

CANADA / JUDGMENT

Lam v. Law Estate

2024 BCSC 1561

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1561 Lam v. Law Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lam v. Law Estate,

2024 BCSC 1561

Date: 20240826

Docket: S215594

Registry: Vancouver

Between:

Ginny Lam

Plaintiff

And

William Law, in his capacity as the Executor of the Will

of Yat Hei Law, deceased, and in his personal capacity, Kim Law,

Sarah Law, Audrey Law, Ken Lam, Kara Lam, and Erin Lam

Defendants

Before: The Honourable Madam Justice Morellato

Reasons for Judgment

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No other appearances

Place and Dates of Trial:

Vancouver, B.C.

May 8-12, 15-17,

July 13-14, November 20-21

and December 18, 2023

Place and Date of Judgment:

Vancouver, B.C.

August 26, 2024

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1. Introduction

- [1] The plaintiff, Ms. Ginny Lam, seeks to vary the will of her mother, Mrs. Yat Hei Law pursuant to s. 60 for the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA]. Essentially, Ms. Lam alleges that her mother's will did not make adequate, just and equitable provisions for her maintenance and support. Ms. Lam relies on significant gifts that her brother, Mr. William Law, received from their mother before her death, coupled with his preferential treatment as the only son. Mr. Law takes issue with any variation of the will, arguing there is no principled basis upon which his mother's testamentary intent should be compromised. He denies any discriminatory or preferential treatment by their mother and submits her testamentary intent should be followed in its entirety.
- [2] For ease of reference and clarity, I refer to the parties and witnesses by their first names. I mean no disrespect in doing so. Depending on the context, I will refer to the testator as Mrs. Law, the deceased, or the mother.

- [3] Mrs. Law died on February 14, 2021. She was predeceased by her husband, Kwok Man Law, the father of Ginny and William. Before her death, Mrs. Law made three wills. The last will and testament of Mrs. Law was executed in 2018 ("2018 Will"). Ginny and her brother William are the only two children of the testator and the only persons claiming an interest in the testator's estate in this proceeding. They are both healthy, independent adults.
- [4] Ginny and William were named as co-executors of their mother's estate in the 2018 Will. Ginny renounced her role as co-executor before bringing this action. William is defending this action in his personal capacity as a beneficiary under the 2018 Will. He remains the executor of his mother's estate, although he takes a neutral position in this action as the executor.
- [5] On December 1, 1999, Mr. and Mrs. Law made mirroring wills ("1999 Will") which appointed each other as executor, trustee and sole beneficiary of the other's estate, with a gift over equally between William and Ginny. William learned of the 1999 Will shortly after his father's death in December 1999. Ginny was not provided with a copy of the 1999 Will until after her mother's death in February 2021. At the time of the father's death, the mother inherited: the family home, three rental properties, and any remaining funds from a million-dollar lottery win in 1992 or other savings.
- [6] On March 17, 2004, the mother executed another will ("2004 Will"), which appointed William as sole executor. She made a specific gift of \$2,000 to Ginny and left the residue of her estate to William.
- [7] The explanation given for providing only \$2,000 to Ginny in the 2004 Will is expressly addressed in the 2004 Will as follows:

BE IT KNOWN THAT the reason that Ginny is only receiving this my bequest of TWO THOUSAND (\$2000.00) DOLLARS is because Ginny HAS ALREADY RECEIVED IN OCTOBER 2002 FROM ME FUNDS TOTALLY ONE HUNDRED AND TWENTY THOUSAND (\$120,000) DOLLARS of lawful money of Canada, which funds came from the equity in my property located at 2555 Venables Street Vancouver, British Columbia.

- [8] Ginny was not advised of the contents of the 2004 Will until after her mother's death.
- [9] When the mother executed the 2004 Will, she also arranged for the transfer of the family home at 2555 Venables Street ("Family Home"), from herself as sole owner into a joint ownership arrangement with her son William.
- [10] The parties agree that the Family Home was a specific gift to William in 2004. The mother did not execute a gift of deed in relation to the transfer and William was put on the title to the Family Home as a joint tenant. William confirmed during his testimony that he was placed on title to the Family Home in 2004 on the understanding that his mother would continue living in the home until her death.
- [11] Ginny was not advised about this gift to William until after her mother's death.

[12] At the time the 2004 Will was executed, Mrs. Law's estate consisted of a rental property on East 18th Avenue in Vancouver, bank accounts, investments, and her personal and household items (after placing William on title to the Family Home). As discussed later in these Reasons for Judgment ("Reasons"), approximately two years prior to the time the 2004 Will was made, Mrs. Law sold two of her rental properties and gave approximately half of the net proceeds to William. Ginny was also not aware that William received a portion of the net proceeds of the sale of the two rental properties when they were sold.

[13] As noted previously, the third and last will of the deceased was made on January 11, 2018.

[14] The 2018 Will provided, in part, as follows:

I GIVE, DEVISE, BEQUEATH all my Estate, both Real and Personal whatsoever and wheresoever situate in the manner following that is to say:

-the property I owned at 2555 Venables Street, Vancouver, B.C. [legal description omitted] shall be transferred to my son, namely WILLIAM LAW for his use absolutely;

-the rental I owned at 1194 East 18th Avenue, Vancouver, B.C.[legal description omitted] shall be transferred to my son namely WILLIAM LAW and my daughter namely GINNY LAM in equal shares.

[15] As I will discuss later in these Reasons, Ginny and William do not agree on the value of the gifts William received from his mother prior to her death. Ginny submits that the total value of the gifts to William from his mother, when valued at the time of her death, including those gifts that were given before and through the 2018 Will, amounts to a total sum of approximately \$2,986,611.71 of their mother's estate (i.e., 82.6%). This sum includes 50% of the value of the East 18th rental property (i.e., \$459,222.33) set out in the 2018 Will, as well as gifts William received outside the 2018 Will that Ginny asserts amount to \$2,527,389.38.

[16] Ginny underscores that the total value of the gifts she received from her mother during her mother's lifetime was \$170,000 (valued at the time of her mother's death, using an inflation factor). Ginny underscores that this must be compared to William's inter vivos gifts, which she asserts amount to \$2,527,389.38 (also using an inflation factor).

[17] William acknowledges that he received a greater share of his mother's estate than his sister. However, he ardently disputes Ginny's assessment of the relative value of his mother's gifts to each of them through and outside the 2018 Will, arguing that Ginny's assessment overvalues his gifts and undervalues hers. For example, he argues that he did not receive the specific gifts of \$630,820 in rental income from his mother's rental properties during her lifetime, or the benefit of joint BMO lines of credit in the amount of \$114,066.17, which Ginny alleges. William also argues that his mother's gifts to him during her lifetime acknowledged the work he did in managing the rental properties.

