

CANADA / JUDGMENT

Graham v. Chalmers

2010 BCCA 13

COURT

British Columbia Court of Appeal

DECIDED

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2010 BCCA 13 Graham v. Chalmers

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Graham v. Chalmers,

2010 BCCA 13

Date: 20100115

Dockets: CA036364; CA036366

Docket: CA036364

Between:

Janet Laurie Graham

Respondent

(Plaintiff)

And

Sandi Margaret Chalmers in her capacity as the Executrix of the Will of Dolores Jean Graham,
and Shannon Nicole Chalmers

Appellants

(Defendants)

Docket: CA036366

Between:

Janet Laurie Graham

Respondent

(Plaintiff)

And:

Paul Graham Chalmers

Appellant

(Defendant)

And:

Sandi Margaret Chalmers in her capacity as the Executrix of the Will of Dolores Jean Graham,
and Shannon Nicole Chalmers

Respondents

(Defendants)

Before:

The Honourable Chief Justice Finch

The Honourable Madam Justice Kirkpatrick

The Honourable Madam Justice D. Smith

On appeal from the Supreme Court of British Columbia, July 17, 2008, (Graham v. Chalmers, 2008
BCSC 1246, S071544)

Counsel for the Appellants,

Sandi Margaret Chalmers in her capacity as Executrix of the Will of Dolores Jean Graham, and
Shannon Nicole Chalmers:

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Paul Graham Chalmers:

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Place and Date of Hearing:

Vancouver, British Columbia

November 17, 2009

Place and Date of Judgment:

Vancouver, British Columbia

January 15, 2010

Written Reasons by:

The Honourable Madam Justice Kirkpatrick

Concurred in by:

The Honourable Chief Justice Finch

The Honourable Madam Justice D. Smith

Reasons for Judgment of the Honourable Madam Justice Kirkpatrick:

INTRODUCTION

[1] Dolores Jean Graham ("Mrs. Graham" or the "testatrix") died on 12 June 2004. By her will, executed on 16 February 2003 (the "Will"), Mrs. Graham bequeathed \$25,000 to her daughter, Janet Graham. She divided the residue of her estate into four equal shares to be distributed to her daughter, Sandi Chalmers; her grandchildren (the children of Sandi Chalmers), Shannon Chalmers and Paul Chalmers; and Janet Graham. The gross value of the estate at the date of Mrs. Graham's death was \$643,202.78.

[2] Janet Graham commenced an action under the Wills Variation Act, R.S.B.C. 1996, c. 490 (the "Act") on 6 March 2007. Section 2 of the Act reads:

2 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.

[3] On 17 July 2008, the Supreme Court varied the Will to provide that Shannon Chalmers and Paul Chalmers each be paid \$100,000 and that the residue of the estate be divided equally between Sandi Chalmers and Janet Graham.

[4] Sandi Chalmers, Shannon Chalmers and Paul Chalmers appeal from the order.

BACKGROUND

[5] Mrs. Graham was born in 1933. She was widowed in 1983. She had two children born on 13 November 1961, Sandi Chalmers and Janet Graham, both of whom the trial judge found were well and equally loved by their mother.

- [6] The trial judge also found, and it appears undisputed, that their father was hard on his daughters and ordered them both out of the family home when they completed high school in 1979. Sandi Chalmers left the home and married her husband, Kevin Chalmers, a few years later. At the trial date, their daughter, Shannon Chalmers, was 22 and their son, Paul Chalmers, was 16. They were thus 17 years and 11 years of age respectively at the date of the Will.
- [7] Janet Graham did not leave the home as demanded by her father. The trial judge found (at para. 5) that "she stayed on so that she could, in her words, protect her mother from his abuse". The trial judge further found:
- [5] ... After their father's death in 1983, Janet remained in the home. She and her mother shared a close, comfortable, and companionable life together in the West Vancouver home until Mrs. Graham's death at age 71 in June of 2004. Janet lived her entire life with her mother and, at age 46, has modest financial means. Janet stayed initially to protect her mother from abuse and, albeit quite happily, did not pursue obtaining her own home and family. She and her mother were a help to each other and it appears, at least to some extent, that Janet's residence with her mother made it easier for Mrs. Graham to continue living in the family home until her death.
- [8] The trial judge described the relationship between Mrs. Graham and her daughter Sandi Chalmers, her husband Kevin Chalmers, and their two children at para. 6:
- [6] Sandi Chalmers and her husband Kevin were close to Mrs. Graham as well. Kevin helped with a kitchen renovation and did some of the yard work. There were frequent visits and family dinners. Sandi and Kevin's two children, Shannon, now 22 and Paul, now 16, were the only grandchildren and had a special place in their grandmother's affections. They had regular sleepovers at her house when they were younger and regular visits back and forth throughout their lives. Their grandmother spent more time with them on summer holidays when their parents were working, taking them to activities and paying for camps and sports and lessons.
- [9] On 17 November 1994, Mrs. Graham executed a will by which she bequeathed \$20,000 to Janet Graham and divided the residue between her two daughters.
- [10] A central issue at trial concerned the testatrix's wishes for the education of her grandchildren. The trial judge found at para. 7:
- [7] All of the witnesses agreed that this was a close-knit family who enjoyed each other's company. There was no dispute on the facts that Mrs. Graham wanted to fund her grandchildren's education. She had, apparently, an active and curious mind and believed strongly in education. Mrs. Graham wanted Paul and Shannon to achieve their educational goals.

