

CANADA / JUDGMENT

Brown v. Pearce Estate

2014 BCSC 1402

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 1402 Brown v. Pearce Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Brown v. Pearce Estate,

2014 BCSC 1402

Date: 20140724

Docket: S128890

Registry: Vancouver

Between:

James David John Brown

Plaintiff

And

Frances Gail Buckle, as Executrix of the Last Will and Testament of

Catherine Ann Pearce, otherwise known as Cathy Pearce, C. Pearce,

Catherine Ann Smith, Cathy Smith and C. Smith, Deceased,

Andrea Leanne Newana, also known as Andrea Leanne Buckle,

Harley Michael Ross MacKinnon,

The Public Guardian and Trustee, as guardian ad litem of

Tia Ann MacKinnon, an infant,

Jordan Daniel James Brown, Lynn Alvalee MacKinnon,

Lynn Malcombe and Greg Goodall, Kalip Brown, also known as Kal Brown, and Gloria McPherson

Defendants

Before: The Honourable Mr. Justice Kent

Reasons for Judgment

Counsel for the Plaintiff:

R. Trevor Todd

Janis Ka Lam Ko

Jackson Todd, Articling Student

Counsel for the Executrix:

Peter Roberts

Victoria More, Articling Student

Counsel for the Defendant, Tia Ann MacKinnon:

Barbara J. Curran

The Defendant, Lynn Malcombe:

Appearing on her own behalf

Place and Dates of Trial:

Vancouver, B.C.

June 2-6, 2014

July 18, 2014

Place and Date of Judgment:

Vancouver, B.C.

July 24, 2014

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1. Introduction and Summary

[1] Catherine (Cathy) Ann Pearce died on October 4, 2012 at the age of 68. She left a last will and testament dated January 19, 2006 and a codicil dated March 18, 2010 (the "Will").

[2] Ms. Pearce had been married for a number of years to James Brown and together they had two children, the plaintiff James (Jim) David John Brown born May 14, 1965, and the defendant Lynn Alvalee MacKinnon, born February 22, 1969. James and Lynn were the only children of the deceased and although she had a second marriage and a common-law relationship with other men over the years following her divorce from Mr. Brown, none of her spouses were alive at the time of her death.

[3] Ms. Pearce and her son James became estranged in 1995 and remained so throughout the last 17 years of her life.

[4] A few years before her death, Ms. Pearce gifted her daughter Lynn \$200,000. In her will she made some bequests to family and friends but left the residue of her estate to three of her four grandchildren whom, by all accounts, she held very dear. Ms. Pearce had not met and did not know her fourth grandchild.

[5] To her two children, Lynn and James, she bequeathed each the sum of \$10,000. Her Will explained:

I wish to leave no more than the \$10,000 referred to above to my estranged son, James David John Brown. Although I have sacrificed for him and I have supported him over the years, he has refused any contact with me, and, since 1995 when I left the family home, he has made it clear that he wants no further relationship with me.

My daughter Lynn Alvalee MacKinnon has already received a cash payment from me which was understood by her to be her inheritance.

- [6] The plaintiff, the deceased's son, now brings action pursuant to s. 2 of the Wills Variation Act, R.S.B.C. 1996, c. 490, asserting that the Will fails to make adequate provision for his proper maintenance and support. He seeks variation of the Will such that \$200,000 is awarded to him with the balance of the estate being divided pro rata between the other beneficiaries.
- [7] The size of the estate is approximately \$382,000 before legal costs are taken into account. By order of this court granted May 29, 2013 the legal expenses of the executrix incurred in defence of this litigation are to be paid from the estate. At the conclusion of trial, the parties estimated that the size of the estate after deduction of legal fees would be approximately \$300,000.
- [8] For the reasons that follow the plaintiff's claim for variation of the Will is dismissed.
2. Review of Evidence and Witnesses' Testimony
- [9] The parties presented the court with an "Agreed Statement of Facts", some of which I will review below but all of which I adopt as findings of fact in this case.
- [10] The plaintiff testified at length and also adduced testimony from his former wife, Nancy Brown. On behalf of the defendants, testimony was provided by the executrix, Fran Buckle; the lawyer who drafted the deceased's last two wills, Brian Markus; the deceased's daughter, Lynn MacKinnon; the plaintiff's first wife, Kal Brown; the plaintiff's son and grandson of the deceased, Jordan Brown; and Gloria McPherson, the deceased's good friend during the last years of her life.
- [11] Perhaps not unusually in this type of litigation, there was a considerable amount of hearsay testimony tendered respecting the deceased's statements and intentions at various stages of her life. Few objections were made to the admission of this evidence, possibly because of s. 5 of the WVA which provides as follows:

Evidence

5(1) In an action under section 2 the court may accept the evidence it considers proper of the testator's reasons, so far as ascertainable,

- (a) for making the dispositions made in the will, or
- (b) for not making adequate provision for the spouse or children,

including any written statement signed by the testator.

- (2) In estimating the weight to be given to a statement referred to in subsection (1), the court must have regard to all the circumstances from which an inference may reasonably be drawn about the accuracy or otherwise of the statement.

- [12] As noted in *Bell v. Roy Estate* (1993), 75 B.C.L.R. (2d) 213 (C.A.) at paras. 37-38, by this section "[i]t is clear the legislature wished to ensure that otherwise inadmissible evidence was before the court as an aid to the court in the exercise of its discretion" [to vary the will], although "the weight to be given evidence of the testator's reasons is affected by its accuracy".
- [13] It is also clear that this section of the Act applies not just to any reasons expressed by the testator in the will itself but also, more generally, to any reasons that may be ascertainable from any other source. For example, this would include any explanations that Ms. Pearce gave to Mr. Markus in the course of preparation of the Will.
- [14] As indicated, many of the background facts are not in dispute.
- [15] The deceased was born January 9, 1944. She and James Edward Brown were married on June 23, 1964. The plaintiff was born May 14, 1965 and would have been 47 years old at the time of his mother's death. His sister Lynn was born February 22, 1969 and would have been 43 years old at the time of her mother's death.
- [16] Ms. Pearce and Mr. Brown were divorced in April 1973. Later that year she married Edward Smith. The two lived together for 22 years, finally separating in 1995. Mr. Smith was employed as a police officer and, indeed, the deceased herself worked for 20 years in the information management and public service sections of the Vancouver Police Department until she retired in March 2005.
- [17] Mr. Smith had a daughter named Anne-Marie from a previous relationship. She had been born in 1966 and she lived with the deceased and Mr. Smith after their marriage. Anne-Marie was killed in a car accident in August 1989 at the age of 24 and it appears that her death (suspected by family members to actually be an unsolved murder) triggered unresolved grief and emotional conflict leading to discord, abuse and alcoholism in the family household
- [18] In approximately 1999, the deceased entered into a common-law relationship with Mr. Stanley Ciok. It appears to have been a happy relationship but unfortunately Mr. Ciok died suddenly in July 2004. Thereafter ensued the deceased's own decline into alcoholism eventually leading to poor health and ultimately an early death in sad circumstances at the age of 68 on October 4, 2012.
- [19] The plaintiff married the defendant Kalip (Kal) Brown on February 11, 1990 and their son, the defendant Jordan Brown, was born in March 1993.

