

CANADA / JUDGMENT

Kuzyk v. Czajkowski

2016 BCSC 1109

COURT

Supreme Court of British Columbia

DECIDED

16 June 2016

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2016 BCSC 1109 Kuzyk v. Czajkowski

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kuzyk v. Czajkowski,

2016 BCSC 1109

Date: 20160616

Docket: 99005

Registry: Kelowna

Between:

Olga Kuzyk

Plaintiff

And

Catherine Czajkowski (also known as Cathy Czajkowski) and Maria Salt,

Executors of the Estate of Michaylo Kuzyk also known as Mike Kuzyk, Deceased, Peter Kuzyk,
Catherine Czajkowski, also known as Cathy Czajkowski, and Maria Salt

Defendants

Before: The Honourable Mr. Justice G.P. Weatherill

Reasons for Judgment

Counsel for the Plaintiff:

H. Taylor; E. Cram

Counsel for the Defendants,

Peter Kuzyk, Catherine Czajkowski and Maria Salt:

J.W. Robinson

Counsel for the Defendants,

Catherine Czajkowski and Maria Salt, Executors of the Estate of Michaylo Kuzyk

J. Metherell

Place and Date of Trial/Hearing:

Kelowna, B.C.

March 29 - April 1, April 4 - 8,

and April 14, 2016

Place and Date of Judgment:

Kelowna, B.C.

June 16, 2016

Introduction

- [1] This is an action pursuant to the Wills Variation Act, R.S.B.C. 1996, c. 490 [WVA]. It involves a mid-life second marriage ("Marriage") between Michaylo Kuzyk ("Deceased") and the plaintiff, Olga Kuzyk. Both parties have adult children from their previous marriages. This action also involves a prenuptial agreement the couple entered into before the Marriage (the "Pre-Nuptial Agreement"). Under the Pre-Nuptial Agreement, both parties agreed that their respective children would inherit the assets each owned prior to the Marriage, free from any claim by the other.
- [2] The Marriage was a "traditional" one. They were married for 24 years, including a 9 year period of separation.
- [3] The Deceased died on January 6, 2012, at the age of 83. His will left his entire estate to the three children of his first marriage and nothing to the plaintiff.
- [4] The defendants are the Deceased's three children. The defendant Catherine Czajkowski ("Catherine") is the eldest child. She is 62 years of age and is married to Dave Czajkowski ("Dave"). Catherine and Dave have two adult children in their 30's.
- [5] The defendant Maria Salt ("Maria") is the middle child and is 60 years of age. She is married to Ron Salt ("Ron"). Maria and Ron have two adult children in their 30's.
- [6] The defendant Peter Kuzyk ("Peter") is the Deceased's youngest child. He is 56 years of age and is married to Shelley Kuzyk ("Shelley"). Peter and Shelley have four adult children, also in their 30's.

- [7] The plaintiff is 83 years of aged and retired. Her children from her first marriage are Shirley, now age 62 ("Shirley"), and Randall, now age 58 ("Randall").
- [8] The plaintiff and the Deceased married on February 20, 1988, in a ceremony on the Deceased's farm, ten one-quarter sections of grain/cattle farm located in the hamlet of River Course, Alberta, south of Lloydminster ("Deceased's Farm"). At the time, the plaintiff was age 56 and the Deceased was age 59. Weeks before their marriage, they entered into the Pre-Nuptial Agreement.
- [9] In October 2006, the Deceased and the plaintiff retained Mr. Spelliscy, a Kelowna lawyer, to prepare new wills. The Deceased's Last Will and Testament ("Will") was signed on October 13, 2006. He named his daughters as executors and all three children as the sole beneficiaries of his estate.
- [10] The plaintiff sues under the WVA and pursuant to the principles of unjust enrichment and constructive trust. She seeks a significant portion of the Deceased's estate, claiming that he did not make adequate, just and equitable provision for her.
- [11] For the reasons that follow, the Deceased's Will is varied by making a payment to the plaintiff of \$150,000 out of the Deceased's estate.

Background

- [12] The plaintiff married her first husband, Myron Horon ("Myron"), in 1949. Shirley and Randall were the product of that union. The plaintiff and Myron lived near Lavoie, Alberta, a town east of Edmonton. They owned and farmed a quarter section grain farm (the "Lavoie Farm") from 1949 to 1973. Myron inherited the Lavoie Farm from his father.
- [13] It was a traditional relationship. Myron performed most of the farm work, and the plaintiff looked after the garden, the house, the yard, cooking and other domestic chores. In 1973, Myron retired and the couple moved into a home they had purchased in Vegreville, Alberta (the "Vegreville Home"). The Lavoie Farm was rented to another farmer on a crop sharing basis, with Myron and the plaintiff receiving 1/3 of the grain sales. The couple intended that on their passing, Randall would inherit the Lavoie Farm and Shirley would inherit the Vegreville Home.
- [14] The plaintiff worked as a full-time nursing assistant from 1973 to 1988. Myron died in 1982, after 32 years of marriage. The plaintiff continued to rent the Lavoie Farm and receive annual payments pursuant to the crop share agreement. The plaintiff was not wealthy, did not have much savings and lived a modest lifestyle.

- [15] The Deceased was born on April 7, 1929, into an Alberta farming family. He met and married his first wife, Flora, and together they raised Catherine, Maria and Peter on their mix grain and cattle farm. From a very early age, Catherine, Maria and Peter worked on the farm, doing whatever farming chores they were able to do to help their parents. By all accounts, it was a traditionally operated family farm, with everyone pitching in when required.
- [16] At age 17, Peter decided he would follow in his father's footsteps and become a full-time farmer. The Deceased was pleased that the farm could be passed down to another generation of Kuzyks.
- [17] Over the years, the farm grew in size, with the Deceased either purchasing or inheriting additional one-quarter sections of farm land.
- [18] Flora and the Deceased separated in 1983 and Flora moved to Lloydminster. Prior to the separation, Flora was fully involved in all aspects of the farm. She received two of ten one-quarter sections of farm land in the divorce settlement, which continue to be part of the land comprising the Deceased's Farm. She also received \$100,000 spousal support payable at \$1,000 per month, choosing to agree to this settlement because of the Deceased's intention that the defendants would inherit the farm.
- [19] On Flora's departure, Peter's wife Shelley assumed responsibility for the Deceased's house, yard, chickens and helping with the cattle and bookkeeping.
- [20] The plaintiff met the Deceased at a singles' dance in Vegreville in October 1987. They had a whirlwind romance and four months later decided to get married. At the Deceased's behest, the Pre-nuptial Agreement was prepared by his lawyer in Lloydminster, who arranged for independent legal advice for the plaintiff. Other than her involvement with Myron's estate she had no prior dealings with lawyers. She signed the Pre-Nuptial Agreement on January 27, 1988.
- [21] Once married, the plaintiff and Deceased lived together on the Deceased's Farm.
- [22] Prior to the Marriage, the plaintiff supported herself as a nursing assistant at a government of Alberta facility in Lloydminster, where she looked after the elderly and persons with dementia and other debilitating conditions. Her intention was to work to age 65 because she needed the income to support herself. Shortly after the Marriage, she gave up her job because the commute from the Defendant's Farm to work was two hours each way.
- [23] Following the Marriage the couple took to their traditional roles. The plaintiff performed domestic duties as a homemaker including cooking, cleaning and laundry. She also grew and maintained a large vegetable garden. Meanwhile, the Deceased and Peter ran the farm operations.
- [24] There is no debate that the plaintiff was very good to the Deceased and was an excellent homemaker. Peter had a good relationship with her and considered her his second mom.

