
CANADA / JUDGMENT

J.R. v. J.D.M.

2016 BCSC 2265

COURT

Supreme Court of British Columbia

DECIDED

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2016 BCSC 2265 J.R. v. J.D.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.R. v. J.D.M.,

2016 BCSC 2265

Date: 20161202

Docket: S133257

Registry: Vancouver

Between:

J.R.

Plaintiff

And

J.D.M., J.N.M. and Solus Trust Company Limited, Administrator with Will annexed of the Estate of W.F.M., deceased

Defendants

Before: The Honourable Madam Justice Dardi

Reasons for Judgment

Counsel for J.R.:

P. Roberts

Counsel for J.D.M.:

M. Lott

L. Uppal

Counsel for Solus Trust:

A.D. Francis

Place and Date of Trial/Hearing:

Vancouver, B.C.

April 11-15, 2016

Place and Date of Judgment:

Vancouver, B.C.

December 2, 2016

Introduction

- [1] The late W.F.M. died after a brief illness on August 21, 2012. He was 65 years old.
- [2] In order to protect the privacy interests that arise in this case I have used initials for the names of all involved and to the extent possible omitted references to non-essential details. I also order that the parties' initials be used in the style of cause.
- [3] The deceased was survived by his second wife, the defendant J.D.M., whom he married on May 8, 2004. He and J.D.M. had no children together. The deceased also left two surviving children from his first marriage: the plaintiff, J.R. who was born in 1975 and the defendant, J.N.M., who was born in 1973.
- [4] J.D.M. was appointed as the sole executrix and named as the sole beneficiary of W.F.M.'s last will executed on August 17, 2011 ("the Will"). On February 4, 2013 a grant of probate of the Will was issued to J.D.M. Pursuant to a court order pronounced on October 3, 2014, J.D.M. was removed as executrix, the alternate named executors were passed over and the defendant, Solus Trust Company Ltd. was appointed as the Administrator with Will Annexed of W.F.M.'s estate.
- [5] J.R. seeks a variation of her father's will pursuant to the Wills Variation Act, R.S.B.C. 1996, c. 490 (the "WVA").
- [6] It is common ground that the WVA governs the disposition of this case. W.F.M. passed away before the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 (the "WESA") came into force on March 31, 2014. Based on the pertinent transitional provisions the WESA has no application to the issues in this case.

history of THE proceeding

- [7] This action was commenced on May 3, 2013, by J.N.M. as plaintiff. At that time, J.R. was joined as a defendant. J.N.M. advanced two claims: a claim under the WVA and a constructive trust claim with respect to his father's home.
- [8] In late March 2015, J.N.M. settled his constructive trust claim with J.D.M. and advised that he would not be proceeding with his claim under the WVA.
- [9] At a trial management conference on April 5, 2016 and, by consent, J.R. was substituted as the plaintiff and J.N.M. as the defendant. The response to civil claim filed by J.R. on June 6, 2013, was ordered to be treated for all purposes as the notice of civil claim and the notice of civil claim filed by J.N.M. was to be treated for all purposes as a response to civil claim. J.N.M. did not participate in the trial.
- [10] Solus Trust appropriately adopted a neutral position in the WVA litigation.
- [11] I will next summarize the pertinent facts.

facts and chronology

- [12] In these Reasons, the summary of facts reflects evidence that was either not in dispute, or, where disputed, the factual findings I have made based on consideration of the evidence as a whole. I have explained the reasoning underlying my findings where the evidence conflicted in a significant way on material points, or a party has urged that a particular inference be drawn from the evidence.
- [13] W.F.M. married J.R.'s mother, E.S., in 1968. They divorced in or around 1986. After her separation from W.F.M., E.S., who had been a full-time homemaker, worked as a waitress and struggled financially. She eventually attended community college and became qualified as a denturist. She worked in her own practice for 20 years prior to her retirement.
- [14] I found E.S. to be credible and consider her evidence reliable. She endeavoured to provide a forthright account of pertinent events, even though she was asked to recall difficult and painful matters. She readily acknowledged what she did not know or could not recall.
- [15] Overall, I found J.R. to be a thoroughly credible witness who in an understated manner, provided clear and convincing testimony. She responded to questions in a direct and straightforward way, without any embellishment or exaggeration. Her evidence was not weakened in cross-examination on any material point.

The Early Years

- [16] W.F.M. and his family moved from Vancouver Island to the Lower Mainland when J.R. was two years old. Thereafter, and until his death, W.F.M. was employed as a control room operator in a cement plant.

- [17] When J.R. was approximately six years old the family moved to a property in Tsawwassen (the "Property"). W.F.M. assumed the primary role for the construction of the family home, seldom retaining tradesmen to assist him. The evidence establishes that the home remained under construction for some 20 years. The home was still under construction when the family moved in. This caused them considerable inconvenience and stress. By way of illustration, until J.R. turned 13, there were no doors hung on any of the upstairs bedrooms or bathroom. There was no carpeting on the plywood floors. At W.F.M.'s insistence E.S. and the children assisted in the construction as much as was possible in the circumstances. E.S. found the permanent state of construction a difficult environment in which to raise her children.
- [18] W.F.M. was very controlling, domineering and short-tempered. E.S. persuasively recounted that he yelled at his children daily. J.R. was a shy, introverted child and as a young girl she was frightened of her authoritarian father. She credibly described frequently being driven to tears by her father's taunting. She found him impossible to please.
- [19] Although the children were provided with the necessities, the family lived extremely frugally. They wore second-hand clothing or home-made clothing and the children had few toys.
- [20] In or about 1983, E.S. could no longer tolerate W.F.M.'s escalating mental and emotional abuse. She moved out of the Property with J.R. and her brother J.N.M. in tow. J.R. who was eight years old at the time, describes being sad and confused when she learned that her parents were divorcing. Her father never spoke to her about the divorce or provided her with any reassurances or comfort.
- [21] W.F.M. and E.S. engaged in a bitter and high-conflict matrimonial dispute. J.R. lived with her mother and brother for about a year and a half. W.F.M. made threats to E.S. about rendering her "penniless" and denigrated her involvement with her new companion, D.S. W.F.M. told the children that their mother was a terrible person who had "sinned". W.F.M. berated J.R. if he became aware that she had even spoken to D.S. When E.S. eventually married D.S., W.F.M. would not permit J.R. to attend the wedding. According to E.S., W.F.M.'s conduct resulted in the children being very torn and conflicted about the separation. During this period, if E.S. was not home W.F.M. would sometimes show up at her home unannounced and collect J.R. and her brother. His conduct frustrated E.S. and was a constant source of acrimony between them.
- [22] Given the relentless conflict, after a discussion with her children, E.S. determined that it would be in their best interests to return to live with their father in the family home. When J.R. was about nine years old, E.S. dropped off her two children at the Property one evening when W.F.M. was not home. It was evident from her testimony and J.R.'s evidence that this episode was a distressing and traumatic event for the family. Thereafter, until she was 13 years old, J.R. lived with her father and her brother at the Property. W.F.M. eventually obtained a court order granting him legal custody of J.R. and J.N.M. The children saw their

mother in accordance with the terms of a court-imposed visitation schedule.