- [20] The marriage did not last long and divorce proceedings were issued in August 1993. Thereafter (or even before that time so Kal believes) the plaintiff developed a relationship with Nancy. They eventually moved in together in 1995 and were married in 2001. Their daughter, Naomi, was born in November 2003. The marriage between the plaintiff and Nancy also failed and the couple separated after Naomi's birth. However, Nancy describes their co-parenting relationship with their daughter as being friendly.
- [21] The plaintiff's younger sister, Lynn, met her husband Mike MacKinnon in 1989. They have two children, the defendants Harley MacKinnon born May 3, 1993, and Tia MacKinnon born January 23, 1999. Tia is still a minor and her interests in this litigation are being defended by the Public Guardian & Trustee in its capacity as her guardian ad litem.
- [22] The deceased's estate comprised primarily of a condominium unit in Coquitlam, B.C. worth approximately \$280,000, and an investment portfolio of approximately \$300,000. As well, the deceased owned furniture and some jewelry of a modest value. Following payment of debts, taxes and other outlays, the value of the estate for the purposes of the current proceedings is approximately \$382,000, before deduction on account of legal costs.
- [23] The Will provided the following monetary bequests to the following parties:

Name

Relationship

Bequest

Harley M. Ross MacKinnon

Grandson

One gold sovereign and 1/3 residue

Tia Ann Mackinnon

Granddaughter

One gold sovereign and 1/3 residue

Jordan D. James Brown

Grandson

One gold sovereign and 1/3 residue

Lynn MacKinnon

Daughter

\$10,000.00

Andrea Leanne Buckle

God daughter

\$10,000.00

James D. J. Brown

Son, Plaintiff

\$10,000.00

Lynn Malcombe and Greg Goodall

Friends

\$25,000.00

Kal Brown

Former daughter in law, mother of Jordan Daniel Brown

\$25,000.00

Gloria McPherson

Friend

\$25,000.00

[24] Following Stan Ciok's death, the deceased decided to sell her Port Moody house and move to Maple Ridge, closer to Lynn and her family. From the sale proceeds, the deceased made a gift of \$200,000 to Lynn. As indicated above, this gift was referred to in the Will as a cash payment advance of Lynn's "inheritance".

Nancy Brown

[25] Nancy Brown, who eventually became the plaintiff's second wife in 2001, first met the plaintiff's mother in 1993. She testified that she did not see much of the plaintiff until Christmas 1993, by which time she and the plaintiff were in a relationship, but over the next one and a half years she was at the deceased's house quite often.

[26] Nancy described her relationship with the deceased as "not good" but rather polite and distant. She says she did not have much respect for the deceased because of what she considered to be unkind and hurtful comments that the latter would direct towards the plaintiff. She did not witness any physical abuse of any sort between the two but unkind and unpleasant interaction was common.

[27] Nancy believes the deceased treated the plaintiff with more hostility than she treated Lynn. Her own relationship with Lynn was also polite but distant. She believes Lynn tried very hard to win her mother's approval.

- [28] Nancy never saw the deceased drink alcohol although she says the deceased did tell her she drank brandy before going to bed. She was aware that the plaintiff's stepfather, Ed Smith, was an alcoholic. She was not aware of any abuse between the two and says that she never saw any bruises or cuts on the deceased. She knew, however, there was considerable acrimony on both sides.
- [29] Nancy did not see or overhear the altercation between the plaintiff and his mother which occurred in the summer of 1995. This was the occasion when the deceased arrived at the McGill Street house in a moving truck to move her belongings following separation from her husband. Her belongings had been moved out onto the front lawn by James, among others. She says the incident rattled and saddened James.
- [30] Nancy did not see the deceased again following the 1995 incident except on one occasion when she saw her at the mall in 1999. The two of them walked past each other but nothing was said. She acknowledged that she did not call out to the deceased nor did she follow her. She assumed that she had been recognized and ignored.
- [31] Nancy says that neither she nor James made any attempt to contact the deceased after the 1995 incident leading to the estrangement. She said she never introduced her daughter, Naomi, to her grandmother following Naomi's birth in 2003. Her explanation for the lack of contact is the same as the plaintiff's, i.e. that they did not know her whereabouts or how to make contact.
- [32] Nancy was aware that the plaintiff's other child, Jordan, was seeing his grandmother. She did not ask Jordan where the deceased was living, nor to deliver a letter or message. She did not ask for information from Kal, Jordan's mother, who was making the arrangements for Jordan's visits to his grandmother. She never asked Lynn MacKinnon as to the deceased's whereabouts although she acknowledged that she could have. Her explanation for the absence of contact with the deceased (no knowledge of whereabouts) defies common sense and is simply not credible.
- [33] It is apparent that Nancy supports the plaintiff's version of his relationship and interactions with his mother. She believed he had a very difficult upbringing that has contributed to his personality, and which was part of the reason why their own marriage failed. She emphatically described the plaintiff as "volatile, nasty, angry, bitter, insulting, demeaning and unpredictable".

The Plaintiff, James Brown

- [34] The plaintiff was born on May 16, 1965. His sister, Lynn, was born four years later.

- [35] The plaintiff says that following separation of his natural parents, his mother disappeared for some six months. She returned in the company of Ed Smith, whom she married in June 1973, a month after formalizing a divorce from his natural father. According to his natural father, there was a custody battle at the time and his mother was awarded custody of the children.
- [36] The plaintiff described a troubled childhood in which he was physically and emotionally abused by his mother and his stepfather. He says his mother had a "hot and cold" personality. She would switch from being smotheringly affectionate to being verbally and physically abusive. Swearing and name-calling was, he says, the norm, a habit he himself picked up.
- [37] The plaintiff says his mother was angry, impulsive and unpredictable. She was "very physical" with him many times, hitting and kicking him. He says this was "very common for her". He also described how his stepfather frequently beat him up with hands, fist and feet. He says when his stepfather "would go upstairs and put on his cowboy boots, I knew I was going to get it".
- [38] The plaintiff says his parents were "cheap". There was never enough food in the house. Both parents worked shifts and frequently left him to fend for himself. Sometimes the situation was so bad, he says, he went "foraging for food" from the neighbours' apple trees and gardens. He described how, because of the small servings of food in the house, he would eat apple cores and "gnaw on the bones" of a pork chop dinner.
- [39] The plaintiff's testimony respecting hunger and abuse was delivered in a very unemotional, matter-of-fact and dispassionate fashion. The flat affect was at odds with the disturbing content of the testimony and the plaintiff's demeanour in delivery very much detracted from the credibility of the evidence.
- [40] The plaintiff says his parents never gave him any money. He started taking jobs from the age of 11, babysitting, mowing lawns, delivering newspapers and the like. He says he spent the money earned on food and school supplies. His priorities, he says, were to "eat, work, and get out of the house".
- [41] The plaintiff moved out of the family home at age 18 following graduation from high school. He says that the physical abuse had declined as he increased in size and had ceased altogether by the time he moved out.
- [42] Not being underfoot every day changed the dynamic in the relationships. His parents became less critical and he made a point of visiting his mother fairly regularly. He said, however, he always felt that he could never do right in the eyes of his parents and that they were ashamed of him.