- [25] However, there is controversy over how much farm work the plaintiff performed above her domestic chores. The Deceased's family dispute that the plaintiff participated in farm activities or helped with its operation. They did not need or expect the plaintiff to help with the farm operations because by then, Peter was effectively running the farm.
- [26] As the Deceased aged, his pace of work declined. By the late 1980's he was having trouble riding a tractor for extended periods and was otherwise slowing down. He discussed his impending retirement with Peter.
- [27] By 1987, Peter was performing the lion's share of the farming operations. He was splitting the net farm income on a 50/50 basis with the Deceased. By approximately 1989, Peter had completely taken over the farm operations, and paid the Deceased an agreed upon percentage of the crop and cattle proceeds.
- [28] At Peter's request, the Deceased continued as a presence on the farm until 1993, when he fully retired. The Deceased purchased a house in Lloydminster and moved there with the plaintiff. The Deceased continued to be interested in the farm operations and visited the farm every couple of weeks or so.
- [29] Over time, eight of the farm's ten quarter sections of land were transferred to Peter, his sisters and Flora. Two quarter sections remain in the Deceased's estate and continue to be an integral part of the Deceased's Farm. They are known as "Amen's Quarters" and are the subject of this action.
- [30] In the early 1990's, the Deceased began to show escalating signs of unusual behavior and paranoia. He accused the plaintiff of poisoning his food and acting against his financial interests.
- [31] On September 1, 1993, the Deceased threatened the plaintiff and demanded that she leave his Lloydminster house. She moved into her daughter's home the next day. She reported the incident to the RCMP, but did not wish to press charges and the matter was dropped.
- [32] In October 1993, the plaintiff rented an apartment in Lloydminster and lived separate and apart from the Deceased. No divorce proceedings were ever commenced.
- [33] In 1994, the Deceased sold his home in Lloydminster and moved to Kelowna into a home he had purchased.
- [34] The plaintiff and Deceased continued to communicate sporadically. In 2002, they reconciled after the plaintiff travelled to Kelowna to visit the Deceased. The cleanliness of the Deceased's Kelowna home was wanting and it was clear to the plaintiff that the Deceased was in need of her help. She cleaned his house and cooked for him. Shortly after that visit, the Deceased sold his Kelowna home, moved back to Lloydminster and into the plaintiff's apartment. The deceased paid the rent and some of the utilities. The plaintiff bought their groceries, clothes and paid other expenses. She did all the cooking, cleaning, laundry and other domestic activities.

- [35] In January 2005, the couple decided to move to Kelowna. The Deceased purchased a home (the "Sandalwood Home") and registered it in both names as joint tenants. The plaintiff provided no funds for its purchase but the Deceased nevertheless wanted it in both names. The plaintiff knew that if she survived the Deceased, she would become the sole owner of the Sandalwood Home and would be able to sell it or will it to her children as she saw fit. Completion of the purchase was on May 20, 2005. The Deceased and the plaintiff lived in the Sandalwood home until the Deceased's death.
- [36] As was their custom, the plaintiff continued to perform all daily domestic chores and looked after the Deceased, who by this time was in declining health. Living expenses, maintenance and other expenses were shared on an informal basis, but paid mostly by the Deceased.

The January 27, 1988 Pre-Nuptial Agreement

- [37] In early January 1988, the plaintiff received a letter from the Deceased's lawyer in Lloydminster enclosing the Pre-Nuptial Agreement, with instructions to take it to her own lawyer for review and signature. The letter stated:

Pursuant to instructions received from Mr. Kuzyk, we have prepared a draft Pre-Nuptial (sic) Agreement to be executed by yourself and Mr. Kuzyk.

This agreement must be signed by you in front of a lawyer outside of our office.

Assuming the terms of the draft agreement meet with your satisfaction, please notify our office as to the name of your solicitor and we will arrange for delivery of three copies of the agreement to him for your signature.

- [38] The plaintiff retained a Lloydminster lawyer named Mr. Neufeld. She met with Mr. Neufeld, reviewed the Pre-Nuptial Agreement and signed it without question or debate. She understood the intent was to document the agreement she and the Deceased made, that their respective assets would be kept separate and free from any claim by the other.
- [39] The plaintiff's recollection of the meeting with her lawyer is vague. She says she signed the Pre-Nuptial Agreement without giving it any thought or asking any questions. After it was signed, she says the Pre-Nuptial Agreement was never discussed or referred by either the Deceased or her.
- [40] The relevant portions of the Pre-Nuptial Agreement provide:

WHEREAS Kuzyk and Horon are about to enter into marriage with each other;

AND WHEREAS each party has significant assets and is fully advised and informed of the property, estate and prospects of the other party and each party has been fully advised and informed of his or her respective rights and liabilities against and to the other and to and in the property and estate of the other;

AND WHEREAS the parties hereto desire to fix and determine by this Agreement the rights that will accrue to the other and to accept the provisions of this Agreement in lieu and in full discharge and satisfaction of all rights which they may have to the property and estate of the other;

AND WHEREAS the parties acknowledge that neither is under any duress or undue influence of the other and that they are voluntarily entering into this Agreement

Ownership of Property

1. The parties agree and acknowledge that it is their intention to keep their respective estates separate and apart and that each party shall retain independent of any claim, right or demand of the other party all property of every kind, nature and description and wheresoever situate which is now owned or held or is in the future acquired by either party including but not limited to income earned from and increases in value of such property.
2. The parties agree and acknowledge that Kuzyk has no right, title or interest whatsoever in property of every nature and kind owned by Horon prior to the marriage or property acquired by Horon during the marriage including any increase in value of such property, any income earned from such property (including interest and dividend income) or the proceeds of the sale of such property.
3. The parties agree and acknowledge that Horon has no right, title or interest whatsoever in property of every nature and kind owned by Kuzyk prior to the marriage or property acquired by Kuzyk during the marriage including any increase in value of such property, any income earned from such property (including interest and dividend income) or the proceeds of the sale of such property.

Release of Rights in Each Others Estate

1. Kuzyk and Horon release each other from all claims and rights that he or she may have had or afterwards may acquire:
 - (a) In the estate of the other upon the other dying intestate whether by way of statutory allowance or right under the laws of any jurisdiction .
 - (b) Upon the death of the other, under the laws of any jurisdiction and in particular The Family Relief Act in force from time to time in the Province of Alberta, ;

General Provisions

2. No modification or waiver of any of the terms of this Agreement shall be valid unless in writing and executed with the same formality as this Agreement.
3. It is understood and agreed by Kuzyk and Horon that if any part, term or provision of this Agreement is determined by a court of competent jurisdiction to be unlawful or otherwise unenforceable by reason of conflict with any law applicable to them in the province where

made or where it is sought to be enforced, the validity of the remaining portions or provisions shall not be affected. The rights and obligations of Kuzyk and Horon shall be construed as if the contract did not contain that particular part, term or provision held to be invalid or unenforceable.

Independent Legal Advice

1. Kuzyk and Horon each acknowledge that each:
 - (a) has had independent legal advice, and;
 - (b) understands their respective rights and obligations under this Agreement, and;
 - (c) is signing this Agreement voluntarily.

Pre-Nuptial Agreement to Bind Estates

1. This Agreement shall enure to the benefit of and shall be binding upon Kuzyk and Horon, their respective heirs, executors, administrators and assigns.

[41] The Pre-Nuptial Agreement was signed by the Deceased and the plaintiff under seal.