- [11] In about 2000, Mrs. Graham attended the funeral of her sister in Nova Scotia, at which time she discovered that a joint plan with her sister to create a trust for the grandchildren was unlikely to be fulfilled. Mrs. Graham concluded that she would have to make arrangements for her grandchildren. She suggested to her family that she wished to arrange her estate in the same manner as her father had divided his estate, by which Mrs. Graham's father divided his estate equally between his two daughters and two grandchildren.
- [12] Mrs. Graham made her new Will in 2003, which reflected the arrangements discussed by her with her family. The solicitor who prepared the Will testified that he raised with Mrs. Graham the potential for an action under the Wills Variation Act because she was giving equal shares to her daughters and grandchildren. He said that Mrs. Graham's only reason for this distribution was that Janet Graham had already received some benefit because she lived with Mrs. Graham.
- [13] The 2003 Will provided the monetary bequest to Janet Graham of \$25,000, apparently to equalize Janet Graham's interest in the estate by reason of Mrs. Graham's gift to Sandi Chalmers of \$20,000 in 1990 to assist her and Kevin Chalmers to purchase their first home for \$155,000. Without such assistance, they would have been unable to purchase the home. In 2004, the home was worth \$500,000 and at the trial date was valued at \$715,000 with equity of about \$570,000 which constituted the Chalmers' major asset.
- [14] Prior to her death, Mrs. Graham discussed transferring the home to her daughters to avoid probate taxes and potential friction between them. The day before Mrs. Graham died, she was admitted to palliative care. For reasons that are not entirely clear, Janet Graham and Sandi Chalmers agreed to use their powers of attorney to transfer the home into Kevin Chalmers' name, presumably in trust for the estate.
- [15] By the trial date, the house had been sold by the estate for \$1.16 million for a net amount of just over \$1 million and the proceeds were held in trust. At trial, Janet Graham argued that the bequest to her did not amount to fair and adequate provision when, in effect, her sister and her family received three-quarters of the estate. Sandi Chalmers emphasized her mother's testamentary wishes, in particular her mother's desire that her two grandchildren be provided for their education.

TRIAL DECISION

- [16] The trial judge identified the central issue at paragraphs 13 and 15 of her reasons:
- [13] The issue in this case, of course, is whether Dolores Graham adequately and properly provided for her daughter, Janet, when she left her \$25,000 and one-quarter of the residue of the estate which is worth about \$1 million in total. I have no doubt that Mrs. Graham intended to adequately and properly provide for Janet, but that is not enough. The test is an objective one and requires me to look beyond what the testatrix thought and inquire whether the gift is in accordance with society's reasonable expectations of what a judicious parent would do in the circumstances applying contemporary community standards. That

test requires me to determine whether Dolores Graham had a legal or moral obligation to Janet that she failed to meet.

...