[18] Ginny replies, in part, that her assessment of William's gifts from their mother during her mother's life is conservative. She also notes that the attributed value of \$459,222.33 to each of William and Ginny for the East 18th rental property, granted through the 2018 Will, must also take into account the significant mortgage on that property, coupled with the capital gains tax, that were owed at the time of their mother's death. Further, Ginny adds that she also spent very considerable time and effort over many years caring for their mother.

[19] Ginny does not allege that William misappropriated his mother's rental income, investments or other assets. Further, she does not allege he breached any fiduciary duty he may have had in managing his mother's financial affairs. She submits that their mother's disproportionate gifts to William was based on her mother's gender-bias and inequitable treatment.

2. Summary of Evidence and Findings of Fact

[20] For purposes of economy and efficiency, I have not summarized all the evidence of each witness in these Reasons. However, I have considered all the evidence before me in formulating my determination of the issues at trial.

A. The Families' Background

[21] Mrs. Law and her husband were born in China. They married in 1967. William, was born in Hong Kong in 1968. Mr. Law immigrated to Canada in 1969, followed by Mrs. Law and William in 1970. Ginny was born in Canada in 1971.

[22] Mrs. Law had little formal education. She had a very limited command of the English language, spoke her native tongue while living in Canada, and relied on Ginny and William to translate for her. For example, they would translate documents that their mother received in the mail, and would also translate for her at various medical or other appointments. William recalled that his mother tried to get a driver's licence but could not because "she did not know enough English". Mrs. Law also relied on assistance from her children to travel to and attend medical and other appointments.

[23] Mrs. Law was a seamstress before she and her husband purchased the Pink Pearl restaurant in North Vancouver. They operated the Pink Pearl for a period of time in the 1980s until it burned down on December 31, 1985. Both William and Ginny assisted their parents by working at the restaurant.

[24] In May 1980, Mr. and Mrs. Law purchased their Family Home for \$155,000.

[25] On September 8, 1992, Mr. Law won \$1,000,000 in the BC/49 lottery, after which he and his wife purchased three rental properties:

- 1) On December 9, 1992, Mr. and Mrs. Law purchased 1165 East 26th Avenue, Vancouver, BC ("East 26th Property"), for \$277,500; \$100,000 of the purchase price was paid via mortgage proceeds from the Bank of Montreal, and the balance was paid from their personal funds;

- 2) On December 11, 1992, Mr. and Mrs. Law purchased 1194 East 18th Avenue, Vancouver, BC ("East 18th Property"), for \$249,000; \$100,000 of the purchase price was paid via mortgage proceeds from the Bank of Montreal, and the balance was paid from their personal funds; and
- 3) On December 7, 1992, Mr. and Mrs. Law purchased 2395 Nanaimo Street, Vancouver, BC ("Nanaimo Property"), for \$230,000; \$100,000 of the purchase price was paid via mortgage proceeds from the Bank of Montreal, and the balance was paid from their personal funds.
- [26] Mr. and Mrs. Law did not return to paid employment after the BC/49 lottery win.
- [27] In the mid-1990s, Mr. Law was diagnosed with lung cancer and underwent radiation and chemotherapy treatment. Mr. Law died on December 18, 1999.
- [28] As at the date of Mr. Law's death in 1999, Mr. and Mrs. Law's estate consisted of the Family Home, the Nanaimo Property, the East 26th Property, the East 18th Property, and the balance of the lottery funds plus any previous savings or investments, all of which passed to Mrs. Law upon her husband's death.
- [29] William and Ginny both spent many, many hours in the years after their father's death attending to their mother's needs, including taking her to various appointments, purchasing groceries and other items for her and assisting with household chores. As discussed later in these Reasons, William also attended to his mother's rental properties and finances. It is clear that both Ginny and William were dedicated to their mother.
- [30] The evidence as a whole establishes that Mrs. Law lived simply and frugally at her home in east Vancouver.

B. Mrs. Law's Health

- [31] Mrs. Law had her first heart surgery when the parties were children. She suffered from various health problems throughout her life.
- [32] William described his mother as a highly anxious person, with a number of serious health issues that required frequent care and attention from both her children.
- [33] The evidence as a whole, including Ginny's clear and consistent testimony, established that Ginny played a major role in caring for her mother, particularly after her father's death. For example, Mrs. Law insisted on staying with Ginny at Ginny's home for her medical care, assistance, and comfort following surgeries and significant health events. Such care included:
- a) Mrs. Law underwent heart valve surgery after her husband's death in 2000. I accept Ginny's evidence that after her mother came home from the hospital, she was responsible for taking care of her and did so. Ginny was living in the Family Home at the time.

- b) In 2009, Ginny cared for her mother at Ginny's home for a period of three months, after her mother underwent another major heart surgery.
 - c) On April 29, 2015, Ginny accompanied her mother to her mother's cataract eye surgery, and Mrs. Law stayed at Ginny's home following the surgery.
 - d) On June 25, 2015, Ginny accompanied her mother to her mother's second cataract surgery, and Mrs. Law once again stayed at Ginny's home following the surgery.
 - e) On August 30, 2019, Ginny accompanied her mother for a further cataract eye surgery. Mrs. Law stayed at Ginny's home following the surgery.
 - f) On December 2, 2016, Ginny accompanied her mother for her pacemaker surgery. Mrs. Law stayed at Ginny's home for one night following the procedure.
- [34] There were numerous other times where Ginny assisted her mother with her health care needs over the years by taking her mother to various doctor and specialist appointments, and by managing and coordinating medical visits with William who also took his mother to various medical appointments. I accept Ginny's evidence that she attended the majority of emergency room visits, clinics, labs, and routine appointments with her mother.
- [35] I also find that William, like Ginny, was deeply devoted to his mother and very attentive to her health care. Not only did William also take his mother to medical appointments, he went to see his mother whenever she was at the hospital and at Ginny's home after his mother's surgeries. He also took his mother to post-op consultations, and he attended to such details as ensuring his mother's medications were properly prescribed. He, like Ginny, visited his mother regularly at her home.
- [36] I also accept, based on the entirety of the evidence before me, including Ginny's evidence, that as her mother aged, Ginny took on more of the time and effort required for her mother's medical care than her brother or anyone else.

C. William's Involvement in Mrs. Law's Finances

- [37] The evidence establishes that William oversaw and managed Mrs. Law's finances after Mr. Law's death, and that he spent a significant amount of time doing so. Ginny was not included in the management of their mother's financial affairs. I accept Ginny's evidence that she offered, on numerous occasions, to assist William in this regard but he repeatedly refused.
- [38] Ginny testified that William did not want her to be involved in the management of their mother's financial affairs and she gave the following example: Ginny recalled an instance where their mother asked Ginny to help out with one of the tenants because their mother thought the rent was too low. When Ginny offered to assist and mentioned the matter to William, William made it clear that he did not want Ginny to assist and "got quite angry."

