears. She also recalls that her mother left a note on the kitchen table when she left although she cannot recall the contents of that note.
- [46] She clearly loved her mother and was deeply upset and frightened by her sudden and unannounced departure from their home. Her testimony in this regard highlighted how profoundly her mother's departure impacted her.

- [47] She also related to the Court the distress she experienced as a result of the incident in Saint John when her mother refused to see her Children, which I have summarised previously. In the fall of 1968 her mother returned to the home for a brief period because her boyfriend, Mr. Wisted whom she eventually married, had assaulted her. However Ms. Wisted left again with no notice which made her youngest daughter Ms. Brown very sad.
- [48] Ms. Brown accompanied her father when he drove Ms. Wisted to the airport after her two week visit with her family in 1970 which I have referred to earlier in these reasons. She took a week off school to visit with her mother and she described this visit as "wonderful." During that visit Ms. Wisted assured Ms. Brown that she was home to stay and she would return to Moncton after settling matters with Mr. Wisted in Vancouver. However as I mentioned earlier Ms. Wisted never returned as she had promised.
- [49] Ms. Brown confirmed that, in the ten year period after her mother left she sent her Children letters, pictures and for the first few years, Christmas gifts. Ms. Wisted telephoned the house occasionally and spoke to each of the Children for a few minutes. In this period Ms. Brown sent her mother letters, pictures and cards because she "wanted her mother back."
- [50] Ms. Wisted never telephoned Ms. Brown after she reached adolescence. Over the years Ms. Brown made an effort to telephone her mother but the frequency with which she telephoned her mother varied through different periods of her life. Ms. Brown and her mother always exchanged letters and cards.
- [51] In 1981, Ms. Brown visited her maternal grandparents. In 1982 after the automobile accident in which her grandmother had been killed and her grandfather was hospitalized, Ms. Brown telephoned her mother and "begged" her to come to visit him before he died. Ms. Wisted declined to do so.
- [52] Ms. Brown invited her mother to her wedding in 1982 but Ms. Wisted did not attend nor did she send a wedding gift. Ms. Wisted never responded to Ms. Brown's telephone message informing her about the birth of her daughter. Ms. Brown sent her mother photographs of her children and over the years Ms. Wisted sent Ms. Brown's children gifts she had knitted.
- [53] Ms. Brown was candid in her testimony in describing the range of emotions she experienced in relation to her mother over the years. Initially, as a young child she missed her mother and desperately wanted her mother back. As she grew older she developed an angry attitude about her mother's absence and lack of contact. She described herself as "bitter." She craved a relationship with her mother, but at the same time she expressed a desire to punish her mother for the hurt she had inflicted upon her.
- [54] In approximately 1989 Ms. Brown came to Vancouver to visit her sister, Ms. Nichols. Ms. Brown expressed hurt and disappointment that her mother had not met her at the Vancouver airport upon her arrival nor even bothered to call her at Ms. Nichols'. Although Ms. Brown had told Ms. Nichols she did not want her mother to come to the airport to greet her, Ms. Brown had in reality hoped her mother would make some effort to reach out to her.