- [23] At W.F.M.'s insistence the two children spent a considerable amount of time assisting him at the Property. He frequently left them unsupervised when he went to work. He worked shifts and so his work hours varied. In this period J.N.M. and J.R.'s chores increased significantly because, in addition to performing small construction tasks, they assumed the cooking and cleaning responsibilities their mother formerly carried out. They chopped, stacked and unloaded wood and tended to the large garden. Adhering to their father's demands, they also hauled lumber and brick, hammered nails into the plywood floors and shoveled and hauled manure.
- [24] J.R. was frequently unwell as a child. She was diagnosed with a heart murmur, suffered from asthma and was hospitalized with pneumonia. When she was 12 years old her father took her and her brother on a three week road trip in his camper. J.R. persuasively recounted the lack of proper hygiene and nutrition. She took ill during the trip but W.F.M. refused to take her to a doctor. It was only when she returned home that her mother arranged for her appropriate medical care.
- [25] J.R. described certain of her father's behaviours during this time frame. It is not necessary to set out the evidence in detail but suffice it to say W.F.M. engaged in ongoing sexual conduct with her and emotionally abused her. When J.R. was 13 years old a female adult friend of the family approached her privately with respect to concerns about how W.F.M. touched and conducted himself towards her. J.R. was acutely embarrassed and disclosed nothing in their discussion. However, it validated J.R.'s feelings that her father's conduct was entirely inappropriate.
- [26] Based on her observations of J.R., E.S. believed that she was terrified of her father. E.S. describes having developed disquieting suspicions regarding J.R.'s fear of her father but, when she broached the subject, J.R. would not divulge anything. She was too frightened to discuss the matter with anyone.
- [27] Shortly after the discussion with the family friend, J.R. had a distressing altercation with her father, which left her very anxious and in tears. After her father had left the house she packed up some of her belongings and telephoned her mother. E.S. picked her up and for the following year or so, J.R. lived at her mother's home. By this time her mother had married D.S. Her brother, however, remained living with his father at the Property.

Teen Age Years and Adulthood

- [28] E.S. explained that when J.R. resided with her, she adamantly refused to see her father. W.F.M. telephoned J.R. three days after the incident to ask whether she would be home for dinner. She answered no and told him she would never go back to live with him. During that telephone call W.F.M. offered no apology or an overture of reconciliation. With the exception of this single telephone call and arranging to send J.R. two cards, there was no contact between W.F.M. and his daughter during this period. In all likelihood W.F.M.

delivered the cards to E.S. at her workplace. I will return to the cards later in my Reasons.

- [29] In the summer of 1990, when she was 14 years old J.R. left her mother's home following an argument about curfews. After she left, J.R. slept on a friend's sofa for approximately six weeks. E.S., who was very concerned about her daughter's safety tried unsuccessfully to enlist the assistance of the police in locating J.R. There was no evidence that W.F.M. took any steps to locate J.R.
- [30] J.R. eventually obtained a job working in a restaurant on weekends. During this period of time she had no contact with her father and only saw her mother a few times for lunch. Neither parent provided J.R. with any financial support.
- [31] In September J.R. returned to school to attend grade 10. Upon been apprised that J.R. was living on her own social services became involved. J.R. was eventually introduced to a foster mother, R.L. J.R., who was now 15, was happy and felt safe at her new foster home. She described her foster mother as a wonderful person. J.R. lived in foster care for nearly three months from October through December of 1990.
- [32] While she resided in foster care a social worker arranged for occasional telephone calls and meetings between J.R. and her father. I accept J.R.'s evidence that on these occasions her father relentlessly engaged in belittling and berating her which upset her deeply. W.F.M. persisted in chastising her in a very angry manner, accusing her of destroying her life and shaming her family. On one of these visits, J.D.M., who was now in a relationship with W.F.M., offered to drive J.R. back to her foster home because J.R. was so visibly and emotionally distressed by her interaction with her father. This was the last occasion on which J.R. saw either J.D.M. or her father.
- [33] J.R. had no prior knowledge of the financial details of foster care arrangements until the social worker informed her after the expiry of three months of foster care that "the term was up". I accept E.S.'s evidence that although she was under considerable financial pressure she paid for the foster care for a three month term in the hopes that it would provide some stability for J.R. However, E.S. could not afford to pay for more than the initial three months. Both her foster mother and the social worker informed J.R. of this. Even though W.F.M. could afford to purchase a time share in Mexico at the time, he flatly refused to pay for any part of J.R.'s foster care.
- [34] J.R., who was clearly a troubled teen, was very sad because she did not want to leave her foster home. She understood that social services would take her back to her father's house as he had legal custody. She desperately did not want to return and be subjected to her father's abuse. She decided to leave foster care before the term ended so that she would not be found and returned to her father. She left her foster home immediately after Christmas. E.S. did not know where J.R. was and her efforts to find her daughter proved futile. As far as E.S. was aware W.F.M. made no efforts to locate J.R. At this point J.R., at the age of 15, did not consider returning to live with E.S. because there had been little contact with her while she had been in foster care. J.R. believed she and her mother were estranged.