- [39] Ginny specifically testified that she "was not allowed to have a role in [her mother's] finances" and that "[t]he whole thing was very secretive my brother said it was none of my business." She explained, for example, that she did not learn until after their mother died that her brother was a joint account holder on their mother's bank accounts, or that he was put on title to the Family Home as a joint tenant in 2004, or that he was the beneficiary of their mother's RRIF.
- [40] William denied that Ginny ever offered to help him with managing their mother's financial affairs. He testified that he would have welcomed such help.
- [41] Having carefully considered the matter, I prefer Ginny's evidence. I found Ginny's evidence compelling, honest and consistent. By contrast, I found William to be less than candid on a number of issues, including this one. Further, the evidence establishes that Ginny consistently demonstrated her devotion to her mother and she is also an astute businesswoman. I have no doubt that Ginny would have been a great asset to William and their mother if she had been given the opportunity to assist with their mother's financial affairs. I accept that she offered to do so but William excluded her from being involved.
- a) William's Conflicting Evidence Regarding his Role in his Mother's Finances
- [42] I find that William gave conflicting evidence as to the extent of his involvement in his mother's financial affairs.
- [43] At his examination for discovery, William stated that he dealt with, and advised his mother, on a variety of her financial matters including not only her rental properties and their management but also with her properties' sales, investments, and some financial planning. In his Response to Notice to Admit, William admitted that both his parents consulted with him for his input and suggestions for mortgage advice, property management advice, investment and day-to-day money advice, and tax advice. However, at some points during his direct examination, William attempted to minimize his involvement in his mother's financial affairs, stating that: he would not read his mother's bank statements unless he was asked; he did not provide investment advice; and he did not assist with his mother's investments or financial planning, or with anything beyond helping with certain tasks on the sale of the rental properties.
- [44] I do not accept William's evidence to the effect that he did not play a key and central role in managing his mother's assets and finances after his father's death. His evidence at his examination for discovery was more candid in this regard, and that evidence is most consistent with the evidence before me as a whole.
- [45] At trial, William claimed that he was not involved in his mother's dealings with Mr. Nin Quan, a close friend of Mrs. Law who assisted her in some of her investments. This was not consistent with Nin's evidence that whenever Mrs. Law did not understand something financial, she requested that Nin speak with William.

- [46] William's wife, Kim, testified that, every weekend, William opened his mother's mail for her as his mother could not read English and, further, that William and his mother "talk[ed] about banking, finances or properties". Kim also testified that William's mother consulted with William before undertaking any major financial decisions.
- [47] William stated that he once noticed a large purchase of about \$1,000 on his mother's credit card, which was out of character for her. He was concerned and followed up on this expenditure with her. This evidence is consistent not only with his previous evidence at his examination for discovery that he was monitoring and managing his mother's finances, but also with his wife's evidence that he oversaw his mother's finances. It is inconsistent with William's evidence at trial when he tried to diminish the level of his involvement in his mother's financial affairs; his evidence in this regard was not credible.
- [48] Ginny testified that, when their father passed, William assumed responsibility for their mother's financial affairs and decisions, and that William did not discuss such affairs with her.
- [49] William acknowledged that he did not keep a ledger regarding his mother's finances or regarding expenditures and income from her rental properties.
- [50] I accept Ginny's evidence that, at the time of her mother's death, she had "no idea" what assets her mother actually held or how they were held. I also accept her evidence that William assumed responsibility for and managed his mother's financial affairs. I also find William was not transparent with his various dealings in managing his mother's finances and assets.

D. Evidence Regarding Mrs. Law's Preference for Sons over Daughters

- [51] The evidence established that Mrs. Law loved her children dearly. However, with the utmost of respect, I also have no difficulty in concluding that the evidence before me also establishes that she favoured William because of his gender. More specifically, I find that Mrs. Law held the view that sons were entitled to most or all of a parent's estate, rather than daughters. This bias influenced and informed the gifts she gave to William and Ginny throughout her life, and was also reflected in her 2018 Will.
- [52] I accept Ginny's forthright and clear evidence that her mother told her "again and again", in casual conversations over the years, that William was entitled to the estate assets, and that he would inherit most of her estate "because he is the son." For example, Ginny testified that these repeated assertions by her mother included conversations between Ginny and her mother dating back to a time after her father died, as well as a conversation Ginny had with her mother when she was tending to her mother in a hospital emergency room years later.
- [53] Ginny added further context in this regard, which I accept, and which also informs the reliability of her evidence.

- [54] Ginny testified that her mother told her "you should have a son"; Ginny has two daughters. Ginny explained her mother held certain traditional Chinese values and called Ginny a "banana", meaning Ginny was "yellow on the outside and white on the outside." Examples of her mother's traditional views are that she "worked off the lunar calendar" and wanted Ginny to get married "by the lunar calendar". Ginny recalled that a tea ceremony was held as part of Ginny's wedding and Ginny recalled her mother "had a lot to say about how that was done." Ginny was also told not to wash her hair on the Chinese New Year, otherwise she would "wash good luck away". One of the traditional views or practices held by her mother related to the fact that Ginny got married three months before William. Her mother told Ginny that her husband Ken had to buy a pair of pants for William, hang up the pants, and Ken had to walk under the pants to show respect for William. Ginny described this as a very old tradition, which Ken did not want to follow. A solution was reached when Ken's mother gave William \$200 in a red pocket money envelope instead.
- [55] Ginny also described how she was treated differently than William by their mother on a day-to-day basis. For example, she testified as to how the best pieces of meat and fish would be put in front of William. Ginny recalled that on one occasion she switched the plate as a joke, putting William's plate in front of her spot. Her mother switched the plate back. She testified that dinners were planned around William's schedule but "it didn't matter whether [she] was available." Ginny recalled that their mother would offer leftovers to William but not to her. Their mother would also wash the dishes at William's home but not at Ginny's home. Ginny opened and ran a school for children. Ginny testified that during the grand opening of Ginny's school for children, her mother told her that women should not be so smart or successful, and that girls should get a regular job so that they can bear sons and take care of their families.
- [56] Ginny relayed this contextual evidence candidly, calmly and respectfully.
- [57] Ginny acknowledged that her mother was not consistent in which traditional practices she followed and which she did not. However, Ginny did not waiver in her testimony regarding her mother's repeated assertions that William was to be preferred, including in the distribution of her estate assets, because of his gender.
- [58] Prior to this litigation, Ginny and William were close. She and William hosted family meals, celebrated special events like birthdays and Christmas together, and even holidayed together on a couple of occasions with their respective children. Their mother would also host New Year's celebrations for her children and grandchildren.
- [59] Janey Lee, one of Ginny's high school friends, knew Mrs. Law and had conversations in Cantonese with her over the years. Janey Lee recalled a conversation wherein Mrs. Law asked her about the gender of her children. Janey Lee recalled that Mrs. Law told Janey that she was lucky to have a boy, because Ginny only had girls.