- [55] During her visit to Vancouver Ms. Nichols arranged for the two of them to visit their mother at her home in Langley. Ms. Brown acknowledged that during this afternoon visit she exhibited somewhat of a cold demeanour and confrontational attitude towards her mother. She told her mother that she thought she deserved some answers about why she would leave six children and never visit or make arrangements for there to be some contact. Ms. Wisted adamantly insisted that she did not owe Ms. Brown any explanations.
- [56] After this visit Ms. Brown realised that she felt very disappointed that she had not achieved getting to know her mother. As a result in approximately 1990 she made an effort to begin repairing her relationship with her mother. She telephoned her mother frequently and they began communicating in a positive way. She both telephoned her mother and sent a card to express her condolences when Mr. Wisted passed away in September 1992.
- [57] In 1995, Ms. Brown was experiencing a marital breakdown and telephoned both her mother and her sister Ms. Nichols. They paid the costs for Ms. Brown and her children to travel to British Columbia. Ms. Brown and her children stayed with Ms. Wisted and by all accounts they enjoyed a very positive two-week visit. Ms. Wisted enjoyed Ms. Brown's children and invited her to move to British Columbia. Ms. Brown declined because she believed her children needed to have a relationship with their father in New Brunswick.
- [58] Notably Ms. Brown had visited Ms. Wisted's relatives and brought photographs of her grandparents' graves with her on this 1995 visit. Ms. Wisted was not interested and merely expressed her dissatisfaction about not receiving anything from her own parents' estates.
- [59] During the 1995 visit, Ms. Brown asked her mother why, when she left Mr. Long, she had not taken any of her Children with her. Her only response was that she had left him because he was abusive and that the Children were better off with their father, which Ms. Brown perceived to be an incomplete and unsatisfactory response. Nonetheless, overall Ms. Brown described this visit as a positive one in which she came to know her mother better and ultimately came to accept her. After this visit she called her mother fairly frequently and they continued to exchange correspondence and gifts.
- [60] Ms. Brown had a brief overnight visit with her mother in 2003, which arose out of the tragic death in Vancouver of Ms. Long's son. I accept Ms. Brown's evidence that the focus on that visit was, quite understandably, the loss of her nephew and not the relationship with her mother.
- [61] I am satisfied that although Ms. Brown, with Ms. Ferguson, attempted to coordinate a visit to see Ms. Wisted in 2007, Ms. Brown's schedule and finances did not permit her to make the trip. During this period Ms. Brown communicated with her sisters about her mother's health.
- [62] Ms. Brown described herself as having low self-esteem, being very fearful, and always expecting the worst.

- [63] Ms. Brown has two adult children and has lived in a common-law relationship for the past eleven years. She has a high school education. Her salary is \$38,500 per year, and her common-law husband earns \$60,000 per year. She has savings, investments, and RRSPs of approximately \$10,000 and has a private sector pension with 13 years' pensionable service.
- [64] She recently purchased a house in Moncton for \$225,000. She and her common-law husband contributed \$30,000 and her father contributed \$50,000 as a gift, with the intention that he would eventually move in to this new house with Ms. Brown and her family. The balance of the purchase price was financed. (I note parenthetically that this transpired after the date of death.) The evidence shows that she and her common-law husband sold their previous home for \$145,000 but the evidence does not establish the amount of their equity or when the home was sold.
- [65] I found Ms. Brown to be a credible witness. She was responsive and direct in her testimony, and readily admitted when she could not remember the details of any particular event. Ms. Brown, as the youngest of Ms. Wisted's Children was also profoundly impacted by her relationship with her mother over her lifetime. Although her reaction was different than the stoic response of Ms. Ferguson, her anger was an understandable reaction to being abandoned with no explanation by her mother at a tender age. I also accept that after her visit in 1989 Ms. Brown made genuine attempts to repair the relationship with a mother who lived across the country. She eventually reconciled with her mother as best as she could in all the circumstances.

Ms. Nichols

- [66] Debra Nichols, who is 56 years old, is named as the sole beneficiary under the Will.
- [67] She was approximately 12 years old when her mother left the family home. She confirmed that prior to her mother leaving, she and her older sister, Ms. Ferguson, assisted with the household chores. After their mother left they continued to be responsible for these chores and assumed the bulk of the household duties, including cooking, cleaning, laundry, and tending to the younger children.
- [68] She felt great relief when her mother left, as the "heart-breaking" fighting between her parents stopped. According to Ms. Nichols, her father was very abusive to Ms. Wisted. After her mother left she kept contact with her by letters and phone calls. Ms. Nichols called her mother collect and she testified that her mother called the family home "the odd time."
- [69] Contrary to the plaintiffs' recollection, Ms. Nichols testified that when her mother returned to the family home for two weeks in 1970 she told her Children that it was only for a visit, not a permanent return. Her evidence at trial accorded with the testimony of Ms. Long. However in her examination for discovery, Ms. Nichols admitted she did not recall much about that visit. Although Ms. Wisted may have made different statements to different children, I prefer the evidence of the plaintiffs on this point.