- [35] After she left her foster home, J.R. dropped out of school in fear that if she attended school, social services would find her and return her to her father.
- [36] J.R. then spent the next few weeks, in the heart of winter, searching for places to sleep and scrounging food. She described sleeping in a car, a bank vestibule, and a garage and being cold and hungry. She then moved into a room in a house in Richmond for a short period of time. The living arrangement she described was unsafe and inappropriate for a teenage girl. This was a very difficult time for her as she was not working and she had no money.
- [37] Eventually J.R. obtained a minimum wage job and she found more suitable accommodation. From the ages of 16 to 18 she worked as a waitress, living paycheque to paycheque. From the ages of 17 to 20 J.R. lived with her boyfriend T.T.
- [38] At the age of 17 J.R., with some encouragement from T.T., initiated a rapprochement with E.S. E.S. and J.R. eventually reconciled and they have maintained a positive and healthy mother-daughter relationship. They talk on the phone frequently, meet for lunch and celebrate holiday dinners together.
- [39] W.F.M. had set up a trust account for J.R. when she was a young child. Gift monies and family allowance payments had been deposited into this account. When she was 17, W.F.M. arranged to have the interest statements delivered to J.R. so she would be responsible for paying the income tax. At age 20 or 21 J.R. telephoned her father and asked him to transfer the funds in the trust account to her name. J.R. asked her father to meet with her at the bank, but he refused to do so and told her that there was no reason for him to meet with her. However, W.F.M. ultimately arranged for her to receive the \$3,500 in the account. Other than arranging for the transfer of these funds and perhaps making some contribution to the cost of her piano lessons and orthodontics while she lived with E.S., W.F.M. never provided any financial support to or for J.R. after she left his home at the age of 13.
- [40] The only other contact J.R. had with her father after she left foster care was the occasional telephone call from him in or around her birthday. In the telephone calls or messages he left W.F.M. typically berated his daughter by calling her a failure and accusing her of having thrown her life away. He never expressed affection nor made any offers of financial assistance. J.R. received a telephone message from W.F.M. around the time of her 19th birthday. She was very upset at the negative sentiments he voiced in his message. While J.R. may have expressed concern to E.S. about E.S. having passed along her telephone number, the evidence I prefer does not establish that J.R. never asked E.S. to convey to W.F.M. that J.R. did not want a relationship with him.
- [41] I accept J.R.'s evidence, which was corroborated by T.T., that she found W.F.M.'s telephone calls profoundly distressing and demeaning. I find J.R.'s version of the telephone calls reliable; her evidence accords with the preponderance of probabilities a reasonable person would recognise in the circumstances of the case.

- [42] The last time her father telephoned J.R. was around the time of her 23rd birthday. The last time she actually spoke to him was sometime before that.
- [43] J.R. was not invited to her father and J.D.M's wedding.
- [44] J.R. attended her father's funeral. She altered her vacation plans to do so.
- [45] It is uncontroversial that in the period that she did attend school, J.R. excelled academically. J.R. who took piano lessons until she ran away as a young teen, progressed to a Grade 8 level in the Royal Conservatory of Music. Sadly, because of the path her life took when she was a young teen, J.R. never graduated from high school nor did she ever complete a high school equivalency program.
- [46] In 1994 J.R. took two night school courses and later that year she enrolled in Trend College. She attended college full-time for nine months and obtained her qualifications as a legal secretary. She financed her education through some savings and student loans.
- [47] I accept J.R.'s evidence, as corroborated by E.S., that W.F.M. often promised J.R. that he would pay for her and her brother's post-secondary education. As events transpired, he made no contribution whatsoever to J.R.'s education.
- [48] J.N.M. attended university and obtained an engineering degree. According to J.D.M., W.F.M. paid at least some portion of J.N.M.'s tuition and also assisted him with the purchase of a car and motorbike. While J.R. has remained on friendly terms with her brother, who now lives in California, they are not close.
- [49] I turn to consider the personal circumstances of each of J.R. and J.D.M.
- J.R.
- [50] J.R. is currently 41 years old. She married R.R. in November 1999 and they have one son, who was born on April 20, 2000.
- [51] As an adult, J.R. suffers from chronic musculoskeletal pain. Although there was some suggestion that it is attributable to the heavy work she performed as a child, the evidence on this point was not well-developed. In the absence of any medical evidence I am unable to make any findings on her current condition or whether it is linked to the physical labour she was required to carry out while growing up.
- [52] J.R. worked for five years as a legal secretary. She then assisted her husband with his hot tub business for awhile. In 2004, she purchased a fish and chips restaurant and operated it for three years. In 2007, she sold that restaurant and resumed working in her husband's business until 2010. Since 2010, she has been a full-time homemaker.
- [53] J.R. and her husband have a comfortable lifestyle. She is not in financial need.

[54] The evidence establishes that J.R.'s total income was \$10,450 in 2012, \$7,436.96 in 2013, and \$10,452.71 in 2014. Her husband continues to operate his hot tub business. His total income was \$288,224 in 2012, \$8,485 in 2013, and \$6,472 in 2014. His average income from 2009 to 2014 was \$85,551.

[55] There was no evidence of the date of death values of J.R.'s assets.

[56] The 2015 assessed value of the residence owned by J.R. and her husband was \$1.7 million. The property is encumbered with a \$330,000 mortgage and a \$70,000 secured line of credit.

[57] As of 2014, the value of the investments that J.R. held in her own name was comprised of:

Questrade

Margin Account \$59,364.61

TFSA Investments \$5,536.80

RRSP \$17,186.15

\$82,087.56

CIBC Wood Gundy

RRSP \$162,481.89

Investments \$161,188.95

TFSA - \$5,250.00

\$328,920.84

RBC

Investments

\$140,523.97

Total

\$551,532.37

[58] As of the date of trial, the total value of J.R.'s investments had decreased by approximately \$60,000.

J.D.M.

[59] J.D.M., who was 61 years old as of trial, was married to W.F.M. for eight years. Her prior two marriages ended in divorce. She has two adult children, a son and a daughter, from her first marriage.