- [43] The plaintiff got a job washing cars at the Wheaton Pontiac dealership, eventually graduating to car sales where he started to make a reasonable income. He remembers showing a T4 slip to his stepfather in his early 20s and the latter was furious at the amount of money he was making (\$64,000). He says his stepfather proclaimed "you don't f***ing deserve this!".
- [44] The plaintiff met his first wife, Kal, at the car dealership. They were married in February 1990 and their son Jordan was born in March 1993.
- [45] Photographs of the wedding were put into evidence along with a note from the plaintiff and his new wife to his mother and stepfather which read in part:

Our greatest gift from you both is your incredible love and understanding. If there is anything we want, it is a marriage as wonderful as yours. You are both perfect role models to us. We love and respect you. You make us both feel loved and wanted.

- [46] The sentiments expressed in the note stand in stark contrast to the plaintiff's description of a relationship with his parents comprising abuse and deprivation. In cross-examination the plaintiff testified the sentiments were "exaggerated".
- [47] The plaintiff described how, following the death of his stepsister Anne-Marie Smith, in August 1989, the relationship between his mother and stepfather started to deteriorate. The relationship became tumultuous and argumentative, fueled by excessive alcohol consumption on the part of his stepfather. The plaintiff says he saw no physical violence between the two, although he did see his mother shove and slap his stepfather on at least one occasion.
- [48] His mother and stepfather separated in mid-1995. Shortly before the separation the deceased called the plaintiff and asked to meet him at a Denny's restaurant in Blaine, Washington (the family owned a cabin in the area). The plaintiff attended along with his then girlfriend, Nancy. At this meeting, his mother advised that his stepfather had been beating her and that she was in fear of her life. The plaintiff says he expressed disbelief, whereupon his mother got up and walked out.
- [49] Sometime later the plaintiff received a phone call from a family friend to advise that his mother was in fact in a shelter for battered women. He neither inquired as to the whereabouts of the shelter nor did he later make any follow-up inquiries as to his mother's condition or whereabouts.
- [50] In early June 1995, the deceased called the plaintiff to let him know that she was moving out of the family home and that she needed his help with moving her belongings. Nancy dropped him off at the house on the day in question. His mother was not yet there. His stepfather was drinking and was upset.

- [51] The plaintiff carried various items of furniture and other belongings out into the front yard. At some point his mother showed up with the moving truck. She became upset at her belongings being on the lawn and a screaming match ensued. The plaintiff says his mother had loved that house dearly and he realized that it was a difficult day for her. He says it never occurred to him that his mother might be upset and embarrassed by her belongings being deposited on the front lawn.
- [52] The precise chronology of events and the exact language employed by the parties is not completely clear from the evidence. The plaintiff says that he eventually had enough of his mother's swearing and name-calling and declared something very close to 'I won't help you if you don't start treating me better than a neighbour or a dog'. His mother replied "I don't need your help", stormed off and drove away.
- [53] This episode marked the last occasion that the plaintiff saw his mother with the sole exception of the incident, described below, that occurred ten years later in 2005.
- [54] The plaintiff acknowledges his mother never expressly said at the time that she did not ever want to see her son again. He says he assumed his mother would get over the blow-up, that she would reach out when she was ready, and some sort of relationship and communication would continue. However, that never occurred and he came to "realize she didn't want contact" with him.
- [55] The plaintiff saw his mother on one brief occasion in 2005 when he was making a business call at the Vancouver Police Department. His mother was behind the service counter. When she saw him, the plaintiff says she became "incredibly agitated" and looked "venomous". He told her he had an appointment and identified his client whereupon the only words she uttered was to ask for his ID (presumably as part of the usual sign-in procedure).
- [56] The plaintiff says he gave his business card to his mother and said "mom, it doesn't have to be this way". He said she turned away without saying anything further and that was the end of the episode.
- [57] On cross-examination the plaintiff said he was not prepared to have a conversation with his mother at that time. He says it "wasn't appropriate". There was no "hi mom", no expression of affection or missing each other, no attempt to discuss the new granddaughter as a bridge for reconnection ("not appropriate"). Rather, the plaintiff says that by giving her his business card it was "his hope she would call and a dialogue would occur".
- [58] On cross-examination, the plaintiff agreed that, apart from the 2005 episode at the Vancouver Police Department, he made no effort to find or contact his mother in the 17 years between 1995 and her death in 2012. He says he was being a "dutiful, considerate and loving son" by "respecting her wishes to stay away".

- [59] The plaintiff, like his second wife Nancy, also offered the excuse that he did not know how to contact his mother during the 17 years. He acknowledged that at various times numerous people had information as to his mother's whereabouts including his own son Jordan who was visiting her, his ex-wife Kal, his sister, and his mom's friends (Frances Buckle), but it stated was "not appropriate to involve them".
- [60] I do not accept this evidence. It is illogical, indeed absurd. I find as a fact that it would have been an easy matter for the plaintiff to ascertain the whereabouts of, and to make contact with, his mother during the 17 years of their estrangement, whether through friends , family or even the deceased's workplace.
- [61] I find as a fact that the plaintiff quite deliberately created and perpetuated the lengthy estrangement with his mother. He did not do so because he was a "dutiful son respecting his mother's wishes", as the plaintiff claims, but rather did so because he had neither desire nor intention to have any relationship with her.

Frances Gail Buckle

- [62] Ms. Buckle as the Executrix of the estate. She met the deceased in 1980. Their respective husbands played in the police softball league.
- [63] Ms. Buckle says the deceased and her husband were "a lot of fun". The two couples spend a lot of time together, holidaying, visiting the deceased's cabin, sailing and the like.
- [64] Ms. Buckle says she never saw any physical or verbal abuse of the plaintiff. As far as she could tell, he seemed like a "normal teenager". When she was there for dinner, there was always plenty to eat and nobody wanted for food
- [65] The relationship with the deceased and her husband changed after Anne-Marie's death. Both Ed and Cathy were consumed with grief. Ed started drinking a lot more.
- [66] Ms. Buckle said that when the deceased separated from her husband in mid-1995 she was "escaping from his abuse". Previous to that, Cathy had called her describing various incidents of abuse, including smashing up the family vehicle and the incident where she said he "tried to kill her" at the cabin. The deceased was hysterical at the time she called about the latter event and Ms. Buckle says that when she went over Cathy was "banged up bad" with extensive bruising and cuts and she was "petrified" that her husband was going to kill her.
- [67] Ms. Buckle confirmed that she had in fact seen the plaintiff on other occasions with bruises and stitches, including a black eye and the wearing of sunglasses inside the house. She had raised this question with her before and had urged her to report the abuse.