- [70] Ms. Nichols became pregnant at the age of 16. At the age of 18 she became pregnant with a second child, and married the father of her children. The marriage did not last.
- [71] After Ms. Wisted left the family home in Moncton Ms. Nichols kept contact with her mother by way of long-distance phone calls, cards, letters, and Christmas packages.
- [72] In 1974 when she was 20 years old, at her mother's suggestion, Ms. Nichols decided to make a change in her life and moved to Vancouver with her two children. Except for a brief period when she returned to live in the Maritimes she has continued to live in the Lower Mainland since 1974.
- [73] After her arrival in Vancouver, and until she moved into her own apartment in 1976, Ms. Nichols and her two children lived with Ms. Wisted and her husband in their Vancouver home for approximately two years. During this period she completed her high school equivalency degree and worked part-time. She paid rent during this time. At some point she also received social assistance.
- [74] In 1977 Ms. Nichols moved back in with her mother and Mr. Wisted. In 1979 after Mr. and Ms. Wisted sold their home in Vancouver and moved to the Langley Property, Ms. Nichols returned to Moncton to live with her father, Mr. Long, for four months. She then returned to the Lower Mainland and moved into the Langley Property with Mr. and Ms. Wisted for approximately two years. In 1981 she obtained her current job and moved to Vancouver. I accept that after her move to Vancouver she regularly visited her mother in Langley and that even during the periods they were not residing together Ms. Nichols maintained a close relationship with her mother.
- [75] Although Langley was a long commute from where she worked in Vancouver, when Mr. Wisted was diagnosed with his terminal illness in 1990 Ms. Nichols moved back into the Langley Property. She has continued to reside there ever since.
- [76] From 1990 until 2003 Ms. Nichols paid rent of \$500.00 per month. She paid no rent to her mother after 2003.
- [77] Ms. Nichols described her mother as her "best friend." They did many activities together, including shopping, day-trips to Bellingham, traveling, including trips to Edmonton, Reno, and Las Vegas, and some recreational gambling which her mother enjoyed. She also shared in her mother's passion for gardening.
- [78] Ms. Nichols assisted her mother during Mr. Wisted's illness by driving her and Mr. Wisted to medical appointments. Ms. Nichols helped her mother with the yard work and after 1992 did all of the driving including driving her mother to medical appointments. In her mother's final years Ms. Nichols assisted her mother with her financial affairs, such as bringing her cheques if required.

- [79] Prior to 2004 Ms. Wisted had cataract surgery and breast cancer surgery. Ms. Wisted was diagnosed with lung cancer in 2004 but enjoyed a reasonably good quality of life until about one-and-a-half years before she passed away in January, 2008.
- [80] When Ms. Wisted went to the hospital in September 2007 she was told that her illness was terminal and that she had four to six months to live. Ms. Nichols decided to look after her mother during her final months and took an unpaid leave of absence from work. Ms. Wisted told Ms. Nichols that she would pay her and not to worry about her expenses during this time.
- [81] In September 2007 Ms. Wisted took steps to place her two bank accounts into joint names with Ms. Nichols. Ms. Nichols thereafter withdrew \$1800 per month from the joint accounts. Additionally during this period her mother paid other expenses for Ms. Nichols totalling \$8,329.76. On her mother's death Ms. Nichols received by right of survivorship the funds in the two bank accounts in the amount of \$227,856. Excluding the monthly payments and any other withdrawals made before her mother's death, as referred to previously, Ms. Nichols received funds of \$236,186.58 from the joint accounts.
- [82] From September 2007 until Ms. Wisted entered a hospice four days prior to her passing, Ms. Nichols cared for her mother at her home in Langley. With the help of some medical home care assistance, Ms. Nichols made it possible for her mother to remain in her home in her final months. For the most part Ms. Nichols was her mother's primary caregiver and she only received some respite care in Ms. Wisted's final three weeks.
- [83] Sometime before Mr. Wisted died, Ms. Wisted told Ms. Nichols that it was her wish to stay in her home "until the end" and not to move into a senior's facility. Ms. Nichols told her mother that she would "be there until the end."
- [84] Ms. Nichols testified that her mother told her many times that "everything was going to me." However Ms. Nichols' evidence was vague and somewhat contradictory regarding if and when her mother actually discussed the provisions of her will with her. Ms. Nichols conceded in her examination for discovery that she would have looked after her mother regardless of how her mother had decided to dispose of her estate.
- [85] Ms. Nichols is divorced and has two adult children. She earns an income of \$38,500 per year as a medical office assistant and she has a government pension with 29 years of pensionable service as of the date of her mother's death.
- [86] There was insufficient evidence to reliably determine what her assets were either at the date of death or prior to her receipt of the monies from the joint bank accounts she held with her mother.
- [87] The evidence shows that as of the date of death she held a one-third interest with her daughter and a third party in property in Vancouver which has a revenue producing suite (the "Vancouver Property"). She had acquired her interest in the Vancouver Property in 2004; her equity in the Vancouver Property as of the date of death was approximately \$100,000.