[42] Attached to the Pre-Nuptial Agreement is an acknowledgment made pursuant to s. 37 of the Matrimonial Property Act of Alberta that the plaintiff signed in front of Mr. Neufeld on January 27, 1988. It stated:

"I, Olga Horon, of the Town of Vegreville, in the Province of Alberta, HEREBY ACKNOWLEDGE THAT:

1. I am executing this Agreement separate and apart from Mike Kuzyk.
2. I am aware of the provisions, nature and effect of this Agreement.
3. I am aware of possible future claims to property that I may have under The Matrimonial Property Act of the Province of Alberta, and I intend to waive and give up these claims to the extent necessary to give effect to this Agreement.
4. I am executing this Agreement freely and voluntarily without any compulsion on the part of MIKE KUZYSK. "

The Deceased's October 2006 Will

[43] Mr. Spelliscy was the Deceased's Kelowna lawyer who handled the purchase of the Sandalwood Home in May, 2005. In 2006, the Deceased arranged for the plaintiff and him to meet Mr. Spelliscy to have their wills prepared. The instructions they each gave to Mr. Spelliscy, in each other's presence, were that their respective estates were to pass to their respective children. Mr. Spelliscy recalls meeting with the plaintiff and the Deceased, and recalls the explicit instructions that what the Deceased owned was to go to his children and what the plaintiff owned was to go to her children. Mr. Spelliscy satisfied himself that,

despite the Marriage, both agreed to the arrangement. The plaintiff expressed no concerns about the Deceased's wishes to Mr. Spelliscy.

The Deceased's Health

- [44] The plaintiff brought the Deceased to see their Kelowna family doctor, Dr. Schriemer, on a regular basis as needed. Dr. Schriemer knew of and monitored the Deceased's medical conditions, including high blood pressure, diabetes and vascular dementia. He observed and tested the Deceased. He recalls the plaintiff taking a lead role in the visits and doing most of the talking. The Deceased was a man of few words, but never disagreed with the plaintiff. Dr. Schriemer observed that the plaintiff was a doting wife, concerned about the Deceased's health and looked after him very well. The Deceased was always well dressed and groomed and seemed happy. To Dr. Schriemer, the plaintiff and Deceased were a typical older immigrant couple, and he had no concerns that the plaintiff wasn't doing her best to look after the Deceased.
- [45] The various tests that Dr. Schriemer administered confirmed the Deceased's mental faculties were failing. Despite medications, his condition deteriorated over time. By February 2009, his vision, memory and cognition were at the point where Dr. Schreimer strongly recommended he no longer drive. The Superintendent of Motor Vehicles soon cancelled the Deceased's driver's licence.
- [46] In February 2009, the Deceased was formally diagnosed with dementia and early onset Parkinson's disease. The plaintiff became his full time caregiver. She did all the daily household chores, organized and drove the Deceased to his various appointments and to church. She organized his clothes, dressed and toileted him and polished his shoes. She took care of his daily needs. He became more and more dependent on her as he became more and more delusional.
- [47] In August 2009, the Deceased granted Catherine his power of attorney over his life decisions and finances.
- [48] Beginning in 2010, the Deceased's children became increasingly concerned that the Deceased's health was at the point where the plaintiff was having difficulty managing him. During visits to Kelowna in August 2010 and August 2011, they invited the plaintiff to consider moving with the Deceased back to Alberta, where they would both be closer to their respective families and where the Deceased's children would be better able to assist with his care.
- [49] The plaintiff refused their overtures, but left them the impression that she may be open to a move in the future.

Jenna Kuzyk's Wedding and Aftermath

- [50] Peter and Shelley's daughter Jenna was married in July 2011, on the Deceased's Farm. The plaintiff and the Deceased attended. While somewhat frail, the Deceased seemed to enjoy himself; he ate, danced, played cards and socialized. To those in attendance, he seemed to be functioning well given his age and infirmity.
- [51] The Deceased and the plaintiff stayed with Peter and Shelley the night of Jenna's wedding. The Deceased got up in the night and began rearranging pillows and other items. His behavior suggested to the Deceased's daughters that he had reached the stage in his life that a care home in Alberta should be strongly considered.
- [52] In the months following Jenna's wedding, the Deceased's physical health got significantly worse. His communications were reduced to short answers.
- [53] By November 2011, it was obvious to the Deceased's children that the plaintiff was having increasing difficulty with the Deceased's care. They took unilateral steps to move him to Alberta and informed the plaintiff that as the Deceased's attorney, Catherine was moving him into a care facility. Catherine and Maria had researched and found a suitable facility in Lloydminster, initiated the process and bought the required furnishings for his suite. The move date was to be in January 2012.
- [54] The plaintiff objected. She did not want to leave Kelowna, where she and the Deceased had developed a good social and church network. She was adamant that she should continue to look after the Deceased. She hired a lawyer to block the move.
- [55] Dr. Schriemer did not feel it was in the Deceased's best interests that he be placed in a care facility, because of how well the plaintiff seemed to be caring for him at home and managing his complex medical issues. From his observations, there were no signs of neglect or that the plaintiff was getting burned out or frustrated with having to care for the Deceased.
- [56] The plaintiff testified that she stayed by the Deceased's side and looked after his daily needs because "that was the role of the wife to do".
- [57] In December 2011, the Deceased's health took a turn for the worse. He was admitted to the Kelowna General Hospital on December 29, 2011. It was apparent that he was in his last days.
- [58] The Deceased's family gathered at the Kelowna General Hospital during the Deceased's final days. Shelley's sister Betty Jones, a resident of Kelowna, was in attendance and spoke with the plaintiff. During those communications the plaintiff is alleged to have stated that all she wanted was her house (meaning the Sandalwood Home). The plaintiff is also alleged to have stated that she would put a lien on the Deceased's Farm and make sure the Deceased's daughters did not get any farm rental income. The plaintiff denies making these statements.
- [59] The Deceased died in hospital on January 6, 2012.

- [60] Before he died, the Deceased expressed his desire that Amen's Quarters would be transferred to Peter.

The Deceased's Farm

- [61] The Deceased's Farm presently comprises ten one-quarter sections of land, mostly non-contiguous, located south of Lloydminster, Alberta. Six one-quarter sections are owned by Peter and Shelley as joint tenants. One one-quarter section is owned by Flora and another owned by Peter, Maria and Catherine.
- [62] Amen's Quarters are owned by the Deceased's estate.
- [63] Peter continues to farm all ten one-quarter sections of the Deceased's Farm. He pays his sisters and mother either rent or proceeds of grain sales, and pays rent to the Deceased's estate.
- [64] There is no plan to sell any of the properties or realize their value. The plan is that Peter's children, two of whom work on the Deceased's Farm, will inherit it.
- [65] All told, the farmland owned by Peter has a value of approximately \$2.2 million.
- [66] The value of Amen's Quarters is in dispute. They were appraised by licenced appraisers retained by the plaintiff and the defendants. The plaintiff's appraiser, Ms. Noble, appraised their value at \$1,024,000 as at March 9, 2015.
- [67] The defendant's appraiser, Mr. Chuck Taylor, appraised them as at January 4, 2016 at \$941,000 and as at January 6, 2012 (the date of the Deceased's death) at \$449,000.
- [68] Amen's Quarters grossed approximately \$70,000 last year in wheat and peas.

The Deceased's Estate

- [69] Depending on which valuation of Amen's Quarters is used, the Deceased's estate is currently worth between \$1.58 and \$1.66 Million Dollars. It is made up of cash/investments in various accounts totalling approximately \$638,900.00 and Amen's Quarters.