- [15] Turning to moral obligations, Mrs. Graham did have a moral obligation to her two children, but not to her two grandchildren. The real question is whether the moral duty has been met. As the Supreme Court of Canada noted in *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 there is no clear line that can be drawn and moral obligations are "more susceptible of being viewed differently by different people." Here, Mrs. Graham provided equally for both daughters and the case turns on whether one-quarter of the estate is just and equitable in the circumstances where there are no other competing legal or moral claims on the estate, half of which was left to two grandchildren.
- [17] The trial judge considered the circumstances of those to whom the testatrix owed a moral duty - her daughters. She then considered whether the circumstances of the case negated or minimized the testatrix's moral obligation to Janet Graham.
- [24] ... The question, really, is whether Mrs. Graham had valid and rational reasons negating or minimizing her moral obligation to her daughter. To constitute valid and rational reasons negating or minimizing that moral obligation, the reasons Mrs. Graham had must be based on true facts and the reasons must be logically connected to the reduction in what would otherwise be due to Janet, in a sense, to meet Mrs. Graham's moral obligation to her daughter.
- [18] The trial judge found that Mrs. Graham had two reasons for reducing "what would otherwise be due to" Janet Graham - her wish to provide for her grandchildren's education; and her belief that she had provided benefits to Janet Graham during her lifetime (para. 24).
- [19] As to the grandchildren's education, the trial judge concluded:
- [30] I find that Mrs. Graham's desire to provide for her grandchildren's education is a valid one, but that the extent of the reduction in Janet's share of the estate is not rationally connected to that objective. Mrs. Graham appears to have believed the grandchildren would need one-quarter of her estate to cover their educational expenses. Whether that was because she was not aware of how rapidly the house was increasing in value or did not appreciate the cost of college courses or planned to transfer the house to her daughters so that it would not be part of the estate, we do not know, we cannot know, nor is it necessary for this Court to determine.
- [31] In my view, it was not necessary to reduce Janet's share of the estate so significantly in order to achieve the goal of providing for the grandchildren's education. So this reason for reducing the moral obligation is not rational in that sense.

- [20] As to the benefits received by Janet Graham during the testatrix's lifetime, the trial judge concluded that both Janet Graham and Sandi Chalmers received benefits from the testatrix and the shared living arrangement with Janet Graham was not a benefit "which in itself is a valid and rational reason negating the moral obligation of the testatrix" (para. 37) to Janet Graham.
- [21] Janet Graham lived with her mother in the family home until her mother's death and then for an additional two years. At the date of Mrs. Graham's death, the home was valued at \$723,200. The equity after accounting for two mortgages registered against the property was \$623,896.09.
- [22] The trial judge found that Janet Graham paid rent to her mother of \$400 to \$600 per month. As well, she contributed to some expenses for the maintenance of the home. Mrs. Graham paid for the insurance, property taxes, telephone, hydro and cable. She also performed the tasks of cooking and grocery shopping. It is obvious and uncontested that Janet Graham received a benefit by remaining in the home. On the other hand, it is also clear that Mrs. Graham benefitted from the companionship and, later, care provided by Janet Graham.
- [23] As the trial judge noted, Sandi Chalmers also "received benefits from her mother by way of help with childcare, assistance driving the children to activities while Sandi and her husband worked, and payment by Mrs. Graham of the children's summer camps and lessons. As Sandi Chalmers said of Mrs. Graham, 'She practically raised my kids.'" (para. 37)
- [24] The parties agree that there are no persons to whom the testatrix owed any legal duty to support. They also agree that Janet Graham and Sandi Chalmers are the only persons to whom Mrs. Graham owed a moral obligation. The trial judge described their individual circumstances at paras. 17-18:
- [17] ... Janet has worked with Revenue Canada for 28 years and currently earns about \$50,000 a year as a collections officer. As I have noted before, she has never married, she has no children, and it appears that she entered into her first marriage-like relationship about two years after her mother died. At the time of her mother's death, Janet had savings of \$34,000 and, credit card debt of \$19,000. She owned a car with an outstanding loan of \$26,000.
- [18] Sandi has worked for the past 17 years as a legal assistant with a law firm in Vancouver earning about \$35,000 a year. In 1990, Mrs. Graham gave \$20,000 to help Sandi and her husband buy their first home for \$155,000. ... Other than a car and savings of about \$27,000 in 2004, that house is Sandi and Kevin's major asset. ... Sandi and Kevin have been married for 23 years and he earns \$60,000 per year currently, \$46,000 at the time of the testatrix's death.
- [25] The trial judge, having concluded that there were no valid and rational reasons negating or minimizing the testatrix's moral obligation to Janet Graham, found that the testatrix did not make adequate provision for Janet Graham. She therefore exercised her discretion under the Act to vary the Will.

- [26] The trial judge directed that the Will be varied to provide a lump sum of \$100,000 to each of the grandchildren. She directed that the specific bequest of \$25,000 to Janet Graham remain, and that "the remainder of the estate of approximately \$800,000 be divided equally between Janet and Sandi."