She also owned some investments and savings but the evidence does not show the amounts of those assets. It is not clear whether Ms. Nichols fully disclosed the relevant documents in this regard.

- [88] Ms. Nichols had a close and loving relationship with her mother for many years and unquestionably she was a very devoted daughter. Ms. Nichols clearly enriched her mother's quality of life through her companionship, particularly after Ms. Wisted was widowed. She played a critical role in her mother's care in the final stages of her life. However, Ms. Nichols chose to live with her mother and it cannot be denied that over the years Ms. Nichols also derived some real benefit from their arrangement. She enjoyed her mother's companionship and as I mentioned earlier described her as her best friend. She paid low cost rent for several years and no rent after 2003 which permitted her at a minimum to acquire an interest in real estate in Vancouver.
- [89] Ms. Nichols was intent on portraying her mother in a favourable light for the Court. In cross-examination she denied that her mother was self-centered. Although she may well have convinced herself of this, I do not accept that this perception of her mother is accurate. The preponderance of the evidence does not support such a characterization of her mother. On occasion Ms. Nichols appeared somewhat resentful about these proceedings challenging her mother's testamentary wishes and the consequent requirement for disclosure of financial matters which she clearly perceives to be an unwarranted intrusion. Overall I have approached her evidence with considerable caution.

### **Ms. Long**

- [90] At this point it is appropriate to address the evidence of Ms. Long. In essence even though she was also disinherited she supports her sister Ms. Nichols receiving the entirety of Ms. Wisted's estate. While in no way detracting from her apparent resilience and her desire to honour her mother's wishes, she is not an applicant in this case. The focus for the Court must necessarily be on the applicants and what if any moral duty Ms. Wisted owed them. Moreover, Ms. Long presents as harbouring some degree of antagonism towards the plaintiffs and is clearly aligned in interest with her sister Ms. Nichols. Given her clear lack of impartiality, where there is a conflict in the evidence I prefer the evidence of the plaintiffs.

### **LEGAL FRAMEWORK**

- [91] The key provision of the Wills Variation Act is s. 2. That section provides that if, in the Court's opinion, a will fails to make adequate provision for the proper maintenance and support of the testator's spouse or children, the Court is empowered, in its discretion, to vary the will to make provision that it considers adequate, just and equitable in the circumstances.

- [92] *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, is the governing authority in British Columbia on the Act. McLachlin J. (as she then was), writing for the Court, articulated the relevant considerations and principles that animate the application of the Act. The fundamental approach is anchored in her observation at p. 814 that "[t]he search is for contemporary justice." The courts must read the Act "in light of modern values and expectations" and "are not necessarily bound by the views and awards made in earlier times" (at pp. 814-815).
- [93] The Court in *Tataryn* stated at para. 13 that the determination of whether a will makes adequate provision and if not what provision would be adequate, just and equitable are "two sides of the same coin."
- [94] In *McBride v. Voth*, 2010 BCSC 443, the court summarised the two fundamental interests protected by the Act, as those were identified by the Court in *Tataryn*:
- [125] ... The main statutory objective is the adequate, just, and equitable provision for a testator's spouse and children. The other protected interest is the testator's testamentary autonomy. Of necessity, testamentary freedom is subordinate to the main objective of the Act. This is because a testator is only permitted to be unconstrained in his or her testamentary dispositions so long as adequate provision has been made to the narrow class protected by the Act. The conceptual essence of the Act is to permit judicial interference of testamentary freedom where a testator's spouse or child has not been left adequate provision. Testamentary freedom must therefore yield to the extent required to achieve adequate, just and equitable provision for the applicant spouse and/or children. In that sense and to that degree only, testamentary autonomy will be curtailed by the application of the Act.
- [95] Since societal circumstances change, the Court must apply an approach to the Act that accords with a contemporary view of marital and parental obligations, and of testamentary autonomy. In addressing the adequacy of the testamentary provision, McLachlin J. clarified that the question of whether a testator has acted as a judicious parent or spouse in relation to the provision under the will is measured by an objective standard, assessed in light of current societal legal norms and current societal moral norms (*McBride*, at para.127).
- [96] Pursuant to *Tataryn*, legal norms are the obligations that would be imposed upon the testator during his or her life if the question of provision for a claimant's spouse or child were to arise. Testator's moral duties are to be grounded in "society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards" (*Tataryn*, at pp. 820-821).
- [97] *Tataryn* expressly acknowledged that moral duties are more susceptible to being viewed differently by different people because there is no clear legal standard by which to judge moral duties (at p. 822).
- [98] The Court in *Tataryn* held that all moral and legal claims should be satisfied where the size of the estate permits. Generally, claims that would have been recognised as legal obligations during a testator's lifetime take precedence over moral claims. The court must also weigh