- [60] Linda, Ginny's mother-in-law testified and recalled a conversation with Mrs. Law about their families, where Mrs. Law told Linda that she was so lucky because Linda had two sons.
- [61] I wish to make clear that I have carefully assessed the hearsay evidence before me regarding statements made by Mrs. Law to Ginny, as well statements made by Mrs. Law to other witnesses including William. I have done so in light of the leading authorities on hearsay evidence, such as: *R. v. Khelawon*, 2006 SCC 57 at para. 42; *Modonese v. Delac Estate*, 2011 BCSC 82 at paras. 79-81, *aff'd* 2011 BCCA 501; see also *R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. Smith*, [1992] 2 S.C.R. 915; and *R. v. Bradshaw*, 2017 SCC 35. I discuss these authorities later in these Reasons. For present purposes, suffice it to say that I have found Ginny's evidence credible and sound. Ginny's evidence regarding her mother's statements to her was not only reliable and necessary evidence, I found it compelling and truthful in light of the evidence as a whole. After evaluating the matter, I also accept Janey Lee's and Linda's evidence.

E. Ginny's Gift

- [62] Ginny testified that after the lottery win, her father had promised Ginny that when she got married, he would gift her one of the family properties. Her father died before Ginny was engaged to be married. When Ginny became engaged to her husband Ken in 2001, she approached her mother about her father's promise to gift her a home when she got married. Ginny recalled that she was nervous about asking her mother for assistance. She added that she knew it would take time to sell a property and considered converting one of the rental properties.
- [63] When Ginny approached her mother and reiterated her father's promise, Ginny testified her mother responded negatively by noting that her father was "no longer here" and that the properties were "hers" (the mother's). Ginny testified that at first, her mother dismissed her request. Ginny recalled that her mother also told her that "everything" was to go to William. Ginny testified that she was "shocked" because "[she] knew [her mother] had four houses" (that is, three rental properties and the Family Home). Notably, this conversation took place before the second 2004 Will was made, wherein Ginny was essentially disinherited except for a \$2,000 gift.
- [64] I accept Ginny's evidence that her mother initially rejected her request on the basis that "everything" was to go to William, but that she later agreed to gift Ginny money to purchase a home. Again, Ginny's evidence was clear, cogent and consistent not only in this regard, but also as a whole.
- [65] William testified that his mother spoke to him privately about Ginny's request and told him she wanted to give Ginny an early inheritance and so he presented "options" to his mother. He recalled his mother said, "Well, let's sell a property" and that his mother first suggested selling the Family Home. William testified that he "said no" to this suggestion:

I did not want to sell the family home, so I just told her, "You should not sell the family home. If any property - if you had to sell a property, you're going to sell East 18th."

- [66] William's own testimony suggests he was directing the outcome of this decision. He also testified that in the course of discussing the options with his mother, he suggested that instead of selling property, they could take out a mortgage and give a cash gift to Ginny instead. That is precisely what occurred. A mortgage for \$120,000 was taken out on the Family Home, although the evidence is not clear regarding how the figure of \$120,000 was arrived at. After their deliberations, William and Mrs. Law met with Ginny and informed her that she would be given \$120,000.
- [67] The following year, after the initial request in 2001, sometime between October 7-9, 2002, Ginny received her \$120,000 gift ("Ginny's Gift").
- [68] Ginny testified that her \$120,000 gift came with the condition that she was to purchase a home close to her mother's home. William corroborated his sister's testimony that their mother objected to giving the gift to Ginny if Ginny were to purchase a home in Richmond. William added that he thought the main reason for this condition was that Richmond was difficult for their mother to take transit to, and another reason was that "You cannot have a mortgage helper in Richmond." William testified their mother also said, "You can't have a proper basement suite [in Richmond]."
- [69] Ginny and her husband Ken used the \$120,000 for their down payment on their first home on Oxford Street in North Burnaby, a relatively short distance and an easy transit ride from the mother's home.
- [70] At trial, no arguments were made by Ginny that challenged the admissibility of what William testified his mother said to him during the conversations he had with her that led to the \$120,000 gift. Nor were arguments made concerning the admissibility of William's evidence regarding conversations with his mother relating to the sale of two of the three rental properties. Rather, Ginny submitted that the mother's financial decision-making and asset distribution reflected her bias to benefit and prefer William because of his gender.

F. Evidence Surrounding William's Gifts

a) Net Proceeds from the Sale of the Nanaimo and East 26th Properties

- [71] I find the evidence establishes that the mother gifted William approximately half of the net proceeds of sale of the Nanaimo Property and the East 26th Property (together "Nanaimo and East 26th Properties"). These rental properties were sold in early 2002, about two years after the father's death and around the time William and his future wife, Kim, purchased their home on Quilchena Crescent in Kerrisdale ("Quilchena Property").
- [72] William testified about a conversation with his mother around the time he was selling his rental properties in Surrey and North Vancouver, and purchasing the Quilchena Property. He stated that his mother said that, since he was selling his own properties, could he help

her sell her three rental properties as well. According to William, his mother said that since he was starting a new chapter in his life and the properties were a burden on his time, "maybe" it was a good time to sell them. William testified that he told his mother, "I don't think we should" but his mother really wanted to sell. William testified he told his mother, "we can sell one" but that it was his mother who wanted to sell two of the rental properties.