ISSUES ON APPEAL

- [27] The appellant, Paul Chalmers, joins with the appellants Sandi Chalmers and Shannon Chalmers, in contesting the trial judge's findings that the testatrix: did not make adequate and proper provision in the Will for the respondent; did not meet her moral obligations; that one-quarter of the estate was not just and equitable where there were no other competing moral or legal obligations; and did not have valid and rational reasons for dividing the estate as she did. The appellants also say that the trial judge failed to give proper weight to the principle of testamentary autonomy.

DISCUSSION

- [28] Before addressing the substance of the appeal, I note that an unusual feature of wills variation jurisprudence is that an appellate court is in the same position as the trial judge and is not required to defer to the trial judge's discretion except on matters based on oral testimony: *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 at 813, and *Berger v. Clark*, 2002 BCCA 316 at para. 17.
- [29] *Tataryn* is the leading decision in this area of the law. McLachlin J. (as she then was), speaking for the Court, clarified the principles applicable to the Wills Variation Act. *Tataryn* continues as the governing authority. On an application to vary a will "the court must ask itself whether the will makes adequate provision and if not, order what is adequate, just and equitable. These are two sides of the same coin" (*Tataryn* at 814). "Adequate, just and equitable" is determined in the specific circumstances and in light of contemporary standards.
- [30] Against this consideration is balanced the principle of testamentary autonomy. However, testamentary autonomy must ultimately yield to what is "adequate, just and equitable": *Tataryn* at 815-816.
- [31] Under the *Tataryn* analysis, courts must first consider the testator's legal responsibilities to support a spouse and minor or dependent children. That is not a consideration in the case at bar.
- [32] The second consideration is the testator's moral duties toward spouse and children. Where, as here, the moral duty may be toward independent adult children, the Court explained at 822-823 that:

... While the moral claim of independent adult children may be more tenuous, a large body of case law exists suggesting that, if the size of the estate permits and in the absence of circumstances which negate the existence of such an obligation, some provision for such children should be made: *Brauer v. Hilton* (1979), 15 B.C.L.R. 116 (C.A.); *Cowan v. Cowan Estate* (1988), 30 E.T.R. 216 (B.C.S.C.), *aff'd* (1990), 37 E.T.R. 308 (B.C.C.A.); *Nulty v. Nulty Estate* (1989), 41 B.C.L.R. (2d) 343 (C.A.). See also *Price v. Lypchuk Estate*, *supra*, and *Bell v. Roy Estate* (1993), 75 B.C.L.R. (2d) 213 (C.A.) for cases where the moral duty was seen to be negated.

[33] Further, the Court in *Tataryn* recognized that conflicting claims will inevitably arise but that "where the estate permits, all should be met" (at 823).

... A will may provide a framework for the protection of the beneficiaries and future generations and the carrying out of legitimate social purposes. Any moral duty should be assessed in the light of the deceased's legitimate concerns which, where the assets of the estate permit, may go beyond providing for the surviving spouse and children.

[34] Lastly, the Court cautioned (at 823):

... In many cases, there will be a number of ways of dividing the assets which are adequate, just and equitable. In other words, there will be a wide range of options, any of which might be considered appropriate in the circumstances. Provided that the testator has chosen an option within this range, the will should not be disturbed. Only where the testator has chosen an option which falls below his or her obligations as defined by reference to legal and moral norms, should the court make an order which achieves the justice the testator failed to achieve. In the absence of other evidence a will should be seen as reflecting the means chosen by the testator to meet his legitimate concerns and provide for an ordered administration and distribution of his estate in the best interests of the persons and institutions closest to him. It is the exercise by the testator of his freedom to dispose of his property and is to be interfered with not lightly but only in so far as the statute requires.

APPLICATION OF THE TEST TO THIS CASE

[35] The first question to be asked in this case was whether the Will made adequate, just and equitable provision for the testatrix's adult independent daughter within the wide range of appropriate options. The appropriate date at which to assess the value of the estate was the testatrix's date of death: *Landy v. Estate of Landy* (1991), 60 B.C.L.R. (2d) 282 (C.A.), at para. 38.

[36] At the date of death, the estate was valued at approximately \$645,000. The residue, after payment of the \$25,000 bequest to Janet Graham, was \$620,000. The effect of the estate distribution in the Will on a gross basis was to give Janet Graham \$180,000, and each of Sandi Chalmers and the two grandchildren \$155,000, representing their individual 25% shares of the residue.