the competing moral claims and assign each its priority according to their relative strength (at p. 823). In the final analysis, "the exercise by the testator of his freedom to dispose of his property is to be interfered with not lightly but only in so far as the statute requires" (at p. 824).

- [99] With reference to the moral claim of independent adult children, the Court in *Tataryn* observed that while they "may be more tenuous" than that of a spouse or dependent child, some provision for adult independent children should be made if the size of the estate permits and in the absence of circumstances which would negate the existence of such an obligation (at pp. 822-823).
- [100] In *McBride*, the court reviewed the circumstances that might support or negate a testator's moral duty to recognize the claim of an adult child and summarised various considerations that govern the analysis of a testator's moral duty to adult independent children (see also *Clucas v. Clucas (Estate)*, (25 February 1999), Vancouver A973288 (S.C.)). The court's summary at para. 132 is of particular relevance to this case:
- [132] In the early development of the caselaw, a long period of separation, abandonment or estrangement between a child and testator was frequently, though not invariably, taken to militate against finding a moral duty to an adult child. 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: *Gray v. Gray Estate*, 2002 BCCA 94, 98 B.C.L.R. (3d) 389, *Doucette v. Clarke*, 2007 BCSC 1021, 35 E.T.R. (3d) 98 [*Doucette*]; *Tomlyn v. Kennedy*, 2008 BCSC 331, 38 E.T.R. (3d) 289; *Wilson v. Watson*, 2006 BCSC 53, 21 E.T.R. (3d) 285; *P.S.G. v G.G. Estate*, 2005 BCSC 1855; *Ryan*. [Emphasis added.]
- [101] In *Lukie v. Helgason* (1976), 1 B.C.L.R. 1 (C.A.), Taggart J.A. expressed the view that the failure to provide support to a child during his or her minority is alone an insufficient basis for granting relief. However, he affirmed that the history of the relations between the testator and the claimant is evidence the court may consider along with all the other circumstances in deciding whether relief should be granted. The more recent jurisprudence supports the view that the failure of a parent to financially contribute to a child's support during his or her minority is a factor in assessing his or her claim (see *Martin v. McIlwain Estate*, 66 B.C.L.R. (2d) 195 (S.C.); *Thatcher v. Bowling*, (19 December 1990), Vancouver A890779 (S.C.)). The court in *Pattie v. Standal Estate* (1997), 42 B.C.L.R. (3d) 211 (S.C.) at para. 26, found that in the absence of special circumstances, such a failure creates a basis upon which an adult child may advance a moral claim to a share of his or her parent's estate.
- [102] The comments of Donald J.A. in *Gray v. Nantel*, 2002 BCCA 94, in addressing the moral claim of an adult child, are instructive:

- [17] I cannot accept that a child so neglected for his first 18 years and then treated shabbily during a brief reconciliation can be said to forfeit the moral claims to a share in his father's estate by abandoning any further effort to establish a relationship. The fault in this sad story lies with the father and, in my opinion, the onus to seek further reconciliation was on his shoulders. The testator gave the appellant virtually nothing in an emotional or material way; the will was his last opportunity to do right by his son.