- [73] On October 29, 2001, the mother's Nanaimo and East 26th Properties were both listed for "a quick sale". William agreed on cross-examination that there was no urgency on their mother's part to sell these properties.
- [74] On October 30, 2001, William sold his apartment at 506-160 East 13th Street in North Vancouver ("North Van Apartment") for \$168,500. He originally purchased his North Van Apartment on June 1999 for \$145,899.69, financing it with a mortgage of \$117,000.
- [75] On November 29, 2001, William and Kim, purchased the Quilchena Property for \$593,000, with a mortgage of \$445,000.
- [76] On November 30, 2001, Mrs. Law obtained a mortgage for \$180,000 ("\$180,000 Mortgage"), which was secured against title to the Family Home.
- [77] William testified that he sold another property he owned at 10277 125A Street, Surrey ("Surrey Property"), for \$197,000, after purchasing it for \$232,000 in May 1999 with a mortgage of \$162,400.
- [78] On January 29, 2002, the Nanaimo Property was sold for \$235,000, after being purchased for \$230,000. Based on the evidence before me regarding the monthly mortgage payments, the balance of the original \$100,000 mortgage as at December 31, 2001 was approximately \$72,139.89. No capital gains were payable on the sale with a net capital loss of approximately \$7,097.30. There were commission fees of \$11,101.28 and legal fees of \$350 payable. Accordingly, the net proceeds from the sale of the Nanaimo Property were, as best as can be determined on the evidence before me, \$151,408.83 (i.e., sale price of \$235,000 less outstanding mortgage of \$72,139.89 less commission and legal fees).
- [79] On February 28, 2002, the East 26th Property was sold for \$296,250, after being purchased for \$227,500. The purchase was financed by a \$100,000 mortgage. The balance of the mortgage on December 31, 1999 was \$87,885.55. On December 31, 2000, the balance on the mortgage was \$85,043.88. Between December 31, 1999 and December 31, 2000, the balance of the mortgage was decreased by \$2,841.67. It is reasonable to infer that the mortgage payments would remain constant such that at December 31, 2001, the balance of the mortgage was approximately \$82,202.21 (i.e., \$85,043.88 less \$2,841.67). The commission fees from the sale were \$11,035.76 and the legal fees payable were \$350. The total capital gain was \$2,951.22, after subtracting the net capital losses incurred in the sale of the Nanaimo Property. The mother's income in 2002 was \$11,693. Using the 2023 tax rate, the tax rate applicable to capital gains would be 10.03%. It would be reasonable to conclude, using the best evidence available, that the mother paid a capital gain of \$296.01 (i.e., \$2,951.22 x 10.03%).

Accordingly, the net proceeds from the sale for the East 26th Property were, as best as can be determined on the evidence before me, \$202,366.02 (i.e., sale price of \$296,250 less outstanding mortgage of \$82,202.21 less commission and legal fees).

- [80] Kim testified that she did not know the amount of William's current or past salary because William "wouldn't tell [her]". Kim also testified that she and William joked about how they made around the same income. She also stated she made between \$90,000 to \$110,000 when she and William purchased the Quilchena Property. William worked for ICBC at the time.
- [81] Kim testified that to her knowledge, William applied all of the funds he received from the sale of his North Van Apartment and Surrey Property to the purchase of the Quilchena Property. However, this would not be possible in light of the completion dates for the sale of his Surrey Property and the Quilchena Property because the Quilchena Property was purchased before the Surrey Property was sold.
- [82] Kim confirmed that William handled the mortgage process for the Quilchena Property and any information she had in relation to the mortgage on the Quilchena Property was limited to what William had told her. Kim conceded she did not know how much, or with what monies, William contributed towards the purchase of the Quilchena Property.
- [83] The Quilchena Property was renovated close in time to its purchase and William handled those expenses. William aggressively paid down the Quilchena Property mortgage between 2001-2006; and he handled the larger expenses in relation to their wedding in August 2003.
- b) William's Inconsistent Evidence Regarding the Net Proceeds he Received from the Sale of the Nanaimo and East 26th Properties
- [84] William agreed he received some portion of the net sale proceeds from the sale of the Nanaimo and East 26th Properties.
- [85] Early in the litigation, in May 2021, William's counsel confirmed in a letter to Ginny's counsel that William received approximately one-half of the net sale proceeds of the Nanaimo and East 26th Properties. The letter from William's counsel stated:

To the best of our client's knowledge, the net sale proceeds from E. 26th was approximately \$72,000 and from Nanaimo Street was over \$50,000 but less than \$70,000. The Deceased was entitled to do what she wished with the proceeds of sale, which included to our client's knowledge the payment of your client's wedding as well as his own.

In addition, our client received some funds outright from the two sales from his mother of approximately one half of her net proceeds. They were gifts to him in appreciation for his assistance to her and the management of the properties, which your client did not do.

Our client is not aware if his mother had made a general power of attorney in his favour but in any event he took no transaction under one, including for the sales of these two properties.

[Emphasis added.]

- [86] William testified these numbers were based on a phone call he made to his accountant. Half of the net proceeds of the East 26th Property according to this information would be approximately \$36,000 and half of the Nanaimo Property would be approximately \$25,000-\$35,000, for a total of between \$61,000-\$71,000.
- [87] At trial, William changed his position and said he received a total lump sum of \$40,000 from the net sale proceeds from the sales of the Nanaimo and East 26th Properties; that is, \$20,000 from each of these properties. He claimed that at the time of his counsel's letter, he could not recall the amount he received because "there was a lot going on". However, he was certain at trial (over two years after counsel's letter) that he received \$40,000 because this "is the number that stands out." The evidentiary record does not support William's evidence and indicates he received much more than \$40,000. I do not accept William's evidence. Not only is it inconsistent with the documentation before me, it does not align with what William advised his counsel in May 2021, as evident in the excerpt from his counsel's letter reproduced in part above.
- [88] William's wife Kim also testified that William received \$40,000. However, she admitted she had no independent source of knowledge to substantiate this amount. She admitted that her only source of that information was William. Kim also stated that she maintained separate bank accounts from William and that it was William who was in charge of the finances in their household. Kim admitted she had no way of knowing what William received from his mother from the net sale proceeds or at any time.
- [89] No documentation was provided by William to support his assertion that he had received a total of \$40,000 from the net sale proceeds of the Nanaimo and East 26th Properties. William did not produce any documents to support where the net sale proceeds were deposited or paid.
- [90] In light of all the evidence before me, including the documentary evidence and William's initial acknowledgment through his counsel's letter that he received approximately half the proceeds of the net sales of the Nanaimo and East 26th Properties, I find that it is most likely that William received, at minimum, approximately \$75,704 from the net proceeds of sale of the Nanaimo Property, and approximately \$101,183 from the net proceeds of sale of the East 26th Property, for a total sum of approximately \$176, 887.
- [91] My conclusion that William was gifted about \$176, 877 from the sale of the Nanaimo and East 26th Properties in early 2002 is based not only on the documentary record before the Court but is also buttressed by Ginny's submission, which I found compelling: that is, if William's version of events is true, one would expect to see some greater wealth in their mother's hands at the time of her death, as a result of the sale of the Nanaimo and East 26th Properties, or at least a plausible description of her expenses showing that the lion's share of her net proceeds of sale from these properties was applied to pay expenses, or used for the mother's benefit in some way. However, William did not provide a plausible or coherent explanation in regard to the use of the net proceeds of sale, notwithstanding that he oversaw

and managed his mother's financial affairs. No paper trail or documents were tendered by William in regard to the manner in which the net proceeds of sale of the Nanaimo and East 26th Properties were used, either spent or invested, which would have supported William's version of events. Yet, William is the only person who had access to such information or documentation, other than his mother (who needed William's assistance in translating them). Consequently, the Court's assessment was made all the more difficult. Nevertheless, based on the best evidence available, I am satisfied, on a balance of the probabilities, that William received about half the net proceeds of sale in the amounts set out above. The documents and surrounding evidentiary context, in large measure, speak for themselves.