The Lavoie Farm

- [70] In September 1998, the plaintiff transferred the Lavoie Farm to herself and Randall as joint tenants. This was in accordance with her plan that Randall would inherit the Lavoie Farm on the plaintiff's passing. In 2013, Randall transferred his interest in the Lavoie Farm back to the plaintiff because he was having marital issues and did not want his spouse claiming an interest in the Lavoie Farm.

- [71] In 2014, Randall saw that farm values in the Lavoie area were increasing and determined that the Lavoie Farm should be sold. He discussed the idea with the plaintiff who agreed. Randall met with a prospective purchaser and very quickly agreed on a sale price. The sale proceeds of \$586,000 were placed in a joint account in the names of the plaintiff and Randall.
- [72] Those funds remain in that account and available to the plaintiff. Although the plan is that Randall is the beneficiary of those funds, he confirmed that the plaintiff would have access to them if needed.

The Plaintiff's Financial Circumstances

- [73] The plaintiff is 83 years of age and retired. She continues to reside in the Sandalwood Home, which passed to her by right of survivorship.
- [74] In the years since the Deceased's passing, the plaintiff's line 150 income has been as follows: \$26,376.96 in 2010, \$28,283.51 in 2011, \$19,896.10 in 2012, \$169,381.34 in 2014 (inclusive of capital gains of \$151,625) and \$30,496.45 in 2015.
- [75] The plaintiff receives a modest income consisting of a small work pension, CPP and OAP. Until this year, she received a portion of the net grain sale proceeds from the Lavoie Farm, but because it has now been sold, she will no longer receive that income. Going forward, her annual income is expected to be in the \$15,000 - \$20,000 range. In accordance with Myron's wishes, the proceeds of the sale of the Lavoie Farm were given to her son Randall. She has approximately \$200,000 in savings which she encroaches on to pay her bills.
- [76] During the years leading to the Marriage, and although the plaintiff worked full time, her expenses typically exceeded her income. She saved very little. Her intention was to work full time until age 65, because she couldn't afford to retire earlier.
- [77] In evidence are many of the records the plaintiff kept while cohabiting with the Deceased (February, 1988 - September, 1993 and 2002 - January, 2012). She recorded what she spent in meticulous detail. Save for the months that are missing, I have no doubt that these records track everything the plaintiff spent from her resources during the parties' cohabitation. In the scheme of things, they were quite modest.
- [78] Since the Deceased's passing on January 6, 2012, the plaintiff has lived the same lifestyle as she did previously. She agreed that she is frugal by nature and watches how she spends her money. She is not a spendthrift. She testified that "I don't spend much" and "I never spend more than I have to". That has always been her nature. She agrees she is living the way she wants and is not disappointed in her financial status. Her financial position has not significantly changed and she is able to live her normal and relatively comfortable life without depleting her savings. She has no financial need and in fact has travelled to the Ukraine and made financial gifts to her children since the Deceased's death.

The Defendants' Financial Circumstances

[79] The defendants all reside in Alberta.

[80] Their respective incomes and net worths at the time of the Deceased's death are:

- a) Peter's income was \$60,567 in 2010; \$74,012 in 2011; \$53,691 in 2012 and \$67,117 in 2013. Peter and Shelly's combined net worth was \$3,245,999, including pregnant capital gains and \$700,000 of farm equipment whose useful life is limited.
- b) Catherine's income was \$80,053 in 2010, \$85,536 in 2011, \$87,297 in 2012 and \$81,336 in 2013. Catherine and David's combined net worth was \$1,384,940.85, including pregnant capital gains.
- c) Maria's income was \$89,166 in 2010, \$90,922 in 2011, \$100,073 in 2012 and \$102,211 in 2013. Maria and Ron's combined net worth was \$2,296,445.19, including pregnant capital gains.

Legal Framework

Wills Variation Act

[81] Section 2 of the WVA 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.

[82] Subject to s. 2, a deceased is entitled to dispose of his or her estate in the manner he or she sees fit.

[83] The determination of whether or not adequate provision has been made involves a two-step process:

- a) in the court's opinion, did the Deceased's Will make adequate and proper provision for maintenance and support?
- b) if not, what would be adequate, just and equitable in the circumstances?

[84] The parties provided me with a detailed summary of the legal principles that apply to actions under the WVA.

[85] The leading case is *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 [Tataryn], where the Court provided a guide as to what "adequate, just and equitable" means in the circumstances of estate litigation. Firstly, the court must look at what, if any, legal obligations would have been imposed on the testator during his lifetime, including those to his spouse and children. Legal obligations may be determined by having regard to the deceased's duties under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), family property legislation and the law of

constructive trusts: *Tataryn* at 821. Specifically, the Court stated the following about legal obligations at 821(citing the British Columbia Law Reform Commission):

It follows that maintenance and property allocations which the law would support during the testator's lifetime should be reflected in the court's interpretation of what is "adequate, just and equitable in the circumstances" after the testator's death.

[86] The second consideration for the court is whether the testator has met his moral duties. These moral obligations are considered in terms of the contemporary community standards of what a judicious person would do in the circumstances. Moral obligations include consideration of a wide range of factors, and there is no clear legal standard by which to judge moral duties: *Tataryn* at 822. The Court stated at 822-823:

For example, most people would agree that although the law may not require a supporting spouse to make provision for a dependent spouse after his death, a strong moral obligation to do so exists if the size of the estate permits. Similarly, most people would agree that an adult dependent child is entitled to such consideration as the size of the estate and the testator's other obligations may allow. 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 [citations omitted].

[87] There are a wide range of options available on how competing claims can be balanced. I note the Court's direction at 823-824.

How are conflicting claims to be balanced against each other? Where the estate permits, all should be met. Where priorities must be considered, it seems to me that claims which would have been recognized during the testator's life -- i.e., claims based upon not only moral obligation but legal obligations -- should generally take precedence over moral claims. As between moral claims, some may be stronger than others. It falls to the court to weigh the strength of each claim and assign to each its proper priority. In doing this, one should take into account the important changes consequent upon the death of the testator. There is no longer any need to provide for the deceased and reasonable expectations following upon death may not be the same as in the event of a separation during lifetime. 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.

I add this. 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.

Issues

[88] The issues are:

1. Did the Deceased make adequate provision for the plaintiff's proper maintenance and support?
2. If not, what provision should this Court order that would be adequate, just and equitable in the circumstances?

The Plaintiff's Position

- [89] The plaintiff submits that she was a loving and devoted spouse, who sacrificed her own financial well-being to care for and support the Deceased during 24 years of marriage. She provided farm, homemaking and nursing services.
- [90] Although the Deceased retired in 1993, the plaintiff did not. She continued her 'job' as homemaker for the Deceased until 1993 when they separated, and then from 2002 until his death.
- [91] In the last six years of his life, the plaintiff was involved in all aspects of the Deceased's medical care, including managing his diabetes. She stayed by his side because it was her "duty" to do so as his wife. She never complained and never asked for help.
- [92] In the last three years of the Deceased's life in particular, she provided the best level of care possible, managing the Deceased's physical and cognitive complications, including severe dementia. Her care allowed him to remain at home in Kelowna.
- [93] This case is about weighing competing claims between the plaintiff and the Deceased's three adult and independent children. The plaintiff has modest assets. The defendants have significant assets.
- [94] The plaintiff submits that the Pre-Nuptial Agreement should be discounted or not considered. At the time it was signed, she had no knowledge of the Deceased's assets, and it never occurred to her to ask. She also had no knowledge of the Alberta legislation referenced in the document and has no recall of what, if anything, was explained to her by her lawyer before she signed it. Although she did have a general sense that the purpose of the Pre-Nuptial Agreement was to confirm that she and the Deceased would keep their own assets, there was no prior financial disclosure. The plaintiff cannot waive claims to property when she didn't know what the Deceased's property was. Further, the plaintiff was unfamiliar with lawyers and the legal process; she was afraid when she met her lawyer. The whole process was foreign to her and she did not really understand her rights.