## POSITION OF THE PARTIES

- [103] At the hearing, mindful of the caution expressed by the Court of Appeal in *Graham*, about awarding a variation in the form of a specific bequest, I raised with counsel the issue of the form of appropriate variation. The sole asset of the estate is the Langley Property which has not yet been liquidated. Moreover, Ms. Nichols had made improvements to the Langley Property since her mother's passing. Both counsel agreed that in the circumstances if the Court varied the Will a variation in the form of a specific bequest would be appropriate.
- [104] The plaintiffs, although acknowledging the close relationship between Ms. Nichols and Ms. Wisted, argue that Ms. Wisted did not act as a judicious parent in completely disinheriting the plaintiffs.
- [105] The plaintiffs submitted that the Will be varied such that they each be awarded one quarter of the total estate and funds passing by way of jointures (approximately \$700,000) and that Ms. Nichols receive the remaining half share. In the alternative they submit that each of the plaintiffs be entitled to one third share of the legal estate. In final submissions their counsel argued that an award of \$150,000 each would constitute adequate, just and equitable provision.
- [106] Ms. Nichols contends that she is deserving of receiving the entirety of her mother's estate. While acknowledging this is not a case involving an estrangement, her primary submission is that the claim should be dismissed because the plaintiffs had no "real" relationship with their mother. In the alternative she asserts that the Will should be varied to provide the plaintiffs with a modest bequest in the range of \$75,000 each.
- [107] Ms. Nichols' counsel properly conceded that in determining whether a testator has made adequate provision for a claimant, the court may consider gifts or benefits a testator had in his or her lifetime bestowed on either the claimants or on individuals other than the claimants. The court may also consider those assets that passed to either the claimants or other individuals on the testator's death outside the framework of the testator's will (McBride at para. 133; *Doucette v. McInnes*, 2009 BCCA 393 at para. 84).

## ANALYSIS

- [108] The essential question in this case is whether the Will made adequate provision for the two plaintiffs. The circumstances existing at Ms. Wisted's death as well as those that were reasonably foreseeable to her at that time are to be taken into consideration to determine whether she has made adequate provision (*Mawdsley v. Meshen*, 2010 BCSC 1099 at para. 317).
- [109] It is uncontroversial that neither the plaintiffs nor Ms. Nichols have any legal claim against the estate.
- [110] I next address the moral claims of the plaintiffs. After she left the family home in 1968, Ms. Wisted made no financial contribution to either of the plaintiffs' support. Nor did she provide much in the way of any moral or emotional support in their formative years. While the difficulties the family encountered cannot all be laid at Ms. Wisted's feet, her absence and the path of emotional destruction she left behind her was likely a contributing factor to the dysfunction in her family and the emotional difficulties experienced by the plaintiffs.
- [111] Ms. Wisted appears to be a woman who, for reasons not made clear at this trial, did what she wanted when she wanted in her lifetime with little regard for her parental responsibilities. This is underscored by her refusal to provide any meaningful explanation to the plaintiffs for her abandonment of them as children. She was willing to have a relationship with the plaintiffs as adults, but only on her own terms. She made no effort to telephone them or visit, and she was not responsive to their respective invitations to their marriages or to share in the birth of their children. The only telephone communications they had were initiated by the plaintiffs; the only physical contact they had was when the plaintiffs visited Ms. Wisted in British Columbia.
- [112] As mentioned earlier this is not a case of estrangement between a parent and child. Despite the geographical separation, the history of their mother's abdication of her parental responsibilities and somewhat indifferent and callous treatment of them, the plaintiffs each made efforts to keep in contact with their mother and each in their own way came to accept her. Ms. Ferguson travelled to British Columbia to see her mother on two occasions, and Ms. Brown visited her mother in 1995 for two weeks at her mother and sister's invitation, and briefly on the two other occasions previously referred to. I accept that both plaintiffs were constrained in their efforts to a certain extent by their own financial circumstances. I find that to the extent each of the plaintiffs was able to reconcile with their mother it was more through their own efforts than those of Ms. Wisted.
- [113] In my view the evidence manifestly establishes that at her death Ms. Wisted owed a moral duty to Ms. Brown and to Ms. Ferguson. While recognising that the Act is not intended as a means of awarding compensation for family abuse, a judicious parent, in the circumstances of this testatrix, viewing the facts of this case objectively would recognize a moral obligation to the plaintiffs for her unfair treatment of each of them over her lifetime, including her refusal to discuss in any meaningful way her reasons for leaving the family home and her

essential denial of any harmful consequences of her activities (*Sawchuk v. MacKenzie Estate*, 2000 BCCA 10 at para. 16; *Doucette* at para. 71). This duty is intensified in view of the efforts each of the plaintiffs made in their own way to reconcile with their mother. Like the testator in *Gray*, Ms. Wisted's Will was her last chance to do right by the plaintiffs.