- [68] Ms. Buckle was also called by the deceased following the incident outside the McGill Street property in mid-1995. The deceased was crying and stated that "they've thrown everything out on the lawn" and that she "doesn't know what to do". Ms. Buckle remembers male voices screaming in the background and she urged the deceased to phone the police.
- [69] Ms. Buckle said that the deceased's relationship with the plaintiff seemed to be "completely normal". He was working all the time and the deceased was proud of that fact.
- [70] Following the 1995 incident on the front lawn, Ms. Buckle says the deceased "felt abandoned". She specifically remembers being with her and trying to call James together. She also said the deceased told her she had "dropped over" to her son's place but that "they wouldn't answer the door".
- [71] Ms. Buckle knew that the deceased was receiving visits from both Kal and her grandson Jordan. Ms. Buckle was present during some of these visits both before and after the move from the Burnaby house. She says the deceased loved her grandchildren.
- [72] Ms. Buckle testified the deceased did know that James had a second child, Naomi. She says the deceased was sad that she not had met her grandchild and wished that her relationship with James was better so that she could meet her.
- [73] Ms. Buckle said the deceased spoke to her many times about her Will and, indeed, they made a couple of visits together to the office of the lawyer, Mr. Markus. She wanted her estate to be left to the grandchildren. The deceased told her that Naomi was not named in the Will because the deceased did not know her.
- [74] Ms. Buckle met the deceased's new common-law husband, Stan Ciok, a few times. It appeared to be a very loving relationship. They took trips together and enjoyed each other's company. As far as she could tell, there was no abuse of any sort.
- [75] Stan Ciok died in 2004 and the deceased became depressed, lonely and started drinking a great deal. In 2005 Ms. Buckle and her family moved to Osoyoos but she still met the deceased for dinner and other visits on a few occasions.
- [76] Ms. Buckle was aware that the plaintiff was hospitalized on a couple of occasions because of excessive alcohol consumption. She also tried rehab unsuccessfully. On one occasion the deceased told Ms. Buckle that she was "alone and didn't have anything to live for".
- [77] After Stan's death, the deceased would call Ms. Buckle for advice on legal and financial matters. Ms. Buckle would give her a "dose of reality" in that regard.
- [78] Eventually, the deceased started getting sick, deteriorating and wasting away. At the wedding of Ms. Buckle's daughter in Jamaica in 2010 she looked sick and weighed perhaps 85-90 pounds. On that occasion, she got very drunk, passed out and had to be hospitalized. She was so incapable at the time that she lost control of her bowels.

- [79] After her death, Ms. Buckle went to the deceased's apartment. It was filled with flies. Brandy bottles were everywhere. There was "bio-waste" on the floor and bed. Twenty-eight garbage bags of refuse had to be removed.
- [80] Ms. Buckle found various documents in the deceased's office, including the Will that is the subject matter of this litigation as well as various earlier wills which were also put into evidence.
- [81] Also included in the documents was a typewritten chronology dated October 10, 1996 prepared by the deceased and describing various incidents in her relationship with Ed Smith over the years 1973 to 1996. The chronology graphically describes physical abuse by Ed. It also recounts an incident in their divorce proceedings when Ed threatened to burn down the house rather than yield possession of the home to the deceased (an incident later corroborated by the evidence of the lawyer, Mr. Markus).
- [82] Ms. Buckle was an honest and credible witness. I accept her evidence in its entirety.

Jordan Brown

- [83] Jordan is 21 years old. He was 19 when his grandmother died.
- [84] He remembers his grandmother well. He described her as "very caring, helpful and understanding". There were lots of hugs and smiles and she was happy to see him (and his mother, Kal).
- [85] He last saw his grandmother when he was 16 or 17 years old, a couple years before her death.
- [86] He would talk to his grandmother about his dad whenever she asked. He thinks this happened every other visit. He remembers on one occasion when he was quite young his grandmother asking him to "give your father a hug from me". He believes he did indeed give his father the hug but he cannot now say whether he actually told his father about the request.
- [87] Similarly he may have mentioned to his father about his grandmother's inquiries but he cannot specifically recall.
- [88] His grandmother did ask about Naomi. He mentioned this to his father once, but he cannot recall his father's reaction.
- [89] Jordan had his grandmother's phone number and would call her from time to time.

Kal Brown

- [90] Kal Brown testified to her relationship, marriage, and divorce from the plaintiff. She also testified regarding her observations of the plaintiff's relationship with his mother.

- [91] She described the deceased as sweet, loving, attentive, generous and kind, at least to her and Jordan. She said the plaintiff never seem to have a particularly close connection to his mother and seemed distant. She said she never certain saw any verbal or physical abuse from her towards him.
- [92] On the occasions that she went over to the deceased's house for dinner, there was no shortage of food. During their relationship, the plaintiff never said anything to her about being abused as a child or not having enough food to eat.
- [93] Kal stayed in touch with the deceased right up to her death. She described her relationship as "taking her as my own mother". She visited her twice a week with Jordan in tow. On occasion, Jordan was left with his grandmother, from a Friday to a Sunday.
- [94] Kal testified that the deceased did ask after James once in a while. However she told the deceased that she and James were not on speaking terms.
- [95] Kal says she did tell James on one occasion to contact his mother. This was after an episode when the deceased was feeling depressed and had broken down and cried. James was "very cold" to the suggestion and did not respond.
- [96] Kal says she always knew where the deceased lived and had her phone number. She never passed this information on to James because James never asked for it. She says that if she had been asked, she would have provided the information.

Lynn Mackinnon

- [97] When asked to describe and summarize her mother, Lynn said that she was a 5'2" fiery redhead, who was stubborn, had rules and "didn't take crap", but who loved to travel, loved her grandkids and enjoyed her work. She said her mother was neither verbally not physically abusive to her or James, although they were punished if they did something wrong. Instead the relationship between her mother and her brother was "fine as far as I know". They did have fights, usually over chores which were not done. She says food was never an issue for her while growing up in the family. She never felt neglected.
- [98] Before Anne-Marie's death, her parents' relationship seemed strong. They traveled all the time and enjoyed each other. There were arguments from time to time but she did not see abuse of any sort.
- [99] Lynn says that Anne-Marie's death devastated and destroyed the family and that her father in particular never got over it. He became depressed and a "roaring alcoholic".
- [100] Lynn testified that her mother struggled following her separation from her father but that she eventually got over it. She started seeing Stan Ciok in 1999 and had a wonderful relationship with him until his death six years later. That death was "too much" for her mother who started drinking and never recovered.

- [101] Lynn was present in the house in 1995 when the incident involving belongings on the lawn occurred. She said her father had been drinking. When James showed up they started moving furniture and belongings to the front yard. When her mother showed up, a big argument ensued and there was "a lot of yelling". Lynn says she "went downstairs and bawled my eyes out".
- [102] Lynn believed her mother was very embarrassed to have her belongings left outside for all to see. Her mother also told her at some stage that she (her mother) had a lot of anger and pain over the incident.
- [103] Lynn says that she and her mother eventually built a new relationship. She, Lynn, was now an adult. Their relationship grew stronger and they became much more open with each other.
- [104] Lynn says her mother was wonderful with her children and "spoiled them rotten". She described visits to swimming pools, the PNE, picnics, whale watching with Stan Ciok, and train rides.
- [105] Lynn described her mother's sad descent into alcoholism. Her mother was extremely depressed and was hospitalized on occasion.
- [106] In tearful and emotional testimony, Lynn described how she came to decide that she "couldn't just watch her mother commit suicide slowly by alcohol". Lynn had lost weight and was so stressed her hair was falling out. She decided she had to stop seeing her mother. She told her mother about her decision. Her mother did not say much in response.
- [107] Even though Lynn stopped visiting her mother from that point forward, she did see her periodically from time to time. Her mother's condition was worsening.
- [108] Her mother did send Christmas cards and a cheque to the children and she did phone from time to time. Lynn would also send her mother photographs of the family.
- [109] After Stan's death, Lynn was with her mother every day for quite some time. Her mother decided to sell the Port Moody house and moved to Maple Ridge. She gave Lynn a \$200,000 cheque from the proceeds which Lynn says she did not want to take as it all seemed "too rushed". Her mother, who was bothered by the conduct of Stan's daughter immediately after the death, insisted.
- [110] During her mother's hospitalization and periods of heavy drinking, Lynn did not call James to inform him of same. She said she had stopped talking to him ten years earlier. He had not been in his mother's life either and had never showed concern for her. She said her brother "didn't give a s**t about mom".
- [111] Lynn's take of the matter is that "James just stopped talking to all of us". It was his decision and she cannot explain it.