- [95] Although the plaintiff and the Deceased kept their assets separate, their marriage was a traditional one in every sense. When they married in 1988, the plaintiff was an independent and self-supporting woman of modest means. The Deceased built up his estate through his farming efforts, which the plaintiff supported and contributed to from the Marriage until the Deceased's retirement. The Deceased's farming enterprise would not have been nearly as successful without her contribution.
- [96] The Deceased's failure to provide for her in his Will was a breach of his legal and moral obligations to her, as outlined in *Tataryn*. It is not a viable option for the Court to approve a disposition that substantially prefers the Deceased's independent adult children's moral claims over those of the plaintiff, who was a long term, caring and dedicated spouse: *Bridger v. Bridger Estate*, 2006 BCCA 230 at para. 20; *Picketts v. Hall (Estate)*, 2009 BCCA 329 at para. 62.
- [97] By making no provision for the plaintiff in his Will, the Deceased acted outside the range of testamentary autonomy entitled to deference: *Brown v. Terins*, 2016 BCSC 42 at para. 56.
- [98] Under the Divorce Act and the Family Relations Act, R.S.B.C. 1996, c. 128, the plaintiff would have been entitled to spousal support and at least a 50% share of the family assets, had the parties separated.
- [99] The plaintiff argues that Amen's Quarters are family assets within the meaning of s. 58 of the Family Relations Act, because the income derived from them was used for a family purpose. Further, she argues that she worked on the Deceased's Farm from the Marriage to the Deceased's retirement in 1993, and thereafter money derived from the farm was used for family purposes. She says that her years of unpaid homemaking, care and farm services allowed the Deceased to preserve Amen's Quarters for his estate.
- [100] The legal duty owed by the Deceased is in addition to the strong moral obligation he owed her to make provision for her as his dependent spouse. The plaintiff submits that the Deceased had a duty to ensure that she could live independently and comfortably for the remainder of her life.
- [101] The plaintiff submits that a just and equitable distribution of the estate would provide that she receive one-half of the Deceased's estate valued as at the date of trial, in addition to the Sandalwood Home she received through survivorship. The Will should be varied accordingly.
- [102] The plaintiff also relies on the principles of unjust enrichment and constructive trust. She argues the Deceased was unjustly enriched and she is entitled to a remedy on his death because he left nothing to her in his Will and he can no longer make restitution to her: *McMillan v. Johnson (Estate)*, 2011 BCCA 48.

[103] Likewise, the plaintiff argues that the homemaking and farming services she provided without payment allowed the Deceased to carry on farming operations, which Amen's Quarters were an integral part of, resulting in financial savings to him.

[104] Imposing a constructive trust is appropriate, she says, because the plaintiff's farm services were directly tied to the Deceased's farming operations. Further, she states that the nursing care she provided resulted in direct savings to the Deceased, allowing him to retain the farm lands in a rapidly increasing real estate market. A monetary remedy on a "value received" basis may not be adequate to compensate the plaintiff for the Deceased's enrichment. It would be unjust, she says, to deny her the benefit of the increased value of Amen's Quarters, which have increased by some \$575,000 since his death.

The Defendants' Position

[105] This case is about the Deceased's wishes that the farm and wealth he and his family built should go to his children.

[106] The Pre-Nuptial Agreement provides a complete defence to the plaintiff's claims. Even without it, the Deceased's legal obligation to the plaintiff is modest because:

- a) substantially all the Deceased's wealth was acquired before he married the plaintiff;
- b) after he retired from farming in 1993, his wealth grew only passively with no input or help from the plaintiff;
- c) had the plaintiff and Deceased been separated prior to his death and the plaintiff was not caring for him, 80% of the Deceased's income would have been used to pay for long-term care pursuant to the Continuing Care Fees Regulation, B.C. Reg. 33/97, which would have meant the plaintiff would have more available income than the Deceased; and
- d) given the plaintiff's age and life expectancy of eight years, she would only have a time-limited need for spousal support in any event.

[107] The defendants were raised on the Deceased's farm where, for forty years, their parents worked hard to grow it into what it is today. From a very early age, the defendants worked the fields, fed the cattle and performed whatever work they could to assist their parents.

[108] The Deceased wanted to preserve the family farm for his children. When the Deceased decided to marry the plaintiff in 1988, he put his mind to the family farm and his other assets, with the plaintiff in full agreement, to ensure his children would inherit what he had built.

[109] The plaintiff had her own family and wanted to preserve her assets for them as well. Together they entered into a binding Pre-Nuptial Agreement on the understanding that "what's mine is mine, and what's yours is yours". The Pre-Nuptial Agreement is not unfair. The Deceased agreed to and did provide for the plaintiff during the time they cohabited.

- [110] From the outset of their marriage, they settled on their respective roles: the Deceased would continue to work the family farm and provide for the plaintiff, and the plaintiff would be the homemaker. They maintained those roles throughout their relationship.
- [111] In accordance with their agreement, they kept their financial affairs separate from beginning to end.
- [112] The Deceased retired from farm life in 1993, when the couple moved to Lloydminster. The plaintiff accepted that the Deceased was at retirement age and did not return to work, accepting the life of a retired couple.
- [113] The plaintiff was able to support herself during the nine years that she was separated from the Deceased. When they reconciled in 2002, the Deceased resumed his role as the provider, paying the majority of their living expenses, and the plaintiff resumed her role as the homemaker. To ensure his legal and moral obligations to the plaintiff were met, the Deceased registered the Sandalwood Home that he purchased with his assets into joint tenancy.
- [114] Throughout their relationship, the plaintiff and Deceased maintained their original agreement that their estates would be inherited by their respective families, free from any claim by the other.
- [115] The Deceased's declining health towards the end of his life was not unexpected. The defendants concede that the plaintiff cared for the Deceased in a routine and normal manner, as expected of spouses of their generation.
- [116] The plaintiff seeks improperly, unfairly and in breach of the Pre-Nuptial Agreement to turn the homemaker role she undertook when they married (including her role as his caregiver) into a substantial claim against the Deceased's estate.
- [117] Any legal or moral duty the Deceased may have owed the plaintiff was satisfied by giving her the Sandalwood Home on survivorship.
- [118] In all the circumstances, the Deceased arranged his affairs within the range of outcomes a "judicious testator" might reach. His wishes that the family farm and wealth he acquired should go to his children who helped him grow it should be honoured.

Discussion

- [119] The plaintiff seeks to have this Court re-write the Will to leave her one-half of the Deceased's estate, on the basis that he failed to make adequate provision for her proper maintenance and support within the meaning of s. 2 of the WVA.