- [60] J.D.M. trained as a registered nurse and she obtained a health care management degree from BCIT in the 1980's. W.F.M. paid for J.D.M.'s tuition for a Master of Arts in leadership in healthcare program which she enrolled in shortly before W.F.M. passed away. She completed the program, and since December 2015, has been working full-time as a clinic's operation manager at a local hospital. She currently earns an annual salary of \$91,000. Her annual income in 2012 was \$59,266.
- [61] J.D.M. and W.F.M. were companions from 1989 until 2001, when he decided to pursue a relationship with another woman. They resumed their relationship in 2003. As I mentioned, they were married on May 8, 2004. They did not cohabit prior to their marriage.
- [62] J.D.M.'s uncontroverted evidence is that she and W.F.M. had a happy marriage. They travelled two to three times per year including taking Mexican and Caribbean cruises and trips to England. After they married, J.D.M. who was working full-time as a registered nurse, agreed to change her employment status to that of a casual employee in order to permit her the flexibility to travel with W.F.M.
- [63] According to J.D.M., during their marriage, W.F.M. had a close relationship with her adult children and grandchildren. He assisted her daughter financially. Notably, when he was seeing J.D.M. in the 1990's W.F.M. told his friend and accountant Herman Godefroy, that he wanted no involvement in raising her children. J.D.M. never permitted W.F.M. any opportunity to discipline her children. She described W.F.M. as dogmatic and admitted in cross-examination that he was "extremely authoritarian".
- [64] J.D.M. and W.F.M. kept separate finances during the marriage. J.D.M. contributed \$600 per month towards living expenses and W.F.M. paid the bills. W.F.M. was very private about his financial affairs. J.D.M. did not know what his income was and she had no knowledge about his investments. They never discussed their respective wills or testamentary intentions.
- [65] J.D.M.'s last will that she executed in 2005 bequeaths some personal effects to W.F.M. However her will leaves the entirety of the residue of her estate to her children if they survive her.
- [66] J.D.M. brought no assets into the marriage and she did not contribute to the purchase or maintenance of the Property where she has resided since 2004. In 2011, W.F.M. transferred the title of the Property into joint tenancy with J.D.M. Title passed to her by right of survivorship upon W.F.M.'s death. The only evidence on the valuation of the Property is the B.C. Assessment value of \$732,000 in 2012. As of W.F.M.'s death, the Property was not subject to any financial encumbrances. On W.F.M.'s death J.D.M. also became the sole owner of the vehicle that they had purchased for \$28,000 in 2012. She received life insurance proceeds of \$102,000 and was the sole designated beneficiary of W.F.M.'s RRSP that had a market value of \$141,756.
- [67] J.D.M. owned no other significant assets as of the date of W.F.M.'s death.

- [68] As a result of W.F.M.'s death, J.D.M. receives a widow's pension of \$530 per month and a spousal pension of \$2,500 per month from W.F.M.'s former employer. Therefore, she has entitlement to pension benefits of \$36,360 annually for her lifetime. Upon her retirement she will also be eligible for her own modest pension from the Fraser Health Authority.

THE will

- [69] As mentioned, the Will leaves W.F.M.'s entire estate to J.D.M. if she survived him for 30 days. In the event that she failed to survive him for the stipulated 30 days, which did not occur, the Will directs that the estate be divided equally between J.N.M. and each of J.D.M.'s two children.
- [70] W.F.M. did not provide any written statement as to his reasons for disinheriting J.R., either in the Will or at all.
- [71] Mr. Boisvert, the notary public who prepared and witnessed W.F.M.'s Will, testified at trial. I will return to his evidence later in these Reasons.

THE estate

- [72] The date of W.F.M.'s death is the appropriate date at which to assess the value of the estate: *Graham v. Chalmers*, 2010 BCCA 13 at para. 35; and *Eckford v. Vanderwood*, 2014 BCCA 261.
- [73] The gross value of the estate declared for probate purposes was \$625,556.75, with debts declared at \$40,423.28. However, it is common ground that there was incomplete disclosure by J.D.M. when she was acting as executrix.
- [74] According to the testimony of Jackie Sewell, a representative of Solus Trust, the value of the estate as of August 22, 2012 is estimated at approximately \$775,000. This valuation, which I accept, was not disputed by J.D.M.
- [75] The current value of the estate is estimated at \$760,000. Solus Trust calculates that J.D.M. owes an additional \$30,000 to the estate.
- [76] The date of death valuation of the estate and the current value of the estate cannot be determined with exactitude because J.D.M. has not yet provided a full accounting.
- [77] There are expenses properly payable by the estate in the form of probate fees, remuneration of Solus Trust, and legal fees relating to the administration of the estate, and the like. While I have not been provided with the precise calculations, based upon my review of the accounting provided, it is reasonable to estimate that the net value of the estate will be in the range of \$725,000-\$735,000.
- [78] I am mindful of the caution expressed by the Court of Appeal in *Graham*, with respect to awarding a variation in the form of a specific bequest. However, in light of the disputed accounting issues, counsel agreed that in this case if the Court varied the Will, a variation in the form of a specific bequest would be appropriate. I share that view.

position of THE parties

- [79] The plaintiff submits that W.F.M. did not act as a judicious parent in disinheriting her. Accordingly, she seeks a variation such that she receives a specific bequest of \$500,000.
- [80] J.D.M. counters with the submission that she is the deserving recipient of the entirety of her late husband's estate and that there is no principled basis to support a variation in J.R.'s favour. Her overarching submission is that any moral duty W.F.M. may have owed J.R. was negated by her twenty year estrangement from her father which she alleges was created and perpetuated by J.R.

legal framework

- [81] The key provision of the WVA is s. 2. That section provides that if, in the Court's opinion, a will fails to make adequate provision for the proper maintenance and support of the testator's spouse or children, the Court is empowered, in its discretion, to vary the will to make provision that it considers adequate, just and equitable in the circumstances.
- [82] *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, is the governing authority in British Columbia on the WVA. McLachlin J., as she then was, writing for the Court, articulated the relevant considerations and principles that animate the application of the WVA. The fundamental approach is anchored in her observation that "[t]he search is for contemporary justice": *Tataryn*, at 815. The courts must read the WVA "in light of modern values and expectations" and "are not necessarily bound by the views and awards made in earlier times": *Tataryn*, at 814-815.
- [83] The Court in *Tataryn* stated that the determination of whether a will makes adequate provision and, if not, what provision would be adequate, just and equitable, are "two sides of the same coin": *Tataryn*, at 814.
- [84] The primary statutory objective of the WVA is the adequate, just, and equitable provision for a testator's spouse and children. As identified in *Tataryn*, the other protected interest is testamentary autonomy. However, testamentary freedom must 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 WVA: *McBride v. Voth*, 2010 BCSC 443 at para. 125. The Court of Appeal in *Chan v. Lee (Estate)*, 2004 BCCA 644 at para. 43 affirmed that courts should not approach the WVA as a means "to right all the perceived wrongs of the past" or "to improve upon the degree of fairness of a will" if the testator has met his obligations under the WVA.
- [85] In addressing the adequacy of the testamentary provision, Madam Justice McLachlin clarified that the question of whether a testator has acted as a judicious parent or spouse is measured by an objective standard, assessed in light of current societal legal norms and moral norms. As outlined in *Tataryn*, legal norms are the obligations that the law would impose upon the testator during his or her life if the question of provision for a claimant's

spouse or child were to arise. A testator's moral duties are grounded in "society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards": *Tataryn*, at 820-821.