Brian Markus

- [112] Mr. Markus is the lawyer who drafted the Will that his subject matter of this litigation. He has been a member of the South African bar since 1985 and a member of the BC bar since 1991.
- [113] Mr. Markus' practice is primarily in the area of foreclosures. He has no particular expertise in the drafting of wills and says that he may have prepared 10-15 of them in his career.
- [114] Mr. Markus remembers first meeting the deceased in respect of a chambers application to secure vacant possession of the matrimonial home. He has a vivid memory of her husband threatening to burn the house down if the order was granted.
- [115] Mr. Markus recalls the deceased well. He described her as a "nice lady with a tragic life".
- [116] Mr. Markus was shown the October 10, 1996 chronology prepared by the deceased. He cannot say if he had seen a copy before but he does know that the deceased instructed him about her husband's behavior. He recalls being told that her husband had beaten her and thrown her out into the snow.
- [117] Mr. Markus also drafted the earlier July 13, 1999 Will that was marked as an exhibit at trial. He recalls the deceased being very clear that she wanted nothing to be left to her son. He was told that the son wanted nothing to do with her, never spoke to her, and would not let her see her grandchild. She was very hurt by this. Mr. Markus was the one who suggested that the deceased leave something to the plaintiff in her will. He told her that doing so would make it less likely for any challenge to the Will by her son to be successful.
- [118] The 1999 Will made a \$10,000 bequest to the plaintiff and a \$30,000 bequest to the deceased's grandson Jordan. The residue of the estate was to be divided equally between the deceased's daughter, Lynn, and her two grandchildren by Lynn, Harley and Tia.
- [119] The 1999 Will contained the explanation regarding the bequest to the plaintiff:
- I wish to leave no more than the \$10,000 referred to above to my estranged son, James David John Brown. Although I have sacrificed for him and I have supported him over the years, he has refused any contact with me, and since 1995 when I left the family home, he has made it clear that he wants no further relationship with me.
- [120] Mr. Markus also drafted the subsequent Will dated January 19, 2006 which is the subject matter of this litigation. At that time, changes included making a \$10,000 bequest to Lynn along with an explanation:
- My daughter Lynn Alvalee MacKinnon has already received a cash payment from me which was understood by her to be her inheritance.
- [121] The \$10,000 bequest to the plaintiff remained as did the paragraph set out above explaining same.

- [122] Mr. Markus did not bill the deceased for the Will and did not open a file for the transaction. He was therefore unable to refer to any notes or other background material to corroborate his recollection. Nevertheless, I accept his testimony as to the plaintiff's statement of intention and her stated reasons for the modest bequest in the Will.

Gloria McPherson

- [123] Ms. McPherson first met the deceased in 1998 while she was working at the Port Moody Victim's Services Branch. The deceased was actually her client for a six-month period. The assistance related to abuse by the deceased's husband. Ms. McPherson saw her once a week during that period at which time she retired.
- [124] Ms. McPherson became good friends with the deceased and saw her socially on a regular basis from 1999 up until her death in 2012.
- [125] Ms. McPherson says that when she first met the deceased, the latter told her she was estranged from her son James. She never did articulate a reason but according to Ms. McPherson, the estrangement hurt the deceased very much.
- [126] Ms. McPherson saw the deceased with all three of her grandchildren on various occasions (Jordan, Harley and Tia). They all enjoyed the visits, including shopping and swimming.
- [127] Ms. McPherson described the last years of the deceased life as very sad. She says the deceased had no will to live. The deceased wanted a relationship with her grandchildren and missed them enormously.
- [128] Ms. McPherson also explained the identity of Dayna Dizdarevich, who was the recipient of a \$25,000 bequest in the 2006 Will but which was deleted by way of a March 18, 2010 codicil. Ms. Dizdarevich was a neighbour in the deceased's condominium complex and was the person who would often buy liquor for the deceased. Ms. McPherson discovered that the deceased was writing Ms. Dizdarevich cheques for various amounts and it was obvious that the latter was taking advantage of the deceased's poor health. She warned Ms. Dizdarevich off and the bequest was deleted by the codicil.
- [129] Ms. McPherson was an honest and credible witness. I accept her evidence in its entirety.

3. Legal Framework

- [130] This action is brought pursuant to s. 2 of the Wills Variation Act, R.S.B.C. 1996, c. 490 ("WVA"), which provides as follows:

Despite any law or statute to the contrary, if a testator dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's spouse or children, the court may, in its discretion, in an action by or on behalf of the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the testator's estate for the spouse or children.

[131] The WVA was repealed in March 31, 2014 and replaced by the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 ("WESA"). The transition provisions of WESA (s. 185) provide that Part 6 [estate administration, including variation of the will] "apply in respect of deaths occurring on or after the date on which those Parts come into force". Hence it is the WVA which applies to this claim. In any event, the relevant provisions in the WVA and WESA are the same.

[132] In *McBride v. McBride Estate*, 2010 BCSC 443, Madam Justice Ballance provided a very comprehensive and erudite analysis of the law pertaining to wills variation which I recite and adopt in its entirety:

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119 The heart of the Act is found in s. 2. It 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.

120 The Supreme Court of Canada's decision in *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 [Tataryn], continues to be the seminal case and the governing authority in British Columbia on wills variation. To fully appreciate the importance of *Tataryn*, it is useful to understand the jurisprudential context in which it was decided. While I do not propose to summarize the pre-*Tataryn* case law (and it is, I think, crucial to approach the jurisprudence based on whether it came before or after *Tataryn*), the Supreme Court of Canada decision of *Walker v. McDermott*, [1931] S.C.R. 94 [Walker] warrants particular mention.

121 The central issue for the Court in *Walker* was whether the adult independent daughter had to demonstrate financial need of support in order to obtain judicial variation of her father's will. The majority of the Court turned away from a financial needs-based approach. In his often-quoted passage, Duff J., speaking for the majority, endorsed a broad interpretation of the scope of "proper maintenance and support", one which encompasses the notion that a testator shoulders a moral obligation as a spouse and parent (at p. 96):

What constitutes "proper maintenance and support" is a question to be determined with reference to a variety of circumstances. It cannot be limited to the bare necessities of existence. For the purpose of arriving at a conclusion, the court on whom devolves the responsibility of giving effect to the statute, would naturally proceed from the point of view of the judicious father of a family seeking to discharge both his marital and his parental duty; and would of course (looking at the matter from that point of view) consider the situation of the child, wife or husband, and the standard of living to which, having regard to this and the other circumstances, reference ought to be had. If the court comes to the decision that adequate provision has not been made, then the court must consider what provision would be not only adequate, but just and equitable also; and in exercising its judgment upon this, the pecuniary magnitude of the estate, and the situation of others having claims upon the testator, must be taken into account.