- [114] The defendant grounds her submission opposing any variation on the principles enunciated in *Bell v. Roy Estate* (1993), 75 B.C.L.R. (2d) 213. In *Bell* the Court of Appeal held that where financial need is not a factor, if the court finds that the testator's reasons purporting to explain a disinheritance are valid and rational the testator's moral duty in respect to that child is negated; the burden then shifts to the plaintiff to show that the testator's reasons were false or unwarranted (*McBride* at para. 138). In a subsequent decision in *Kelly v. Baker* (1996), 15 E.T.R. (2d) 219 (C.A.), 15 E.T.R. (2d) 219, the Court of Appeal stated that the law requires that the reasons are valid, meaning based on fact and rational in the sense that there is a logical connection between the reasons and the act of disinheritance. The testator's reasons for disinheriting a child need not be justifiable (at para. 58).
- [115] I agree with the court's observation in *McBride* that it is difficult to reconcile the approach endorsed in *Bell* and *Kelly* with the principle enunciated in *Tataryn* that a testator's moral duty must be assessed objectively from the standpoint of what a judicious parent would do in the circumstances by reference to contemporary community standards. In any case, for the reasons that follow I am of the view that the principles articulated in *Bell* and *Kelly* do not assist Ms. Nichols.
- [116] As referred to earlier, there is neither an express statement in the Will nor any written statement whatsoever explaining Ms. Wisted's reasons for disinheriting the plaintiffs. (I also note parenthetically that there was no allegation of a "valid and rational reason" for disinheriting the plaintiffs in the statement of defence.) The only evidence adduced at trial as to Ms. Wisted's reasons for disinheriting the plaintiffs was her apparent statement to her neighbour Mrs. Dickinson that her other children would be getting "enough money from their father."
- [117] Applying the principles in *Bell*, this reason is not valid. There is no evidence that Ms. Wisted had any contact with Mr. Long, or that she had any knowledge of his testamentary intentions or any estate related matters, particularly as to what his estate might comprise or to whom his estate might devolve. Ms. Wisted's assertions in this regard ring of self-justification. Moreover, even if this statement was accurate I am not satisfied that it would completely drain Ms. Wisted's moral obligation to the plaintiffs.
- [118] For completeness I also address Ms. Dickinson's evidence that in this same discussion Ms. Wisted also mentioned that she knew "Debbie needed it." This was neither a valid nor rational reason for disinheriting the plaintiffs. With respect to the relative financial need of the plaintiffs and Ms. Nichols there is no evidence that Ms. Wisted had any knowledge of the plaintiffs' financial circumstances at the time she executed the Will or any time thereafter. In any case the evidence does not establish that there was any material

difference between the respective financial circumstances of the plaintiffs and that of Ms. Nichols.

- [119] Ms. Nichols also asserts that Ms. Wisted had a valid reason for not including the plaintiffs: they had "a tenuous relationship" with her. Given Ms. Wisted's rather difficult character, the evidence does not establish any conduct on the part of the plaintiffs that would justify their disinheritance. In considering the minimal effort Ms. Wisted made to the parent-child relationship with the plaintiffs over the course of her lifetime, it would be most unjust if the quality of the relationship the plaintiffs achieved with their mother, largely through their own efforts, negated her moral duty to them.
- [120] In short, to the extent that Ms. Nichols' counsel is asserting that the quality of their relationship with their mother ought to be construed as providing a valid and rational reason for their disinheritance, I find that this does not negate Ms. Wisted's moral duty to the plaintiffs.
- [121] I also observe that Ms. Wisted herself named Ms. Ferguson as her alternate executrix and the alternate beneficiary of half of her estate in the event Ms. Nichols pre-deceased her. This provision in the Will is entirely inconsistent with a valid and rational reason for disinheriting Ms. Ferguson. Rather, it signifies some recognition of the moral duty Ms. Wisted owed Ms. Ferguson.
- [122] At this juncture it is appropriate to comment on an alleged conversation in 1999 between Ms. Wisted and Ms. Brown. As mentioned earlier the Children had lost their brother, Douglas, under suspicious circumstances, which was profoundly upsetting for the family. Ms. Nichols testified about an incident when she answered the telephone and Ms. Brown asked to speak to her mother. According to Ms. Nichols, Ms. Brown asked her mother for funds to be used for a Crime Stoppers reward for further leads relating to their brother Douglas' murder and Ms. Brown became angry and upset when her mother did not agree to contribute to the reward. Ms. Nichols admits that she only heard what her mother said to Ms. Brown. According to Ms. Nichols, her mother was visibly upset after the call.
- [123] Ms. Long testified that Ms. Brown told her that she had called her mother with respect to the Crime Stoppers reward, and that she had become very angry with her mother's refusal to make a contribution. When it was put to her in cross-examination that the call could have been from Vickie Babineau, she conceded that her sister Vickie Babineau had been involved with this Crime Stoppers reward and was also very upset about their mothers' refusal to contribute. However, she did not resile from her position that it was Ms. Brown who had called her mother.
- [124] On balance I am not persuaded that either Ms. Long's or Ms. Nichols' evidence regarding the alleged telephone call from Ms. Brown is reliable.