- [86] The concept of adequate provision is a flexible notion which turns on the particular circumstances of the case: *Dunsdon v. Dunsdon*, 2012 BCSC 1274, at para. 131. *Tataryn* expressly acknowledged that moral duties are more susceptible to being viewed differently by different people because there is no clear legal standard by which to judge such duties: *Tataryn*, at 822. However, the analysis in *Tataryn* underscores that the court must apply an approach that accords with a contemporary view of marital and parental obligations.
- [87] The Court in *Tataryn* recognized that the foregoing assessment necessarily involved the balancing of competing claims, and held that where the size of the estate permits, all moral and legal claims should be satisfied. Where prioritization is necessary, generally, claims that would have been recognized as legal obligations during a testator's lifetime take precedence over moral claims. The court must also weigh the competing moral claims and assign each its priority according to their relative strength: *Tataryn*, at 823. The Court recognized that such an analysis would produce a range of options for the distribution of assets which might be considered appropriate in the circumstances. The court should only make an order to vary a will where the testator's chosen distribution falls outside of this range.
- [88] The jurisprudence also establishes that in determining whether the will-maker has fulfilled his or her obligations, the court may consider gifts made outside the will. If a will-maker has made inter vivos gifts to individuals other than the claimant or has arranged his affairs to facilitate a passing of assets to such individuals outside the framework of the will, the moral duty to a claimant may be intensified: *Wong v. Soo*, 2015 BCSC 1741. Conversely and depending on the circumstances, a will-maker's moral duty may be diminished or negated entirely where he or she has made gifts to a claimant either before death or in consequence of it: *Dunsdon* at para. 185; *Doucette* at para. 84.
- [89] The legislated scheme of intestate succession does not serve as a guidepost in determining whether adequate provision has been made under the WVA: *Wilson* at para. 379; *Hall v. Korejwo*, 2011 BCCA 355 at para. 46.
- [90] In reference to the moral claim of independent adult children, the Court in *Tataryn* observed that while they "may be more tenuous" than that of a spouse or dependent child, some provision for adult independent children should be made if the size of the estate permits and in the absence of circumstances that would negate the existence of such an obligation: *Tataryn*, at 822-823.
- [91] In *Dunsdon* Madam Justice Ballance conveniently summarized the considerations that inform the existence and strength of a testator's moral duty to independent children:
- [134] In the post-*Tataryn* era, the following considerations have been accepted as informing the existence and strength of a testator's moral duty to independent children:

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

(See *Clucas v. Clucas Estate*, [1999] B.C.J. No. 436; *McBride v. McBride Estate*, 2010 BCSC 443; *Yee v. Yu*, 2010 BCSC 1464; *Wilson v. Lougheed*, 2010 BCSC 1868)

[92] In assessing the strength of the legal and moral obligations owed by a testator to a second spouse, the court will consider factors such as:

- (a) The length of the marriage;
- (b) When and how the testator's assets were acquired;
- (c) The contribution of the second spouse;
- (d) How family assets would be divided under the applicable family legislation upon marriage breakdown;
- (e) Competing obligations with the children from the first marriage;
- (f) Financial circumstances of the spouse;
- (g) The size of the estate; and
- (h) The magnitude of assets passing to the spouse outside of the estate in consequence of other pre-death transactions undertaken by the testator.

[See *Wong v. Soo*, 2015 BCSC 1741 at paras. 73-82; *Saugestad v. Saugestad*, 2006 BCSC 1839, varied on different grounds 2008 BCCA 38; *Mawdsley v. Meshen*, 2010 BCSC 1099, affirmed 2012 BCCA 91; *Ciarniello v. James* 2016 BCSC 1699]

analysis

- [93] The question that lies at the heart of this dispute is whether, having regard to all the circumstances, W.F.M.'s testamentary disposition for J.R. falls within the range of adequate provision that would have been made by a judicious parent. The adequacy of provision is to be assessed objectively by reference to contemporary community standards and in accordance with society's reasonable expectations. The circumstances existing at W.F.M.'s death, as well as those that were reasonably foreseeable to him at that time, are to be taken into consideration in determining whether W.F.M. made adequate provision for J.R.: Eckford at para. 53. It is agreed that J.R. does not have any legal claim against the estate. This case turns on a determination of the nature and extent of the moral obligation W.F.M. may have owed J.R. and whether it has been negated.
- [94] Applying the Tataryn principles, the size of the estate in this case is such that some provision should be made for J.R. unless there are circumstances that would negate such an obligation. In its assessment, the Court must balance any moral claim owed to J.R. with J.D.M.'s competing moral and legal claims.
- [95] It is common ground that the WVA is not intended as a tool to award compensation to an aggrieved claimant for past mistreatment. However, the Court of Appeal in *Sawchuk v. MacKenzie Estate*, 2000 BCCA 10, and in *Doucette v. McInnes*, 2009 BCCA 393 endorsed the notion that, where a parent has treated a child unfairly, a judicious parent, would recognize an enhanced moral duty to provide for that child.
- [96] In this case I find that W.F.M.'s sexual conduct, his emotional abuse, his failure to provide for J.R. when she was in foster care, the lack of any material financial or emotional support during her formative years after she left his home and the absence of any genuine effort to repair their fractured relationship informs the assessment of the strength of his moral duty to J. R. W.F.M.'s mistreatment of his daughter from a young age, had a profoundly negative emotional impact upon her. His abdication of his parental responsibilities and his stubborn refusal to assist and protect J.R. when she was a vulnerable and troubled teen in foster care dramatically impacted the course of her life. The loss of a safe and stable home and the termination of her high school education had lasting and adverse consequences for J.R. Even though J.R. had excelled academically and W.F.M. had made promises to her regarding a university education, the opportunity to attend university was foreclosed to J.R, largely if not exclusively, in consequence of his abusive and deficient parental conduct.
- [97] As I referred to earlier, W.F.M. made no material financial contribution to J.R.'s support after the age of 13. In *Lukie v. Helgason* (1976), 1 B.C.L.R. 1 (C.A.), Taggart J.A. expressed the view that the failure to provide support to a child during his or her minority is alone an insufficient basis for granting relief under the WVA. However, he affirmed that the history of the relations between the testator and the claimant is evidence the court may consider along with all the other circumstances in deciding whether relief should be granted. The more recent jurisprudence supports the view that the failure of a parent to financially contribute

to a child's support during his or her minority is a factor in assessing his or her claim (See: *Martin v. McIlwain Estate* (1992), 66 B.C.L.R. (2d) 195 (S.C.); *Thatcher v. Bowling*, 1992 CarswellBC 105 (S.C.)). The court in *Pattie v. Standal Estate* (1997), 42 B.C.L.R. (3d) 211 (S.C.) at para. 26, found that, in the absence of special circumstances, such a failure creates a basis upon which an adult child may advance a moral claim to a share of his or her parent's estate.