122 Judicial reception of Walker was divided. Over time, two competing lines of authority emerged: those maintaining that demonstration of a claimant's economic need was a prerequisite to relief, and those that were true to the Walker analysis.

123 The Tataryn Court was cognizant of the lack of judicial uniformity in the approach to the statute and of the expressed criticism that the law was in disarray and promoted unpredictable trial outcomes based on the "length of the Chancellor's foot". (See Leopold Amighetti, *The Law of Dependents' Relief in British Columbia* (Toronto: Carswell, 1991), at p. 56.) Tataryn did not introduce the moral obligation consideration into the analysis of whether provision consistent with the Act had been made. The Tataryn Court simply affirmed its earlier decision in Walker and laid to rest any lingering legitimacy of a needs-based model.

124 In Tataryn, McLachlin J. (now the C.J.C.), writing for the Court, went some distance to clarify the moral duty concept and the interplay between it and a judicious testator's spousal and parental legal duties in light of contemporary standards. Her articulation of the relevant considerations and the principles underpinning the Act has been reiterated in virtually every case decided thereafter. Her Ladyship powerfully summarized the application of the Act by observing that "the search is for contemporary justice" (p. 815).

125 McLachlin J. identified the two fundamental interests protected by the Act. 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.

126 The Tataryn Court held that the determination of whether adequate provision has been made and, if not, the provision to be substituted by the court to achieve an adequate, just and equitable distribution are "two sides of the same coin" (p. 814).

127 The basic approach formulated in Tataryn to address the adequacy of the testamentary provision can be summarized as follows:

In the pre-Tataryn benchmark case of *Price v. Lypchuk* (1987), 11 B.C.L.R. (2d) 371, 26 E.T.R. 259 (C.A.) [Price], the Court of Appeal clarified that because societal circumstances change, the judicious spouse/parent of the Walker decision must be assessed in accordance with a contemporary view of marital and parental obligations, and of testamentary autonomy. McLachlin J. affirmed that proposition. 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.

Legal Norms

Legal norms are the obligations that would be imposed upon the testator during his or her life if the question of provision for the claimant spouse or child were to arise. In the words of McLachlin J., a testator's legal responsibilities while alive "reflect a clear and unequivocal social expectation, expressed through society's elected representatives and the judicial doctrine of its courts" (p. 821). Pursuant to Tataryn, a testator's legal obligations, had he or she not died, arising under the Family Relations Act, the Divorce Act, and the law of constructive trust are relevant factors in the assessment of the testator's legal obligations for the purposes of the Act. McLachlin J. acknowledged that a testator's legal obligations may extend to dependent children and left open the prospect that an independent adult child might have a legal claim against a parent based on unjust enrichment (p. 822). While McLachlin J. recognized that the legal obligations that contemporary society imposes on living testators vis-à-vis their spouses and children are not necessarily parallel to those on death, she regarded them to be an important indication of the nature of the legal duty in death (p. 822).

Moral Norms

McLachlin J. indicated that a testator's moral duties are found in "society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards" (p. 821). She acknowledged that because there is no clear legal standard to assess moral duties, obligations falling under that rubric are more susceptible to being differently interpreted by different individuals (p. 822).

The position under the Act of a testator's self-sufficient adult child has been controversial since the inception of the statute. In directing her mind to the moral claims of such children, McLachlin J. noted that while they may be more tenuous than that of a spouse or dependent child, the jurisprudence suggests that where the size of the estate permits, some provision for such children should be made, unless there are circumstances that would negate such an obligation (p. 822).

Tataryn recognized that there is no single way for a testator to divide the estate in order to discharge the legal and moral duties. In this regard, McLachlin J. reminded that it is only where the testator has chosen an option which falls below his or her obligation defined by reference to the contemporary sense of legal and moral norms, that a court will make an order "which achieves the justice the testator failed to achieve" (p. 824).

Balancing the Claims

Tataryn held that all legal and moral claims should be satisfied where the magnitude of the estate permits. If that is not possible, the court must prioritize the competing claims. Claims that would have been recognized as legal obligations during a testator's lifetime should "generally take precedence" over moral claims (p. 823). The court must also weigh the competing moral claims and rank them according to their strength. Where the estate assets permit, as part of the

assessment of a testator's moral duty the court must take into account the testator's legitimate testamentary concerns for the protection of beneficiaries and future generations and the carrying out of social purposes which may go beyond providing for the surviving spouse and children (p. 823).

128 In *Tataryn*, the Court clarified that because they are "two sides of the same coin", the factors taken into account to determine whether a testator has made adequate provision are also relevant to the determination of what would constitute adequate, just and equitable provision in the particular circumstances. A number of years ago, this Court identified circumstances that might support or negate a testator's moral duty to recognize the claim of an adult child in the decision of *Clucas v. Clucas Estate*, 25 E.T.R. (2d) 175, [1999] B.C.J. No. 436 (S.C.). I would supplement that helpful summary with the following overview of six of the considerations that inform the existence and the strength of a testator's moral duty to independent children. Although many of these factors were developed before *Tataryn*, for the most part they maintain relevance for the post-*Tataryn* court.

1. Contribution and expectation

129 Contributions by the claimant to the accumulation of a testator's assets with little in exchange, or providing other types of contribution or care to a testator will generally serve to strengthen the moral obligation, other things being equal. The contribution may also found a legal claim in unjust enrichment or quantum meruit: *Tataryn*; *Re Sleno* 78 D.L.R. (3d) 155, [1977] B.C.J. No. 140 (S.C.); *Lee v. King Estate*, [1975] B.C.J. No. 893 (S.C.); *Harris v. Harris*, [1980] B.C.J. No. 1417 (S.C.); *Ryan v. Delahaye Estate*, 2003 BCSC 1081, 2 E.T.R. (3d) 107 [Ryan]. Contributions made by a first spouse who predeceased the testator may support a moral obligation to the adult claimant children of that first marriage: *Saugestad v. Saugestad*, 2008 BCCA 38, 77 B.C.L.R. (4th) 170; *Waldman v. Blumes*, 2009 BCSC 1012, 51 E.T.R. (3d) 253.

130 A moral duty may arise where the testator's conduct has created a bona fide expectation on the part of the plaintiff to receive a benefit which does not come about on death: *Marsh v. Marsh Estate* 19 E.T.R. (2d) 184, [1997] B.C.J. No. 1286 (S.C.); *More v. More Estate*, 2002 BCSC 920, 46 E.T.R. (2d) 96.

2. Misconduct/Poor character

131 Section 6(b) of the Act empowers the court to refuse variation to a person whose character or conduct, in the opinion of the court, disentitles him or her to relief. Such misconduct is measured as at the date of death, not subsequently, and must be directed at the testator. Generally speaking, the conduct must be relatively severe in order to justify disinheritance: *Gieni v. Richardson Estate*, [1995] B.C.J. No. 1227 (S.C.); *Sammon v. Stabbler*, 2000 BCSC 1048, 77 B.C.L.R. (3d) 283. A child who is a disappointment overall (*Sawchuk v. MacKenzie Estate*, 2000 BCCA 10), is an "incompetent weakling" (*Re Bailey Estate*, [1972] 1 W.W.R. 99, 1971 CarswellBC 195 (S.C.)), or is unsuccessful in multiple business ventures and has a difficult time "fighting the battle of life" (*Re Radcliffe*, 2 B.C.L.R. 220, [1977] B.C.J. No. 1036 (S.C.)) was not considered to be sufficiently defective.