- [120] If the plaintiff has not been sufficiently provided for, then this Court must order "what is adequate, just and equitable": *Tataryn* at 814. The WVA did not take away testamentary autonomy; it simply limited it to ensure that spouses and children are sufficiently provided for: *Tataryn* at 815.
- [121] Each case is specific to its facts. As stated in *Tataryn* at 814, "[t]he generosity of the language suggests that the legislature was attempting to craft a formula which would permit the courts to make orders which are just in the specific circumstances and in light of contemporary standards." The search is for "contemporary justice" and "fairness" in each case.
- [122] It is important to note that the decision in *Tataryn* does not require the court to consider what the plaintiff would have been entitled to if she separated from the Deceased before he died, by looking to the Divorce Act, the Family Relations Act and the law of constructive trust. To the contrary, it stated that legal obligations may be found in that legislation.
- [123] In considering the Deceased's legal and moral obligations to the plaintiff and whether his Will made adequate provision for her, the court may consider inter vivos gifts (including interests that pass through the right of survivorship): *DeLeeuw v. DeLeeuw*, 2003 BCSC 1472.
- [124] The two separate interests that s. 2 of the WVA seeks to protect are the adequate provision for the plaintiff and the Deceased's children on the one hand, and testamentary autonomy on the other. If these interests conflict, the court can consider whether the Deceased's wishes as set out in his Will are "within the range of testamentary autonomy entitled to deference": *Saugestad v. Saugestad*, 2008 BCCA 38 at para. 39. Any variation of the Will must be limited to the extent required to make adequate provision: *Tataryn* at 823-824.
- [125] Counsel provided me with numerous cases involving s. 2 of the WVA, each of which turned on their particular facts. The theme that emerges from all these cases is "fairness" and what is "just" in the circumstances of each case.
- [126] An important consideration in determining what is "fair" and "just" is what the plaintiff and Deceased themselves viewed as fair. This consideration requires an assessment of the plaintiff's credibility.
- [127] Although I found the plaintiff's evidence on non-controversial matters generally credible, she tended to embellish her evidence on matters in dispute, presumably in an effort to assist her case. Examples discussed below include: i) the circumstances of signing the Pre-Nuptial Agreement; ii) the amount of farm work she performed from the Marriage to 1993; iii) the circumstances surrounding the execution of the Will; iv) the amount of care the Deceased required during the later years of his life; and v) the Sandalwood Home.
- [128] Her exaggerations made it difficult for me to accept other portions of her evidence.

[129] On the other hand, I found the evidence provided by the defendants, their spouses and Flora credible and I accept it. They all gave their evidence in a straightforward and thoughtful manner.

[130] In reaching my conclusions, I make the following findings of fact:

- a) The plaintiff and Deceased met when they were both in their 50's and after each had prior marriages, children from those marriages and had acquired and built up assets from those marriages.
- b) After dating for a short time, the plaintiff and Deceased decided to get married, but both wanted the assets they had each acquired kept separate and to be passed along to their respective children on their passing. The plaintiff agreed that she did not want the Deceased to inherit her assets if she predeceased him. Likewise, the Deceased did not want the plaintiff to inherit his assets if he predeceased her.
- i. The circumstances surrounding the Pre-Nuptial Agreement
- c) Although the plaintiff admits signing the Pre-Nuptial Agreement, she says that she didn't understand it and didn't know what assets the Deceased had at the time. She was cross-examined at length on the circumstances of the preparation and signing the Pre-Nuptial Agreement. She was successfully impeached. The answers she gave during her examinations for discovery, which I accept over her testimony at trial, persuade me that the plaintiff knew exactly what the Pre-Nuptial Agreement was intended to do and agreed to its terms.
- d) I do not accept her suggestion that she was scared or intimidated when the Pre-Nuptial Agreement was signed. The plaintiff and Deceased wanted to marry each other but wanted an agreement in place that would ensure that the assets each brought into the marriage would be protected from any claims by the other or the other's family on death.
- e) I find that on January 27, 1988, when the Pre-Nuptial Agreement was signed, the plaintiff and the Deceased each gave up any right or interest in each other's property or assets, or increase in value of their respective property or assets. That was the agreement they each made. I do not accept that the plaintiff did not understand the purpose of the Pre-Nuptial Agreement and its consequences.
- f) Although the plaintiff testified that the terms of the Pre-Nuptial Agreement were not discussed after the Marriage, there is no evidence that the parties did not live and conduct their affairs in accordance with its terms. Indeed, the evidence is to the contrary. The Deceased and the plaintiff retained Mr. Spelliscy in 2006 to update their respective wills and the agreement between them that "what's mine is mine and what's yours is yours" was confirmed. I reject the plaintiff's evidence that she does not have a very clear recollection of her meetings with Mr. Spelliscy nor having had any discussions with the Deceased in advance of their wills being prepared. I find that she knew that the Deceased wanted to leave his estate to his children, that the plaintiff wanted to leave her estate to her children, and

that they agreed to respect each other's wishes.

- g) I find that the plaintiff was content with the Pre-Nuptial Agreement because she wanted to ensure her children received her assets and she was capable of living independently as she had done in the years after Myron passed away and before the Marriage.
- h) The parties did everything correctly to accomplish their goal by use of the Pre-Nuptial Agreement.

ii. The amount of farm work the plaintiff performed

- i) There is controversy over the amount the plaintiff did on the farm. Peter, Marie and Catherine testified that save for maintaining a very organized home, the plaintiff did very little on the farm, leaving the vast majority of the work to the Deceased and Peter. The plaintiff testified that she helped with many farm activities including gopher control, bringing meals to Peter and the Deceased in the fields, helping with the cattle, etc.
- j) Where the evidence conflicts, I prefer the evidence of Peter, Catherine and Marie over the plaintiff's. I find that the plaintiff's position that she provided most of the meals during spring planting and fall harvest was incorrect. While I am satisfied that the plaintiff was a good wife for the Deceased and maintained the household and garden for the five years she lived on the Farm, I find that she overstated and embellished her involvement and role in other activities, including farm operations. I find that she made very little contribution to the farm operations.

iii. The circumstances surrounding the execution of the Will

- k) In October 2006, when the Deceased provided instructions to Mr. Spelliscy to prepare his Will, the plaintiff was present and confirmed that agreement that "what's mine is mine and what's yours is yours" to Mr. Spelliscy. The agreement was as set out in the Pre-Nuptial Agreement and remained on the Deceased's death. The plaintiff knew that the Deceased intended to leave his entire estate to his children and leave nothing to her in his Will, and she never objected.

iv. The amount of care the Deceased required during the latter years of his life.

- l) The Deceased and the plaintiff provided for each other in the traditional sense. The Deceased provided a home and farm income, and paid the farm expenses and the majority of the couple's living expenses. The plaintiff maintained and cleaned the Deceased's home, cooked the meals and did other domestic chores.
- m) I have no doubt that the plaintiff's neighbour's and children's description of her as a caring, loving and hard working person is accurate. I accept that she was an excellent homemaker in every respect and that she took her role as the Deceased's wife seriously. The evidence is clear that the plaintiff and the Deceased enjoyed each other's company and relied on each other as partners.