[98] I turn next to consider whether W.F.M.'s moral duty to J.R. has been negated.

[99] When faced with a long period of estrangement as in this case, the court will inquire into the role played by the testator. If the estrangement is largely the fault of the testator, it will likely not negate a testator's moral duty to an adult child. *McBride*, at para.132; *Gray v. Nantel*, 2002 BCCA 94 at paras. 17-21. The Court's summary at para.132 of *McBride* is of particular relevance to this case:

[132] In the early development of the caselaw, a long period of separation, abandonment or estrangement between a child and testator was frequently, though not invariably, taken to militate against finding a moral duty to an adult child. The modern judicial trend indicates that the court will enquire into the role played by the testator in the estrangement or relationship breakdown, and where it is seen to be largely the fault of or at the insistence of a testator, it will likely not negate a testator's moral duty, and may even enhance it. The weight of the authorities also indicates that the court may discern a moral duty as a means of rectifying the testator's childhood neglect of the children: *Gray v. Gray Estate*, 2002 BCCA 94, 98 B.C.L.R. (3d) 389, *Doucette v. Clarke*, 2007 BCSC 1021, 35 E.T.R. (3d) 98 [*Doucette*]; *Tomlyn v. Kennedy*, 2008 BCSC 331, 38 E.T.R. (3d) 289; *Wilson v. Watson*, 2006 BCSC 53, 21 E.T.R. (3d) 285; *P.S.G. v G.G. Estate*, 2005 BCSC 1855; *Ryan*.

[100] J.D.M. contends that J.R. "created and perpetuated" the estrangement with her father. For the reasons that follow, I reject this submission.

[101] As I referred to earlier after her parents separated, J.R. lived with her father from the ages of 9 to 13. J.D.M. points out that during this period W.F.M. worked shift work and that he was embroiled in an acrimonious matrimonial dispute. While acknowledging that W.F.M. "made some mistakes" during this time and should have modified his behaviour, J.D.M. says that it is regrettable that J.R. "made no effort to assist him with modifying his behaviour" and that J.R. "denied him the opportunity to learn and change". I reject this ill-considered submission. An inherent power imbalance existed between this young girl and her father. W.F.M. occupied a position of trust of the highest order. J.R. at a young age had been subjected to a very difficult home life and she should have been able to turn to her father for comfort and protection. Instead, he profoundly betrayed that trust for his own selfish ends.

[102] I have carefully reviewed the three cards that W.F.M. sent to J.R., dated July 1, 1989, February 14, 1990 and December 25, 1990. J.R., a young teen at the time, was unable to recall how or when she received them.

[103] Although W.F.M. professes some expressions of love in the cards, J.R. as a young teen, did not perceive his expressions as genuine. She reasonably interpreted her father's messages as implying that she was at fault for the circumstances in which she found herself. While he purported to offer assistance he refused to pay for her foster care. The cards reveal no insight into his role in the unfolding of her sad story. In all the circumstances, I find that the cards are insufficient to support a notion that J.R., who had been terrified of her father, reasonably should have initiated some form of contact or reconciliation with her father. In response to a question in cross-examination as to why as a young teen-ager she never called her father for help, J.R. answered:

I was - I would not call my father. I was too scared to call my father. He was extraordinarily cheap. He never paid for anything after the age of 13, so he wouldn't pay my mother for child support while I lived there, so I really had no reason to believe and, you know, he fought her on everything. I had no reason to believe that he was going to help me.

[104] The evidence establishes that for a period of time after she left foster care W.F.M. called J.R. on her birthday; sometimes he spoke to her and sometimes he left messages. However, as I mentioned, the evidence supports a finding that these were vindictive and demeaning calls in which W.F.M. berated her. The calls ceased when J.R. was about 23 years old. When she was in her early 20's, W.F.M. flatly refused to meet with J.R. at the bank when she offered him the opportunity to do so. After her son was born in 2000, E.S. suggested that W.F.M. telephone J.R. at E.S.'s home during their Christmas celebration. He declined to do so and told E.S. that he preferred to "not open that can of worms".

[105] J.R. provided a compelling explanation for not contacting her father as an adult. As I outlined above, he had failed to provide her with any material or emotional support in her formative teen years. J.R. persuasively explained that, she never reached out to her father as an adult because she never, at any time, received any indication that her father had changed. There had been nothing positive or healthy in their telephone interactions and J.R. reasonably believed that her father had no genuine interest in making amends or pursuing any reconciliation. Nothing in his conduct would have led her to believe otherwise.

[106] In all the circumstances, I conclude that W.F.M.'s moral duty to J.R. has not been negated. It was W.F.M. that bore the responsibility for the estrangement with his daughter that ensued after she left foster care. It was his mistreatment of J.R. and the voluntary abdication of his parental obligations that caused the fracture of the father-daughter relationship. The onus for repairing the relationship and seeking any form of reconciliation with his daughter rested squarely with W.F.M. His blameworthy conduct enhanced his moral duty to her.

[107] J.D.M. opposes any variation in reliance on the principles enunciated in *Bell v. Roy Estate* (1993), 75 B.C.L.R. (2d) 213 (C.A.), and *Kelly v. Baker* (1996), 82 B.C.A.C. 150 (C.A.). For the reasons that follow, I am of the view that those principles do not assist her.