3. Estrangement/Neglect

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*.

4. Gifts and benefits made by the testator during lifetime

133 Depending on the circumstances, a testator's moral duty may be diminished or negated entirely where he or she has made inter vivos gifts to the claimant, or the claimant has received assets on the testator's death outside the framework of the will. This includes benefits conferred by way of an inter vivos trust, outright gift and assets passing on death by operation of law such as joint tenancies, and by way of specific beneficiary designation of insurance proceeds, RRSPs, pension benefits, RIFs, and the like. On the same reasoning, if a testator has made pre-death gifts to individuals other than the plaintiff, or has arranged his or her affairs to facilitate a passing of assets to such individuals outside the provisions of the will, the moral duty owed to the plaintiff may be intensified. See generally: *Ryan*; *Higgins v. Wojciechowski Estate*, [1992] B.C.J. No. 1398 (S.C.); *Inch v. Battie*, 2007 BCSC 1249, 36 E.T.R. (3d) 79 [*Inch*].

5. Unequal treatment of children

134 That an independent child has not been given the same provision under a will as the testator's other child or children will not, of itself, necessarily establish a moral claim: *Re Lukie et al and Helgason et al.*, 72 D.L.R. (3d) 395, [1976] B.C.J. No. 1393 (C.A.); *Price*. On the other hand, in *Vielbig v. Waterland Estate* (1995), 1 B.C.L.R. (3d) 76, 6 E.T.R. (2d) 1 (C.A.), the Court of Appeal held that equal treatment among independent adult children is prima facie fair from a moral duty standpoint. In *Ryan*, the court held that in the absence of relevant reasons for an unequal distribution, there is a reasonable expectation that adult children will share equally, even though no legal obligation requiring equal distribution exists. (para. 67). The emerging rule of thumb to the effect that equal apportionment among children prima facie discharges a testator's moral duty was applied in *Inch*. There, the court held that an equal distribution was prima facie fair, despite the fact that one child received significant assets by way of inter vivos transfers. The proposition was recently revisited by the Court of Appeal in *Doucette*. In that case, the Court of Appeal appeared to have no difficulty with the disinheritance of one of the preferred beneficiaries by allocating her nothing out of the estate in light of the generous gifts that she had received outside the will via jointly held assets.

6. Testator's reasons for disinheritance/Subordinate benefit

135 The approach to be taken by the court in relation to a testator's reasons for disinheriting or providing a modest benefit only to a child starts with consideration of the Court of Appeal decision in *Bell v. Roy Estate* (1993), 75 B.C.L.R. (2d) 213, 48 E.T.R. 209 (C.A.) [Bell]. In Bell, the testator left a will under which she bequeathed a small gift to one adult son, nothing to her adult daughter, and left the lion's share of her estate to her other adult son. Contemporaneously with making her will, the testator wrote a separate letter purporting to explain the unequal treatment of her children, and in particular the disinheritance of her daughter. The trial judge concluded that the reasons offered by the testator for disinheriting her daughter were accurate and sufficient to support the will. Accordingly, variation of the will was refused. The Court of Appeal's dismissal of the daughter's appeal came before the Supreme Court of Canada issued its decision in *Tataryn*.

136 In his analysis in Bell, Goldie J.A., for the Court, placed heavy reliance on the post-Walker legislative amendments to the Act enacted in 1971 (now s. 5), which permit the court to accept evidence of the testator's ascertainable reasons for making or not making the dispositions in the will relative to his or her spouse and children. That section stipulates that where such evidence is in the form of a written statement signed by the testator as in Bell, the court, in weighing the statement, must have regard to all of the circumstances which may reasonably support an inference about the accuracy or otherwise of it.

137 In addressing those statutory amendments, Goldie J.A. stated, at para. 38:

38 ... the weight to be given evidence of the testator's reasons is affected by its accuracy and not by morally acceptable or unacceptable content. I do not say the legislature swept away any objectively determined moral duty. I do say, however, that the actual intentions of the testator are to be given an effect which is largely denied by reliance upon the notionally objective reasonable testator.

138 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 of that child is negated. The Court held that the burden then shifts to the plaintiff to show that the reasons acted upon by his or her parent were false or unwarranted.

139 Goldie J.A. acknowledged that this approach placed greater emphasis on a testator's intentions and "less on those which might be imputed to her by reference to the reasonable testator" (para. 36). He endorsed giving effect to a testator's subjective rationale which would be "largely denied" by employing an objective reasonable testator standard.

140 The Court of Appeal reaffirmed the Bell model after *Tataryn* was decided at the Supreme Court level. In *Kelly v. Baker* (1996), 82 B.C.A.C. 150, 15 E.T.R. (2d) 219 (C.A.) [Kelly], the Court of Appeal applied the Bell analysis and concluded that the testator had valid and rational reasons for disinheriting the claimant. As to the content of the reasons, Kelly stated that the testator's reasons

for disinheriting a child need not be justifiable. The Court observed that the law merely requires that the reasons are valid, meaning based on fact, and rational in the sense that there is a logical connection between them and the act of disinheritance (para. 58).

141 One cannot quarrel with the outcomes in Bell and Kelly in light of their particular facts. The thorny issue is that the model of inquiry endorsed by Bell and followed in Kelly effectively precludes an assessment of whether the testator's reasons are objectively justifiable from the standpoint of the contemporary judicious parent of Tataryn. In Tataryn, McLachlin J. made passing mention of Bell as an example of a case where a testator's moral duty was seen to be negated. Notably, she did not say nor delve into whether the proposition espoused by Goldie J.A. to negate that moral duty was sound. If the decisions of Bell and Kelly mean that the applicable test is whether a testator has valid (i.e. factually true) and rational (i.e. logically connected to the disinheritance) reasons for disinheriting a child, even where the reasons are unworthy of an objectively judicious parent based on contemporary standards, then they are difficult to reconcile with the fundamental precepts of Tataryn and the search for contemporary justice in the circumstances.

142 For the most part, the apparent incompatibility between Bell and Kelly on the one hand, and Tataryn on the other, has not been squarely confronted by this Court (an exception is found in Hammond v. Hammond (1995), 7 B.C.L.R. (3d) 25, 7 E.T.R. (2d) 280 (S.C.)). I would respectfully observe that there appears to be a growing trend in the authorities decided in the aftermath of Kelly to favour rejection of objectively insufficient reasons on the pretence that they are simply not rational.

[133] The Court of Appeal also recently discussed the law pertaining to wills variation litigation in Hall v. Hall Estate, 2011 BCCA 354 as follows:

37 An application under s. 2 is thus a two-stage process. First, the court must determine whether adequate provision has been made for the proper maintenance and support of the applicant. If not, at the second stage the court must consider what provision for the applicant would be adequate, just and equitable.