- [125] Ms. Brown denies that she ever had this conversation with her mother. I accept her evidence on this point. Her evidence is more consistent with the probabilities of the situation. Even if Ms. Brown did make the call, and although Ms. Wisted's refusal to contribute to a reward may not have been unreasonable, I am not persuaded that given all the circumstances an angry and negative response from Ms. Brown would have negated Ms. Wisted's moral obligation to Ms. Brown.
- [126] I also find the evidence of the plaintiffs' conduct subsequent to Ms. Wisted's death, including the discussion at a dinner meeting of Ms. Wisted's six daughters in New Brunswick after her death, irrelevant to the analysis in this case (*Sammon v. Stabler*, 2000 BCSC 1048 at para. 31). These events were not reasonably foreseeable by Ms. Wisted as of the date of her death.
- [127] In summary, based on the principles formulated in *Bell and Kelly*, I cannot find that there were valid and rational reasons for Ms. Wisted's disinheritance of the plaintiffs.
- [128] Ms. Nichols argues that it is a relevant factor for this Court that Ms. Wisted's estate was substantially accumulated during her marriage to Mr. Wisted. However I note that unlike the circumstances in *Price v. Lypchuk Estate* (1987), 11 B.C.L.R. (2d) 371 (C.A.), the competing claimant, Ms. Nichols, is not a child of Mr. Wisted. Moreover, Ms. Nichols does not assert that she contributed to the accumulation of her mother's estate.
- [129] In view of my findings, it is unnecessary to address the plaintiffs' submissions that the Court should draw an adverse inference from Ms. Nichols' failure to call the solicitor who prepared Ms. Wisted's Will.

## DISPOSITION

- [130] Each of the parties is self-sufficient. Other than the recognition that unlike her sisters Ms. Nichols is single, it was not contended by either of the parties that there was a material difference in their respective financial circumstances as at the date of death. They are each comfortable but by no means wealthy.
- [131] I estimate the net value of the estate as of death to be \$464,000. It is a relevant consideration for this court that as outlined earlier Ms. Nichols received \$236,186.58 from her mother outside of the provisions of the Will.
- [132] In its search for contemporary justice, this Court must have in mind whether an adequate testamentary provision has been made for the claimants. In weighing the totality of the evidence in light of the relevant legal principles, I conclude Ms. Wisted did not fulfill the moral obligation of a contemporary judicious parent. She failed to make adequate provision for Ms. Brown and Ms. Ferguson.

- [133] It is not the function of this Court to rewrite the Will of this testatrix. Rather it is incumbent on this Court to vary the Will only to the extent required to provide the justice to Ms. Brown and Ms. Ferguson that the Will failed to achieve (McBride; Tataryn).
- [134] Ms. Nichols' steadfast devotion, companionship, and contributions to her mother's wellbeing and care during her final years enhance the moral duty that Ms. Wisted owed her. The Court must recognize that Ms. Wisted's paramount moral duty was to Ms. Nichols. In the result I conclude that Ms. Wisted did not owe an equal moral duty to the two claimants and Ms. Nichols.
- [135] In my view, in all of the circumstances a variation which provides a bequest of \$125,000 to each of Ms. Brown and Ms. Ferguson is adequate, just, and equitable provision. This is commensurate with Ms. Wisted's moral obligations and recognizes the greater moral claim of Ms. Nichols to her mother's bounty.
- [136] There will be an order accordingly to vary Ms. Wisted's Will.

## COSTS

- [137] If the parties are unable to agree as to costs, plaintiffs' counsel is at liberty to file a written submission within 60 days from the date of this judgment. Counsel for the defendant is to file written submissions in response within 45 days of receipt of the plaintiffs' submissions, and reply submissions must be filed within 15 days.

"Dardi J."

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