- n) I accept that the plaintiff has a strong sense of community and enjoyed social gatherings in Kelowna. She was strongly protective of the Deceased and his well-being. I have no doubt that she provided the best care she could and did not want the Deceased moved into a long-term care home. She catered to his needs and rarely complained.
- o) She also testified that she looked after the Deceased because she loved him and that was her role as his wife. There were no other reasons. I accept that both the plaintiff and the Deceased were private people who kept their health issues to themselves and would have been embarrassed to share some of the deceased's issues (incontinence for example) with others, including the Deceased's children.
- p) I accept that the Deceased's physical and mental health began to significantly deteriorate in the 2010 time frame and that in the last two years of his life, he relied on the plaintiff quite heavily. I find that this was especially so in the last 6 - 10 months of his life.
- q) When asked by the Deceased's children if they could help financially with caring for the Deceased, the plaintiff always declined stating that he was no bother and was good company for her. She also declined the Deceased's children's invitation to move them back to Alberta so they could help with the Deceased's care, stating she didn't want to move and that she was able to manage the Deceased's needs.
- v. The Sandalwood Home
- r) The Deceased purchased the Sandalwood Home from his resources exclusively and had it registered in both names as joint tenants. On the Deceased's death, the plaintiff became its sole owner. She also became the owner of all its furnishings and appliances. The plaintiff was surprised but grateful that the Deceased had the Sandalwood Home registered in her name because it gave her security and she could pass it to her children on her death. She knew she was benefiting by the Deceased's actions. Later in life, if she needed long term care, she knew she had the option to cover the costs.
- s) The plaintiff led evidence of purchases and improvements she made for the Sandalwood Home. As previously mentioned, the plaintiff was meticulous in logging the money she spent. Despite her evidence, I find that throughout their cohabitation, the Deceased paid the lion's share of the couple's expenses. I find that in the scheme of things, the plaintiff's financial contribution was minimal.
- t) I accept the evidence that the plaintiff stated upon the Deceased's death that all she wanted was the Sandalwood Home. I find that the reason she said this is that, having lived with the Deceased over the years and understanding the family dynamics and knowing the agreement she made with the Deceased before the Marriage, she knew that she had no moral claim to the Deceased's assets.

Issue # 1: Did the Deceased make adequate provision for the plaintiff's proper maintenance and support?

- [131] The answer to the question of whether, in the circumstances of this case, the Deceased made adequate provision for the plaintiff's proper maintenance and support, will follow a consideration of the Deceased's legal and moral obligations to the plaintiff that arose through their relationship. I will consider the Pre-Nuptial Agreement, their respective contributions to the Marriage and the care the plaintiff provided in the last few years of the Deceased's life, interpreted in light of modern values and expectations.
- [132] Throughout their relationship, the plaintiff knew and accepted that the Deceased intended to leave his estate to his children. Indeed, during the Deceased's final days, the plaintiff acknowledged this agreement when she stated, as I find she did, that all she wanted was the Sandalwood Home.
- [133] But that does not end the matter. An important consideration is the level of care she gave the Deceased, especially in the last two to three years of his life (February 2009 - Dec 2012).
- [134] The defendants say that this care is not worthy of a WVA claim. They argue that the plaintiff has many years of experience looking after the elderly and patients with dementia and Parkinson's, as this is how she was employed from the early 1970's to March 1988. Further, she knew going into the Marriage that there was a reasonable possibility that she would have to look after the Deceased in his later years, in particular because he was six years older. She expected that they would grow old together and that she would take care of the Deceased if needed, as she was fully equipped by her work experience to do that. She expected she would stand by him through better or worse. In exchange, the Deceased gifted the Sandalwood Home to her and otherwise provided for her financially throughout the years they were together.
- [135] Indeed, after the Deceased's diagnosis of severe dementia, the defendants would phone her routinely to ask how their father was doing, and she would routinely say that he was no trouble and that she was able to manage. She never complained that the Deceased was a burden.
- [136] I am satisfied that throughout the Marriage, the plaintiff and the Deceased understood and conducted their affairs in accordance with the Pre-Nuptial Agreement. The assets the plaintiff brought into the Marriage would remain hers, the assets the Deceased brought into the Marriage would remain his and neither would claim nor would make a claim against each other's assets.
- [137] Following his retirement, the Deceased did not increase his wealth to any significant degree or acquire any significant assets. His assets were the same as they were at the time of the Marriage and any increase in value was passive.

[138] From my observations of the plaintiff during her testimony and from the evidence in general, she is a meticulous, strong and capable person who would ensure that her best interests were protected at all times. If she felt she had any sort of legal claim to the Deceased's estate or had any other concerns about the Deceased leaving his estate to his children, she would have mentioned them to both the Deceased and Mr. Spelliscy.

[139] The plaintiff argues that Amen's Quarters would be a family asset under s. 58 of the Family Relations Act. Had the parties separated, Amen's Quarters may have been held to have been a family asset under the Family Relations Act. However, in my view it is probable that in the circumstances of this case there would have been a "fairness" reapportionment in favor of the Deceased, with him receiving most, if not all, of their value.

i. The Pre-Nuptial Agreement

[140] I do not agree that the Pre-Nuptial Agreement ought to be set aside. On the evidence, the agreement was not unconscionable. I find that the plaintiff and Deceased put their minds to the fact that the Marriage was their second. They each had accumulated assets from their prior lives and had children from their first marriages. They both wanted to ensure their children would be protected and that their respective estates passed to them free of any claim by the other or the other's family. The plaintiff made an informed decision and accepted the agreement's terms. In my view, there is nothing about the Pre-Nuptial Agreement that was unconscionable.

[141] Likewise, I do not agree the Pre-Nuptial Agreement should be set aside for material non-disclosure. I do not accept the plaintiff's evidence that she did not know what assets the Deceased had before the Marriage. I find that she would have known the nature and extent of the Deceased's farm and that it had grown over the years through the Deceased's and his family's efforts. In my view, the cases relied upon by the plaintiff are distinguishable on their facts. These include *Ewachniuk v. Ewachniuk*, 2000 BCSC 986, *Akkor v. Roulston*, 2009 BCSC 258, and *Rick v. Brandsema*, 2009 SCC 10.

[142] I find that the Pre-Nuptial Agreement was a fair bargain when it was signed and remained a fair bargain after. Indeed, the plaintiff agreed that if she predeceased the Deceased, she would not want him having any entitlement to her estate whatsoever. She reiterated that "what is mine is mine, and what is yours is yours".

ii. The Deceased's legal obligation to the plaintiff

[143] The Deceased's legal obligation to the plaintiff while he was alive is founded on the Divorce Act, the Family Relations Act and the principles of unjust enrichment and constructive trust. I accept that the plaintiff and the Deceased were partners from February 1988 to September 1993, and from 2002 until the Deceased's death on January 6, 2012. Each contributed to the other's well-being during this period.

- [144] However, their partnership was governed by their overriding mutual agreement, as documented in the Pre-Nuptial Agreement and later confirmed in the Will, that their assets would be kept separate from the partnership and passed down to their respective children.
- [145] On the facts of this case, I find that the Pre-Nuptial Agreement requires more than passing consideration. It was the agreement that governed their lives and is what they both considered was fair.
- [146] Nevertheless, the plaintiff did resume her cohabitation with the Deceased in 2002 on the expectation that he would support her, which he continued to do until his death.
- [147] I agree that the Pre-Nuptial Agreement does not deal with claims to spousal support, does not waive the WVA (which would not be binding on the court in any event) and does not waive claims founded in unjust enrichment or constructive trust.
- [148] The Sandalwood home is partial satisfaction of the Deceased's legal obligation to the plaintiff. When the Deceased purchased the Sandalwood Home and told the plaintiff he would register it in both names as joint tenants, she was grateful. She knew then that she was financially secure in the event of the Deceased's passing.
- [149] However, I find that the Deceased owed a legal obligation to provide for the plaintiff's support for the balance of her life and while she remained in the Sandalwood home, particularly in the context of their traditional relationship. I view this obligation as akin to spousal support. I also believe a modest amount will satisfy the Deceased's moral obligation, as discussed below.

iii. The Deceased's moral obligation to the plaintiff

- [150] Moral obligations arise from society's reasonable expectations of what a judicious person would do in similar circumstances as the Deceased, having regard to contemporary community standards.
- [151] The plaintiff and Deceased were married for 24 years, broken up with a 9 year period of separation between 1993 and 2002. Throughout both periods of cohabitation and separation, they kept their financial lives separate. Each honoured the Pre-Nuptial Agreement. It is how they conscientiously lived their lives.
- [152] The plaintiff relies on the analysis in *Steernberg v. Steernberg*, 2006 BCSC 1672 [Steernberg], at para 79-82:
- [79] There are a number of reasons why I have concluded that the Court's analysis in *Hartshorne* is of limited assistance in the wills variation context. First, the Court in *Hartshorne* was specifically focused on only one legal obligation owed after separation, that relating to the division of property under the FRA. Other legal obligations are found in the law of unjust enrichment and the Divorce Act.