38 The Supreme Court of Canada set out the principles that guide this analysis in Tataryn v. Tataryn, [1994] 2 S.C.R. 807. McLachlin J., writing for the Court, observed that s. 2 gives the court broad discretion in advancing two interests protected by the Act. The first is ensuring adequate, just and equitable provision for a testator's spouse and children. The second is testamentary autonomy. If the second must yield to the first, the ultimate question is "what is adequate, just and equitable in the circumstances judged by contemporary standards". In answering that question, the court will be guided by two sets of norms. The first are the testator's legal obligations to his or her family. The second are the moral obligations to family members that arise from reasonable expectations of what a judicious person would do in the circumstances. Claims based on legal obligations will generally take precedence over those based solely on moral duties. The testator's "legitimate concerns" should be recognized in assessing the extent of any moral obligations. Finally, there will be a wide range of appropriate options in judging

whether the testator's dispositions meet the requirements of the Act, and one's freedom to dispose of one's estate should be treated with deference as long as the options chosen fall within that range.

39 With specific reference to the claims of adult independent children, the Court stated a testator will not generally have a legal duty to an adult independent child unless the child contributed to the estate. As to moral obligations 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.

[134] In the same case, the Court of Appeal made other observations as to the law which are also relevant to the present dispute, namely:

- to succeed in challenging the will, the plaintiff must establish that the testator's reasons (for disinheritance or for only a very modest bequest), and insofar as those reasons can be ascertained, were false or unwarranted "it is not necessary to find the reasons were justifiable. It is enough if they were factually valid, and rational in the sense of having a logical connection to the act of disinheritance" (para. 43);
- the relevant date to determine whether a testator made adequate provision for the proper maintenance and support of the plaintiff under the first step in the two-step analysis is the date of the testator's death (para. 46);
- because "family histories and dynamics are critical" to the assessment of testamentary provisions made, or not made, for adult independent children, and because such histories and dynamics "vary widely and are often unique", each case must be decided on its own facts and other cases dealing with such assessments will not usually be helpful (para. 44).

[135] With these statements of legal principle in mind, I now turn to an analysis of the facts and law in this case.

4. Analysis

[136] The unique dynamics of the plaintiff's relationship with his mother are critical to assessing the adequacy of the modest bequest in her final Will. In particular the causes of the estrangement between mother and son and its perpetuation throughout the last 17 years of her life must be determined. That estrangement is the rationale stated in the Will for the limited bequest and is, in any event, a major consideration in determining whether there existed any moral duty on the part of the deceased to provide any maintenance and support beyond the amount of that bequest.

[137] I have grave reservations about the credibility of much of the plaintiff's evidence, much of which I find to be overstated and exaggerated.

[138] The plaintiff's testimony respecting neglect and verbal and physical abuse by his parents during his childhood are contradicted by his later declaration of love, respect for his parents and their "perfection" as role models who make him "feel loved and wanted" (the

wedding note). The unemotional delivery of the evidence was at odds with its disturbing content. His excuse for not contacting his mother during 17 years of estrangement (no information as to her whereabouts) is simply not credible when the means of that information was readily at hand.

- [139] I accept that the deceased could be stubborn, aggressive and domineering in her relationship with the plaintiff during his early childhood and into his teens, but I prefer the evidence of Lynn MacKinnon to the effect that, although the children were punished when they did something wrong, the deceased was neither verbally nor physically abusive to either her or her brother. I also prefer her evidence that lack of food was not an issue while growing up in the family and I make a finding of fact to that effect, a finding supported by the observations of the other witnesses who visited the household on occasion.
- [140] I find the plaintiff description of "foraging for food" in the neighbour's garden and eating apple cores and "gnawing on bones" to assuage hunger to be hyperbole without foundation in fact.
- [141] There is ample evidence to establish, and I find as a fact, that the deceased was subjected to severe physical abuse at the hands of her husband in the years before their 1995 separation. When she disclosed this abuse to the plaintiff at the Denny's restaurant in Blaine in 1995 and told him that she was in fear of her life, the plaintiff simply refused to believe or assist her in her time of need. When he subsequently learned that she had indeed gone to a shelter for battered women, he made no inquiries as to her condition or whereabouts. None of this is consistent with being a dutiful and loving son as he now claims to have been.
- [142] The plaintiff was the only witness in a position to give testimony as to the actual events and words in the mid-1995 altercation that occurred on the front lawn of the McGill Street home. I find that his conduct in depositing the deceased's belongings out in the open was embarrassing and deeply hurtful to the deceased and that her vociferous reaction to same was understandable, if not completely justified. Even his alleged ultimatum of refusing help unless the deceased started "treating me better than a neighbour or a dog" rings hollow.
- [143] I do not accept as correct the plaintiff's characterization of the 1995 incident as an expression by his mother to spurn all further contact with the plaintiff. To the contrary, I find as a fact that it was the plaintiff and not his mother who created and perpetuated the estrangement from that date to her death some 17 years later.
- [144] There is ample evidence to support the conclusion, and I find as a fact, that the deceased dearly loved her grandchildren, including the plaintiff's son Jordan, and that she would have loved to have been introduced to and to have the opportunity to develop a relationship with her fourth grandchild, Naomi. The plaintiff did not introduce Naomi to her grandmother, not because he was a dutiful son respecting his mother's wishes for no contact, but rather because he had neither desire nor intention to do so.

- [145] The plaintiff's characterization of the 2005 incident at the Vancouver Police Department as an attempt on his part to repair the relationship with his mother is simply not credible. He acknowledges there was no greeting, no expression of affection, no attempt to discuss the new granddaughter as a bridge for reconnection, all of which he says would have been "not appropriate". He simply gave her his business card along with, so he says, the comment "mom, it does not have to be this way". Again, the plaintiff's version of this event, in respect of which he is the only witness who can testify, rings hollow.
- [146] There is evidence, albeit not substantial, that the deceased asked after her son's welfare and made some effort to communicate with him. I find as a fact that this occurred and I also find that the plaintiff refused to contact his mother when his ex-wife Kal suggested he do so.
- [147] The plaintiff submits that the deceased was a mean-spirited and abusive mother who was the primary cause of the estrangement and who spitefully breached a moral obligation which existed in the circumstances of the case to provide more than a modest \$10,000 bequest to her son in her Will. The plaintiff claims that, contrary to the reasons stated in the Will, there is simply no truth to the assertion that he had "refused any contact" with the deceased or that he had "made it clear that he wants no further relationship" with the deceased.
- [148] Rather cleverly, the plaintiff argues there could not possibly be any "refusal to make contact" because such contact had never been invited by the deceased, i.e. there was no offer to refuse. But of course this argument ignores that in common parlance a "refusal" can simply be an "unwillingness to do something".
- [149] I have found as a fact that from mid-1995 onwards the plaintiff was completely unwilling to try and repair the estrangement from his mother and, indeed, deliberately perpetuated it.
- [150] The onus is on the plaintiff to demonstrate that the deceased's reasons for the modest bequest in her Will were neither valid nor rational. He has not met that onus.
- [151] Similarly, while estrangement or relationship breakdown that is largely at the fault or insistence of the testator will not negate, and may even enhance, the testator's moral duty to make provision in a Will for her independent adult children, I have concluded that the estrangement in this particular case was at the fault and insistence of the plaintiff and not the deceased. In such circumstances, any such moral duty that may otherwise have existed has been negated in this case and leads to the conclusion that the bequest in the Will is neither inadequate, unjust nor inequitable in the circumstances.

5. Conclusion

- [152] The plaintiff's action was dismissed. Costs will follow the event unless circumstances exist warranting a different disposition, in which event the parties are at liberty to seek a hearing on the matter within thirty days.

The Honourable Mr. Justice N. Kent

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