- [92] In addition to the facts set out above, it is notable that at the time of her death, Ginny and William's mother held low balances in her bank accounts, with about \$14,000 cash stored in her home. She also owed \$228,132.34, which was secured against the East 18th Property. Notably, this mortgage debt included a mortgage that was transferred from the Family Home to the East 18th Property. On December 23, 2010, the mortgage on the Family Home was \$93,180.20 (being the balance at that time of the \$120,000 loan that funded Ginny's Gift), and William moved that debt from the Family Home to the East 18th Property on December 23, 2010. William asserts that his mother had the right to move the remaining debt to the East 18th Property in order to obtain more favourable financial terms. As early as November 29, 2010, Mrs. Law held low balances in her bank accounts (approximately \$3,000 in each account).
- [93] I find that William's evidence regarding how Mrs. Law used "her share" of the net sale proceeds of the Nanaimo and East 26th Properties was not grounded in the evidentiary record and was tentative, vague and unsubstantiated. For example, he testified that "Maybe my mom invested in my sister's business". There is no evidence this occurred, and I accept Ginny's evidence that she only received a \$120,000 gift from her mother during her mother's lifetime. Another example of an untenable explanation provided by William is that their mother used the proceeds of sale to pay for his and his sister's weddings. Ginny testified she paid for her own wedding, which I accept. Notably, during the course of his testimony, William also testified that his mother did not contribute towards his wedding expenses. While the mother may have purchased wedding or other gifts for William and Ginny, the evidence does not support the conclusion that these gifts were of the magnitude that would plausibly explain the dissipation of the mother's assets that occurred.
- [94] The evidence also does not support William's suggestion that their mother spent most of her net sale proceeds from the sales of the Nanaimo and East 26th Properties on the maintenance of the Family Home and the East 18th Property. In 2010, eight years after the sale of these properties, their mother's bank account balances totalled approximately \$6,000 and there was significant debt secured on the East 18th Property; as noted earlier in these Reasons, part of the debt secured on the East 18th Property was transferred from the mortgage on the Family Home. Moreover, William was not able to particularize any significant expenses faced and paid by their mother beyond, for example, one-time repairs

(roof, balcony, stair post amounting to about \$40,000), painting, and Chinese herbal medicines, which together did not, again, plausibly explain the debt on the estate, particularly in light of the rental income their mother received from the downstairs suite at the Family Home and the East 18th Property. The evidence shows that the mother had significant rental and pension income and lived a simple frugal life. I find that the mother's rental income, and her pension income (which commenced approximately six years after her husband's death), do not support William's evidence that his mother spent most of the net proceeds of sale the Nanaimo and East 26th Properties (less his \$40,000) on her rental, or other expenses.

[95] I also note that, on the evidence before me, it makes little sense, if one accepts William's evidence that their mother received the lion's share of the total net proceeds from the sale of the properties (i.e., approximately \$353,774 minus \$40,000), that their mother did not use part of these net proceeds to fund Ginny's Gift of \$120,000 in October 2022. Ginny received her gift of \$120,000 just a few months after the sale of the Nanaimo and East 26th Properties, yet a mortgage was taken out on the Family Home to fund her gift. This turn of events also does not support William's assertion that he received only \$40,000 from the sale of these properties, which would have left his mother with more than \$310,000 of the net proceeds from the sale of the Nanaimo and East 26th Properties.

[96] Ginny submits that William has admitted to the receipt of 50% of the net sale proceeds from the sale of the Nanaimo and East 26th Properties and that any attempt to resile from that admission is implausible. I agree.

[97] Ginny also submits that it is more likely than not that more than 50% (possibly 100%) of the net sale proceeds were gifted to or applied for the benefit of William. Based on all the evidence before me, I am unable to reach the conclusion, on a balance of probabilities, that William received all the net proceeds of sale of these two properties. I have no difficulty finding, however, that William received at least half the net proceeds of sale. Further, based on the whole of the evidence before me, the total sum of \$176,877 is a fair and reasonable, albeit conservative, assessment of what William most likely received from his mother from the net proceeds of sale of the Nanaimo and East 26th Properties.

[98] To be clear, Ginny does not dispute that the net proceeds of sale that William received was with their mother's blessing. She simply identifies these net proceeds of sale as an inter vivos gift to William, which ought to inform the Court's judgment in this wills variation claim.

c) The \$180,000 Mortgage Placed on the Family Home

[99] As noted earlier in these Reasons, a \$180,000 Mortgage was secured against the Family Home on November 30, 2001, about a year before Ginny received her gift of \$120,000, and only a day after William and Kim bought their Quilchena Property on November 29, 2001. This mortgage was registered on title to the Family Home on December 3, 2001.

- [100] Ginny asserts this mortgage amounted to an interest-free loan from their mother to William to assist with his expenses in relation to his Quilchena Property "or, alternatively to assist with his personal expenses known only to William, which loan was repaid in 2002". The evidence before me does not address when the \$180,000 Mortgage debt was satisfied. However, the documentary record confirms the \$180,000 Mortgage was discharged from the title to the Family Home on October 7, 2002.
- [101] The circumstances surrounding the taking and discharging of this \$180,000 Mortgage are not entirely clear based on William's evidence. Understandably, Ginny was unaware of the circumstances of this mortgage, why this mortgage was taken, when the mortgage was paid off, or the circumstances surrounding its discharge. Although William was attending to and managing his mother's finances, including her mortgages, he claimed he was not able to explain the circumstances surrounding this mortgage.
- [102] William testified that he did not recall this mortgage transaction at all and was adamant that he did not receive any of the \$180,000 funds. He also claimed he did not recall whether their mother actually received any of the mortgage proceeds. William questioned whether these mortgage funds were ever received. He testified that the \$180,000 Mortgage was likely a line of credit and not a further loan. However, the notary who placed the mortgage, confirmed this mortgage was placed in November 2001 by the parties' mother, mortgage funds were received, and monthly mortgage payments were incurred.
- [103] William also testified that he did not have a clear recollection of the circumstances surrounding the discharge of the \$180,000 Mortgage, although he testified he thought he "saw something" at "some time". There is no evidence before me regarding when the mortgage debt was actually satisfied. William initially testified he could not be sure of when he learned of the mortgage, when it was paid, or when it was discharged and taken off title. However, when he was shown the discharge document by his counsel, he stated he first saw the discharge document during the litigation process. He added this mortgage was paid back but testified he did not know how or when it was paid back.
- [104] On cross-examination, it was suggested to William that the Nanaimo and East 26th Properties were each listed at a price for quick sale because he wanted the proceeds to assist with the purchase of the Quilchena Property. William denied this was the case. It was also put to William on cross-examination that when the Nanaimo and East 26th Properties did not sell fast, he proceeded to arrange the \$180,000 Mortgage on the Family Home. William also denied this proposition. Counsel for Ginny suggested on cross-examination that the \$180,000 Mortgage was used to provide bridge financing for William to facilitate the purchase of the Quilchena Property. William also denied this occurred.