- [80] Second, the Court in *Tataryn* concluded that the second part of the two-part wills variation test, dealing with moral obligations, is distinct from and goes beyond legal obligations. As noted above, the Court said that most people would agree that although the law may not require a supporting spouse to make provisions for a dependent spouse after death, a strong moral obligation to do so exists if the size of the estate permits.
- [81] Third, the FRA explicitly provides that a marriage agreement will prevail unless a spouse can prove that it is unfair. *Hartshorne* was decided in that context. There is no such provision in the WVA.
- [82] Finally, while both the WVA and the FRA consider fairness, each does so in a different context. The FRA is concerned with the situation in which a relationship breaks down and each person continues with his or her separate life; the WVA is generally concerned with a relationship that would have sustained but for the death.
- [153] On the background of the Deceased's farming history, what I have found to be relatively little contribution the plaintiff made to the farm operations, the Deceased's savings and the Pre-Nuptial Agreement they both lived by throughout their relationship, the Deceased's moral obligation to the plaintiff is relatively weak.

iv. Unjust Enrichment and Constructive Trust

- [154] Three elements must be satisfied to prove a claim for unjust enrichment:

- (i) an enrichment;
- (ii) a corresponding deprivation;
- (iii) the absence of a juristic reason for the enrichment.

- [155] The remedy of constructive trust is available where there is a link between the contribution and the property in which the constructive trust is claimed: *Peter v. Beblow*, [1993] 1 S.C.R. at 996.
- [156] The plaintiff argues that the no-cost services she provided on the Deceased's Farm, her homemaking services and nursing care throughout the relationship resulted in considerable savings to the Deceased. These considerable savings allowed him to keep Amen's Quarters in his estate. Had the plaintiff not provided these services, she argues that the Deceased's assets would have been significantly depleted during his lifetime and thus, his estate would not be worth what it now is. She values these services from February 2009 to the Deceased's death at between \$222,000 (residential care) and \$506,000 (24 hour per day in-home support), which she says were direct savings to the Deceased.
- [157] Those valuations were made by Ms. Debbie Ruggiero, an occupational therapist retained by the plaintiff to cost the past care services that would have been needed to care for the Deceased in place of the plaintiff.

- [158] Ms. Ruggiero's costs were based on information the plaintiff provided to her and on her review of the Deceased's clinical records. Her long term residential care cost estimates assumed round-the-clock care and totalled \$74,000 per year.
- [159] Assisted living costs are in the \$200 per day range.
- [160] The assumptions Ms. Ruggiero made concerning the level of care the Deceased required in the two years prior to his death do not match the evidence. In short, I find that the plaintiff exaggerated the level of support the Deceased required, and that he was not as needy as Ms. Ruggiero understood.
- [161] I agree with the defendants that there is no basis for the plaintiff's claim for unjust enrichment. The plaintiff has received the full benefit of any contributions she made to the Deceased's economic success by obtaining full ownership of the Sandalwood Home.
- [162] On the whole of the evidence, I conclude that the plaintiff cared for the Deceased not under a sense of obligation or with an expectation of payment, but because she loved him and based on her cultural background, she accepted it as her role in the relationship.
- [163] The care that she provided to the Deceased was a continuation of the role she had performed throughout their relationship. She received the reciprocal benefit of the Deceased providing for her financially throughout.
- [164] There is no evidence that the plaintiff suffered any material deprivation. She provided care to the Deceased because she loved him and felt she was duty bound to provide it in her role as his wife.
- [165] The gift of the Sandalwood Home satisfies and provides a juristic reason for any enrichment the Deceased may have received.

Issue # 2: What provision should this Court order that would be adequate, just and equitable in the circumstances?

- [166] At January, 2012, the total assets owned by the plaintiff and the Deceased were approximately \$1.227 million. On the assumption the plaintiff would have been entitled to ½ on separation, her claim would be \$613,000.
- [167] However, it cannot be forgotten that a large portion of the Deceased's estate is Amen's Quarters. The Deceased's legitimate concern was that the farm operations, including Amen's Quarters, would be passed to Peter and the generations that follow. In my view, society's concerns would not be met by allowing the plaintiff to be given an interest in any portion of the Deceased's Farm, including Amen's Quarters. To do otherwise would not pay due respect to the Deceased's intentions, the plaintiff's intentions or his obligations to his children.

- [168] In my view, the circumstances of this case and the unusually strong moral obligations the Deceased has to his children because of their history with the farm distinguish it from other cases.
- [169] In the end, this claim is about balancing the Deceased's legal and moral obligations to the plaintiff with his legal and moral obligations to his children in relation to the factual matrix of this case.
- [170] The plaintiff was financially dependent on the Deceased. She continues to be financially dependent. But the plaintiff and Deceased both contributed to and benefited from the relationship in financial and emotional terms.
- [171] Removing the value of Amen's Quarters from the equation leaves approximately \$635,000 in cash and investments in the Deceased's estate at the time of his death. The plaintiff's bank accounts total approximately \$200,000. The Sandalwood Home was valued at \$392,000 as at January, 2012. As at January 12, 2016 (roughly the date of trial), it had increased in value to \$420,000.
- [172] Tataryn and Steernberg are clear that if possible, the estate should be used to provide some support for a surviving spouse. I find that the Deceased's estate is sufficient to satisfy both the claims of his adult children and the plaintiff. I do not accept that the plaintiff is entitled to half of the Deceased's estate as she claims. Rather, I believe that the Deceased owed her a duty to allow her to live in the same comfort as he did in his late years.
- [173] The plaintiff's life expectancy is approximately eight years. Given the living arrangements, I find that the Deceased should have made provision for the plaintiff for her ongoing support of between \$1,000 and \$2,000 per month. I calculated this amount based on the Spousal Support Advisory Guidelines from the date of the Deceased's death in January 2012, which are appropriate to rely on in this context: Steernberg at para. 128.
- [174] Applying the evidence in this case to the legal principles previously discussed and considering what a judicious testator would do, having regard to contemporary standards, I exercise my discretion and vary the Will by ordering the Deceased's estate pay the sum of \$150,000 to the plaintiff. I consider this sum is adequate, just and equitable in all the circumstances.

Disposition

- [175] The Will is varied in accordance with s. 2 of the WVA by providing the plaintiff with the sum of \$150,000.
- [176] In my opinion, the variation of the Will in this way is adequate, just and equitable to the plaintiff and is entirely appropriate in all of the circumstances.

Costs

[177] Although the defendant beneficiaries were largely successful, I find that the plaintiff did have a reasonable basis to bring this action and was successful to the extent of varying the Deceased's Will to obtain maintenance and support for her lifetime.

[178] The parties are at liberty to speak to costs.

"G.P. Weatherill J."

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