- [108] In *Bell* the Court of Appeal held that where financial need is not a factor, if the court finds that a testator's reasons purporting to explain a disinheritance are valid and rational, the testator's moral duty in respect to that child is negated; the burden then shifts to the plaintiff to show that the will-maker's reasons were false or unwarranted: *McBride* at para. 138. In a subsequent decision, *Kelly* the Court of Appeal reaffirmed the requirement that the testator's reasons must be valid, meaning factually true, and rational, in the sense there is a logical connection between the reasons and the act of disinheritance. The Court went on to conclude that the contents of the testator's reasons for disinheriting a child need not be justifiable.
- [109] In *McBride*, Madam Justice Ballance observed that it is difficult to reconcile the analytical framework endorsed in *Bell* and *Kelly* with the fundamental principles of *Tataryn*, that a testator's moral duty must be assessed objectively from a standpoint of what a judicious parent would do in the circumstances, by reference to contemporary community standards. Notably, McLachlin J., as she then was, cited *Bell* as an example of a case where a testator's moral duty was seen to be negated, but she did not clarify whether the propositions formulated by Goldie J.A. were sound.
- [110] As I noted in *Hancock v. Hancock*, 2014 BCSC 2398, the analytical approach and commentary in various authorities from this Court, decided subsequent to *McBride*, underscore the uncertainty regarding the apparent incompatibility between the analytical framework articulated in *Bell* and *Kelly*, on the one hand, and *Tataryn* on the other. This question has engendered significant judicial commentary: *Brown v. Ferguson*, 2010 BCSC 1890 at para. 115; *LeVierge v. Whieldon*, 2010 BCSC 1462; *Schipper v. De Lange*, 2010 BCSC 1067; *Holvenstot v. Holvenstot*, 2012 BCSC 923; *McEwan v. McEwan*, 2014 BCSC 916; *Kong v. Kong*, 2015 BCSC 1669.
- [111] Notably, however, in *Hall v. Hall*, 2011 BCCA 354, the Court of Appeal applied the analytical approach endorsed in *Kelly*, without any critical commentary. As is the case with *Kelly* and *Bell*, it is difficult, in light of the particular facts, to challenge the result in *Hall*. However, based on comments in the more recent jurisprudence from the Court of Appeal in *Scott-Polson v. Lupkoski*, 2013 BCCA 428, I respectfully observe that it may be an unsettled question in this province as to whether the formulation of the analytical approach applied in *Kelly* can be reconciled with the core principles of *Tataryn* that mandate an objective assessment of a testator's moral duty. In *Scott-Polson*, Madam Justice Newbury, in obiter dicta, instructively remarked at para. 43:
- [43] The legally significant finding in terms of the trial judge's reasoning, however, was that the explanation given in her will was "valid and rational" (see para. 76), or "genuine and valid" (see para. 83). I agree with the trial judge's comment at para. 84 that this was a "relevant circumstance". Given this, and given the fact that the plaintiffs did not pursue their cross appeal, it is not necessary for us to consider whether it is in law determinative of what a fair and judicious parent would have thought appropriate. (See *McBride v. Voth*, *supra*, at paras. 135-42.) That issue, if it is seen as one, must await another day.

[Emphasis in original.]

[112] In my respectful view, there are sound reasons for raising the question of whether the analytical approach endorsed in *Kelly* is reconcilable with *Tataryn*. This is particularly apparent in the absence of the clear culpability of a claimant for his or her estrangement from a testator. However, in the final analysis, this Court, in accordance with the principle of *stare decisis*, must continue to apply the analytical framework articulated in *Kelly* and *Bell*.

[113] The *Bell/Kelly* model of inquiry and the subsequent appellate authorities that have applied that analysis are predicated on an express statement having been made by a testator explaining the reasons for disinheriting a claimant and/or for the distributions made in a will. The subsequent authorities have held that the court is not limited to considering only those reasons expressed by the testator in the will itself. The court may examine all properly admissible evidence to determine the reliably ascertainable reasons for a will-maker's testamentary dispositions. However, the pertinent authorities do not endorse the court "conducting an open-ended roving inquiry of the circumstantial evidence to ascertain whether a testator's plan has a valid and rational basis": *Wilson v. Loughheed Estate*, 2010 BCSC 1868 at para. 397; *Hancock* at para. 63.

[114] As I noted earlier, there is neither a statement in the Will of W.F.M.'s reasons for disinheriting J.R. nor any evidence of any written statement regarding those intentions. I will next consider whether his reasons are reliably ascertainable on the evidence.

[115] On July 14, 2011, W.F.M. met with a notary public, Mr. Boisvert, to prepare the Will. Mr. Boisvert testified at trial and his file was tendered in evidence. His file includes a standard wills information form that includes his contemporaneous notes.

[116] In the section entitled "CHILDREN", Mr. Boisvert made the following notation beneath J.R.'s name:

No contact in last 10 or more years.

[117] In the section that references the exclusion of a spouse or child Mr. Boisvert has written "J.". However the section entitled "Reason" is left blank. Under the heading "WVA NOTES" Mr. Boisvert made the following notation :

To write a letter. Had not written it prior to signing will but said he would do it.

[118] In response to his question about J.R., W.F.M. told Mr. Boisvert that it had been ten or more years since he had either spoken to her or seen her.

[119] Mr. Boisvert urged W.F.M. to set out his reasons for disinheriting J.R. in a letter or memorandum. He asked W.F.M. to provide it to him at their next meeting so it would be included as part of his will. As I have indicated, W.F.M. never did so.

- [120] Mr. Godefroy, his accountant, raised the subject of estate planning with W.F.M. on an annual basis every income tax season. Sometime in mid-1990 W.F.M. told Mr. Godefroy that he wanted "to take J.R. out of his will". He did not provide any reasons to Mr. Godefroy for his decision. Mr. Godefroy emphasized to W.F.M. that it was important that he include his reasons in his will. W.F.M.'s response was to the effect that "the courts will decide".
- [121] Sometime after its execution, W.F.M. told Mr. Godefroy that he had made the Will and had left everything to J.D.M. Mr. Godefroy asked him if he had explained in writing why his children were excluded. In their discussions the only statement made by W.F.M. about J.R. was that he had not seen her for some time. However, W.F.M. never once mentioned why he had not seen her. Nor did he ascribe any fault to her for the lack of contact. Mr. Godefroy advised W.F.M. to seriously consider preparing a memorandum explaining the provisions in his will. W.F.M. did not follow his advice.
- [122] W.F.M.'s lack of contact with his daughter, in itself, constitutes the sole reason for the disinheritance. Despite being urged by two professional advisors to do so W.F.M. failed to make any statement in writing regarding his reasons for disinheriting his daughter. Within the Bell/Kelly analytical framework, I conclude that, although it was true that there had been an estrangement, W.F.M.'s reason for the disinheritance was not rational in the sense of having a logical connection to the act of disinheritance. It was W.F.M.'s conduct, not that of J.R., that lie at the root of their estrangement. It cannot fairly be said that J.R. was morally blameworthy, such as would be the case where a child neglects or ignores a parent. The estrangement in this case was not the fault or at the insistence of J.R. Rather J.R.'s lack of effort to re-establish contact with her father was a reasonable reaction to his mistreatment of her. In these circumstances it would be most unjust if the court were to conclude that their estrangement attenuated W.F.M.'s moral duty to J.R.
- [123] Viewing the facts of this case objectively, as of the date of his death, a judicious parent in W.F.M.'s circumstances would have recognized a moral obligation to J.R. In weighing the totality of the evidence and, having regard to the relevant legal principles, I conclude that W.F.M. did not discharge the moral obligation of a contemporary judicious parent. J.R. has established that her disinheritance was not warranted.
- [124] At some point after their divorce and after he had married J.D.M., W.F.M. told E.S. that he intended to leave his estate to his children. This evidence may be interpreted as demonstrating that W.F.M., at least to some degree, recognized he owed a moral duty to J.R. Although relevant in the overall analysis, this is by no means determinative of whether this Court should exercise its discretion to vary W.F.M.'s testamentary disposition. Indeed, as the Court observed in Dunsdon, in the vast majority of cases when a court finds a testamentary disposition to be inadequate and varies a will, it does so in the face of a will-maker's contrary intention: Dunsdon, at para. 190.
- [125] The comments of Donald J.A. in Gray in addressing the moral claim of an adult child in a WVA claim are apposite in this case:

- [17] I cannot accept that a child so neglected for his first 18 years and then treated shabbily during a brief reconciliation can be said to forfeit the moral claims to a share in his father's estate by abandoning any further effort to establish a relationship. The fault in this sad story lies with the father and, in my opinion, the onus to seek further reconciliation was on his shoulders. The testator gave the appellant virtually nothing in an emotional or material way; the will was his last opportunity to do right by his son.
- [126] Like the will-maker in Gray, this was W.F.M.'s last opportunity to do right by his daughter. He failed to do so.
- [127] I turn to consider W.F.M.'s legal and moral duty to J.D.M. under the Tataryn framework.
- [128] The Court in Tataryn suggested that guidance considering a testator's legal obligations while he or she was alive may be found in the Divorce Act, R.S.C. 1985, c. 3 (2 Supp.), family property legislation or the law of constructive trust. In Tataryn however, the court did not conduct a detailed examination or make specific findings concerning property or how much support Mrs. Tataryn would have been entitled to in the event of a separation: *Kish v. Sobchak Estate*, 2016 BCCA 65.
- [129] The judicial approach in British Columbia following Tataryn has been to determine the legal obligations to a spouse by considering the spouses' entitlement on a notional separation immediately prior to death: *Ciarniello* at para. 70. However, Madam Justice Newbury affirmed in *Kish* that the analysis of a deceased spouse's legal obligation need not be detailed or exact given the difficulty of drawing a direct analogy between the consequences of a marriage breakdown - which leaves both spouses with needs and obligations - and the death of a spouse. She underscored at para. 49 that an action under the WVA "should not normally become a proxy for divorce proceedings, complete with elaborate features and special rules applicable to a family law trial".
- [130] In this case it is common ground that the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] should govern the analysis because that was the legislative scheme in force at W.F.M.'s death.
- [131] The FRA provides in s. 56(2) that each spouse is entitled to an undivided half interest in family assets (absent a marriage agreement to the contrary) upon the happening of one of the events enumerated in s. 56(1), commonly known as a "triggering event". Sections 58 and 59 define family assets. Pursuant to s. 65, if the division of property between spouses under the prescribed equal division would be unfair, having regard to the factors enumerated in s. 65(1), the court may order the property be divided into shares fixed by the court.
- [132] The first step in the analysis is to assume a notional separation of the parties immediately before death. I note that the evidence on what constituted a family asset was not well-developed. For purposes of the analysis, I have assumed that the Property with an assessed value of \$732,00, W.F.M.'s RRSP valued at approximately \$140,000 and the car valued at \$28,000 were family assets. Given the imperfect evidence I have also included W.F.M.'s

investments, bank accounts and interest in his numbered company with a total value of approximately \$775,000 as family assets. W.F.M. had liabilities of approximately \$35,000 as of the date of his death. The total value of the family assets less liabilities equals \$1,640,000. A notional equal division of those assets is assessed at \$820,000.

- [133] In a case such as this involving an eight year marriage and where there was no contribution by J.D.M. toward the acquisition of the family assets in all likelihood that there would have been a substantial reapportionment in W.F.M.'s favour on marital breakdown. She brought no assets into the marriage. As I mentioned, in 2011 W.F.M. transferred the title of the Property into joint tenancy with J.D.M. If one includes the benefits and assets J.D.M. received outside the provisions of the Will, at W.F.M.'s death she held property with a gross value of approximately \$1,000,000. In all the circumstances, she received in excess of her notional legal entitlement to family assets. Given the income J.D.M. was earning in 2012 it is doubtful that, on a family law analysis, an order for spousal support in her favour would have been made. In any case, on W.F.M.'s death J.D.M. became entitled to annual pension payments of \$36,360 for her lifetime.
- [134] I conclude that W.F.M.'s legal duty to J.D.M. under the Tataryn framework was amply discharged through the provision W.F.M. made for her outside of the framework of his Will.
- [135] In its search for contemporary justice, this Court must balance W.F.M.'s legal and moral obligations to J.D.M. with W.F.M.'s moral obligations to J.R. Turning to the moral obligation owing to J.D.M. by the "judicious person" in W.F.M.'s position, more factors come into play. A critical one is J.R.'s competing moral claim. In Tataryn the Court stated in many cases, that the moral claims of a spouse will take precedence over those of an adult child. In this case however, the marriage was neither long nor traditional and J.D.M. and W.F.M. kept separate finances. Given how they chose to conduct their affairs J.D.M. could not have reasonably expected to receive the entirety of W.F.M.'s estate. On the other hand, I conclude that viewed through the lens of "modern values and expectations" W.F.M.'s wish that J.D.M. inherit his estate is an important consideration in weighing the competing moral claims: Kish at para. 63.

disposition

- [136] In weighing the totality of the evidence in light of the animating legal principles, I conclude that W.F.M. failed to discharge his moral obligations to J.R. and failed to make adequate provision for her in his will. His disinheritance of her falls outside the range of options a contemporary judicious parent would have considered appropriate in the circumstances.
- [137] Although I have considered the relative financial circumstances of J.R. and J.D.M. as of the date of W.F.M.'s death, the assessment of his residual moral duty owed to J.R. is not amenable to an arithmetical calculation.

[138] It is not the function of this Court to re-write W.F.M.'s Will. Rather, having due regard to testamentary autonomy, it is incumbent on the court to vary the Will, only to the extent required to provide the justice to J.R. that the Will failed to achieve, commensurate with W.F.M.'s moral obligation to her.

[139] Based on the foregoing, I calculate that a variation that provides the bequest of \$250,000 to J.R. is an adequate, just, and equitable provision.

[140] There will be an order to vary the Will accordingly.

costs

[141] If the parties are unable to agree on the appropriate costs order, they are at liberty to reserve a date through Supreme Court Scheduling to arrange a hearing date.

"The Honourable Madam Justice Dardi"

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