[105] William reiterated that he could not recall why the \$180,000 Mortgage was taken out in his mother's name on November 30, 2001 and he was not aware if or when the mortgage funds were released, although these funds were released on December 3, 2001, close in time to the purchase of the Quilchena Property. The completion date of the Quilchena Property purchase was November 29, 2001, followed by the renovation of the Quilchena Property immediately after it was purchased.

d) Was the \$180,000 Mortgage a Benefit given to William by the Parties' Mother?

[106] It is difficult to reconcile William's testimony that he did not know about the \$180,000 Mortgage on the Family Home, with the significant body of other evidence before me that establishes his integral involvement in the management of his mother's financial affairs, including the close attention he paid to them.

[107] As I have found earlier in these Reasons, the evidence before me, including that of William himself, establishes that his mother consulted William for his views and suggestions regarding mortgage advice, property management, sale advice, investments, day-to-day money advice, and tax advice. The evidence also establishes that William was added to his mother's bank accounts so that he could assist her with some banking and for William to use and manage the funds in the accounts. Further, William testified his mother would ask him about his thoughts regarding "anything to do with the household or the properties." He also testified that he would, based on discussions with his mother, carry out her instructions. However, on the evidence before me, as a whole, I find that he did more than that. William influenced, shaped and directed such "instructions" to a large degree, and this included the various mortgage financings and refinancing of her properties, as well as whatever was needed in regard to property management.

[108] As noted early in the Reasons, William's wife Kim testified that, every weekend, William gathered and opened his mother's mail, noting his mother did not open her mail as she could not read English. Kim also acknowledge that her mother-in-law always consulted with William before undertaking any major financial decisions.

[109] Such evidence strongly indicates that William must have known about the \$180,000 Mortgage that his mother took out on the Family Home in 2001.

[110] While William testified that he did not receive any funds from the \$180,000 Mortgage, it was also his evidence that he could only afford to purchase the Quilchena Property by selling both his Surrey Property and North Van Apartment. However, when confronted with the fact that the sale of his Surrey Property closed after the purchase of the Quilchena Property, William changed his evidence and claimed that he had sufficient funds to pay for the Quilchena Property without the proceeds of sale of his Surrey Property.

[111] I also note that after the Quilchena Property was purchased, it was renovated and newly furnished.

- [112] Ginny submits that the only reasonable explanation for the 180,000 Mortgage was that the mortgage proceeds were applied for the benefit of William in the short term to assist William with either the financing or renovations for the Quilchena Property and that the mortgage loan was repaid once William had the cash flow from the sale of his second property.
- [113] William was a poor historian when it came to the addressing the circumstances surrounding the \$180,000 Mortgage. Yet, when it suited him, he had very good and specific recollections of events and conversations that occurred decades ago, including around the time the \$180,000 Mortgage was placed, and even before his marriage and during his childhood. I do not accept William's evidence that he was not aware of and did not benefit from the \$180,000 funds garnered through this mortgage. I find, on a balance of probabilities and in light of the evidence as a whole, that William knew of the \$180,000 Mortgage and that he benefitted from its proceeds interest-free, until it was paid off in 2002, before the \$120,000 mortgage was placed to fund Ginny's Gift.
- e) William's Additional Gifts totalling \$31,985.73
- [114] William testified that before her death, his mother gifted him an RRIF and money of hers held in joint accounts that "could not properly be said to be her assets at death". William acknowledges that if there is to be any equalization, at most, Ginny "may argue that she should receive a cash legacy before division of the residue of that same sum that William received from those accounts". The RRIF and the joint accounts total \$31,985.73.

G. Mrs. Law's Rental Income

- [115] Under cross-examination, William acknowledged that his mother was entitled to all the rental income from all her properties; that is, to all the rental income from the East 26th Property, Nanaimo Property, East 18th Property and the rent from the basement suite of the Family Home.
- [116] In light of William's evidence and that of the current tenants, coupled with the tenancy agreements in evidence, Mrs. Law would have received approximately the following rental income, after the death of her husband:
- East 26th Property: \$1,250/month from Jan. 2000 - Dec. 2001;
 - Nanaimo Property: \$1,000/month from Jan. 2000 - Dec. 2002;
 - East 18th Property: \$1,275/month from Jan. 2000 for an unknown period of time; by Feb. 2021 (when Mrs. Law died), the rent had increased to \$1,755/month;
 - Family Home, basement suite:
 - o \$650/month from Nov. 2002-May 2004
 - o \$700/month from June 2004 - Nov. 2008

- o \$650/month from Dec. 2008-March 2014
- o \$950/month from April 2014-April 2018
- o \$1,000/month from May 2018 -May 2020
- o \$1,026/month from May 2020-Feb. 2021

- [117] I have reduced the total assessment of rental income from the basement suite of the Family Home to \$170,000 to account for times when the basement suite was vacant. As well, in calculating the rental income from the East 18th Property, I agree with Ginny's counsel that a reasonable approach to account for missing information regarding when the \$1,755/month rent first began, is to use an average of \$1,515 per month [i.e., (rent of \$1,275/month + \$1,755/month) divided by 2].
- [118] In this light, the total gross rental income collected would have amounted to approximately \$587,600 over 20 years. However, the evidence establishes that from this gross income amount, expenses were incurred to pay, for example, for mortgage payments, insurance, gardening, furnace repairs, gutter cleaning, plumbing, roofing, a new washer dryer, balcony repairs, and property taxes.
- [119] William testified that although his mother's income was supplemented by old age security and Canada Pension of \$1,696.96, after all monthly expenses were paid, including her personal and medical expenses, he was required to subsidize his mother's total income. He testified he did not benefit at all from any of the rental income he collected over the years.
- [120] Ginny does not accept that William did not benefit at all from the rental income received from their mother's rental properties. She relies, in part, on William's own evidence, as follows, which changed between his examination for discovery, his Response to the Notice to Admit, and his evidence at trial.
- [121] At his examination for discovery, William testified that any funds that he received in his personal bank account were received in error. In his Response to the Notice to Admit, William denied transferring any monies from the joint accounts with his mother for his own benefit; that is, he testified that when such transfers occurred, he was simply repaying expenses he had incurred on this mother's behalf. Also, in his Response to the Notice to Admit, William stated that, on occasion, he deposited rental income from the Family Home basement suite or the East 18th Property into his personal account but he then would transfer a portion into his mother account (held jointly with William), and would then give his mother the balance in cash.
- [122] William's evidence at trial was different. At trial, William testified that he and his mother agreed that he was to receive the East 18th rental income and he deposited \$1,000 every month into his mother's bank account, which represented the partial rental proceeds from the East 18th Property (again, gross rent was between \$1,275/month and \$1,755/month). William testified he would deposit rental income into his personal account and would make

deposits 10 months a year (rather than 12 months a year) into his mother's account. I understand this was done to cover expenses William was paying on the East 18th Property.