- [37] In considering whether the Will fulfilled the testatrix's moral duties to her daughters, the trial judge examined the beneficiaries' circumstances, and whether anything negated or minimized the testatrix's moral duties. The two possible negations of the duty raised were: the provision of educational funds for the testatrix's grandchildren, and that Janet Graham had already received the benefit of living in her mother's house. Neither reason was considered sufficient to reduce "Janet's share of the estate".
- [38] In approaching the analysis in this way, I consider that the trial judge erred in two ways. First, she failed to first consider whether the Will made adequate, just and equitable provision for Janet Graham regardless of the claims of the grandchildren who were not owed any legal or moral obligations under the Act, but whose claims should be met in deference to testator autonomy after the moral claims were met. Second, the trial judge appears to have analyzed Janet Graham's claim on the footing that she was presumptively entitled to a 50% share of the estate, rather than considering whether the Will made a bequest within a range of appropriate options.
- [39] Although I consider that the trial judge did not undertake the analysis suggested in *Tataryn*, I nevertheless consider that the result achieved was the correct one in the circumstances. I would therefore not give effect to the appellants' various grounds of appeal. My reasons for this conclusion follow.
- [40] In my opinion, the trial judge's factual findings (based on oral evidence and therefore deserving of deference) inform the consideration of whether the testatrix made adequate, just and equitable provision for Janet Graham. So, for example, the trial judge noted that Janet Graham, unlike her sister and husband, had not accumulated any assets and, although she was independent, her income was relatively modest. Mrs. Graham's testamentary wishes in limiting Janet Graham's share of the estate seem to have been predicated on the understanding that Janet Graham "had enough extra already" (as described in the solicitor's notes), evidently in reference to the benefit Janet Graham received in living with her mother. However, a judicious parent would recognize that the benefit received by Janet Graham must be balanced by the fact that Janet Graham paid her mother rent, shared in household chores, and otherwise contributed to her well-being. Further, as the trial judge noted, "[t]here were no extraordinary gifts, no payment for travel, and so on" (para. 32). More importantly, Mrs. Graham benefitted from the love and companionship offered by Janet Graham's life with her in the home and involving her mother in her life outside the home. This does not detract from the love and devotion Sandi Chalmers gave her mother. But the applicant was Janet Graham, and the focus must necessarily be on her at this stage of the analysis.
- [41] The next question to ask is whether the provision to Janet Graham was within a range of appropriate options. When one focuses on Janet Graham's circumstances at the date of the Will and her close, loving and giving relationship with her mother, I agree with the trial judge's conclusion that the provision was not adequate, just and equitable in the circumstances. The appropriate range of adequate provision, in my opinion, was between 30

and 50 per cent of the estate. However, balanced as it must be by the testatrix's testamentary wishes, I consider that a 40% share to Janet Graham would be appropriate, just and equitable in all the circumstances. This variation closely approximates the variation ordered by the trial judge.

- [42] The trial judge varied the Will by providing a lump sum of \$100,000 to each of the grandchildren and directing that the remainder of the estate of approximately \$800,000 be divided equally between Janet Graham and Sandi Chalmers. The order was obviously premised on the increase in value of the estate between the date of Mrs. Graham's death to the trial date. The variation of \$100,000 to each of the grandchildren would otherwise not be logical in the context of the value of the estate at the testatrix's death and the court's finding that adequate provision had not been made for Janet Graham. Although there are practical reasons for expressing the division in this manner in this case (where the estate has been liquidated and is held in trust), there are pitfalls in doing so. There may be cases in which the estate is made up of unliquid assets the value of which may fluctuate between the date of death, the trial date, and distribution of the estate. In those cases, it is preferable to express the order in terms of percentages, except of course, in respect of specific bequests that are not disturbed by the variation. The potential difficulty that might arise is that the specific bequest directed by the variation order could, in extreme circumstances of a precipitous decline in the value of the residue, eliminate the intended gift to residual beneficiaries.
- [43] I therefore consider that the preferable expression of the variation in this case should be in percentages of the residue, which also accords with Mrs. Graham's testamentary wishes.
- [44] It follows that I would dismiss the appeal but would vary paragraph 2 of the Supreme Court Order to read that paragraph 4(d) of the Will be deleted and the following be inserted into paragraph 4(d) of the Will: "to divide and appropriate the residue of my Estate ten per cent to my granddaughter, SHANNON NICOLE CHALMERS, ten per cent to my grandson, PAUL GRAHAM CHALMERS, forty per cent to my daughter, SANDI CHALMERS, and forty per cent to my daughter JANET GRAHAM, as shall be living at my death (the "Division Date")."

"The Honourable Madam Justice Kirkpatrick"

I agree:

"The Honourable Chief Justice Finch"

I agree:

"The Honourable Madam Justice D. Smith"

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