[123] Ginny's counsel points out, however, that between 2016 and 2021, the bank account records show that only \$6,050 was deposited from William to Mrs. Law, rather than the \$60,000 one would expect from William's evidence (i.e., 10 months x \$1,000 x 6 years). When presented with this information, William testified:

- 1) the funds might have been transferred to another account or given in cash; and
- 2) the bank records are incorrect because they are not showing the "regular deposits" he stated he made.

[124] Ginny's counsel submits that if this evidence is true, William's position could have been easily proven by providing his personal bank records for any part of the period of time he claims this arrangement was in place.

[125] Ginny's counsel also points out that William admitted in his Response to the Notice to Admit that he was added as a joint account holder with his mother "for him to receive and have use of the funds in the accounts as he saw fit, including to remove monies from the accounts for his personal use and to add funds into the account for his mother's personal use."

[126] In this context, counsel submits that the Court should draw a negative inference against William in relation to missing rental monies because of the lack of evidence he adduced in support of his theory, his shifting evidence on where money went and why, and how money moved from his mother to him.

[127] Ginny submits that it is more likely than not that William paid for his mother's expenses from the rental income and the balance of the rental income received for all of the rental properties was retained by William personally. Ginny further submits that this was a gift from their mother to William made during her lifetime.

[128] While the inconsistency in William's testimony is of some concern regarding the general reliability of his testimony, on this issue of whether he used his mother's rental income for his own benefit, I find it is plausible that his practices in managing his mother's rental income and property may have changed and varied over time, particularly since Mrs. Law chose to give William the ability to manage her rental property and income as he thought best. Further, I am of the view that it would not be proper to draw an adverse inference that William benefited from his mother's rental income based on the fact that William did not disclose his personal accounts. In this regard, I am guided by the decision of Master Bilawich (now Associate Judge) of April 2023, pronounced approximately three weeks before trial, to the effect that William was not required to disclose his personal accounts: *Lam v. Law*, 2023 BCSC 731.

- [129] At the hearing before Master Bilawich, Ginny sought the production of William's personal bank account statements for the seven-year period before their mother died. Master Bilawich denied the order sought for the disclosure of William's personal bank accounts, reasoning that he "did not agree this level of additional disclosure is necessary, appropriate, or proportionate to any assessment of the gifts [William] may have received from the Deceased during her lifetime." He also refers to the "last minute" nature of the application. Master Bilawich reasons in this regard:
- [32] Even if rent was received in cash and not deposited, the amount of rent being generated by the two rental units each month are more or less known quantities and can be estimated reasonably closely. It appears the Deceased may not have paid expenses for the properties directly, which would be consistent with Mr. Law's evidence that he paid them. Most of those are known or can be estimated. A precise accounting is not necessary or relevant for purposes of addressing the matters in issue in this action. The documents Ms. Lam seeks are not relevant to issues in dispute in a will variation claim.
- [33] I also note that when this application came before me, the parties were just over three weeks away from a scheduled trial of the action. Last-minute demands for extensive document production are not appropriate, absent exceptional circumstances. See Justice Kent's reasons in *Forstved v. Kokabi*, 2018 BCSC 111, at paras. 10 and 17.
- [130] Master Bilawich clearly did not have the advantage of hearing all the evidence that I have heard at trial when he rendered the decision he did. However, I remain mindful of his reasoning that extensive document production should not be left until a few weeks before trial. As it turns out, the production of William's personal bank accounts may have been of assistance to the Court in assessing the reliability of his evidence that he did not benefit at all from his mother's rental income, particularly in light of his evidence at trial that he and his wife kept separate bank accounts. Nevertheless, because Master Bilawich ruled that William was not required to disclose his personal bank accounts, I am not inclined to draw an adverse inference against William in circumstances where he was entitled to withhold the production of these documents.
- [131] Moreover, and in any event, I have also considered the entirety of the evidence before me carefully, particularly in regard to the estimated amount of rental income, the expenses likely incurred in maintaining the mother's rental properties, and the mother's use of the rental income for her subsistence (albeit frugal), both before and after her retirement. I am not able, on a balance of probability, to conclude that William's receipt and use of his mother's rental income was of financial benefit to him or, more to the point, that the rental income amounted to an inter vivos gift during his mother's lifetime. The evidence does not establish that he received a gift in this regard, or even what the quantum would be.

H. Rising Mortgage Debts

- [132] At the time of their mother's death, Ginny and William's mother owned only the Family Home debt-free, together with William as joint tenant. The East 18th Property was subject to a mortgage debt at the time of their mother's death that was larger than the mortgage that was originally placed on that property when it was first purchased. More specifically, at the date of their mother's death in February 2021, the mortgage debt on the East 18th Property was \$228,132.34, some \$128,132.34 higher than the original \$100,000 mortgage which was registered against title to that property at the date of its purchase in 1992.
- [133] As noted earlier in these Reasons, after Ginny and William's father died in December 1999, their mother inherited the Family Home, the Nanaimo Property, the East 26th Property, the East 18th Property, and the balance of any lottery funds or other savings. About a year later on December 31, 2000, Mrs. Law's had the following debt obligations:
- a) she owed \$76,391.78 on the Nanaimo Property;
 - b) she owed \$85,043.88 on the East 26th Property;
 - c) she owed \$76,391.78 on the East 18th Property; and
 - d) she owned no mortgage at all on the Family Home.
- [134] As discussed earlier in these Reasons, when the East 26th Property was sold in February 2002 and the Nanaimo Property was sold in January 2002, the mother received half the total net proceeds of sale of approximately \$353,774, or \$176,887.
- [135] After the sale of the Nanaimo and East 26th Properties in early 2002, the various property expenses were essentially comprised of taxes, the East 18th Property mortgage, as well as the maintenance of the Family Home and the East 18th Property. The mother's personal expenditures mainly comprised the cost of groceries, prescriptions, and some herbal medications. She also made small donations to her temple, gave red pocket money to family members on special occasions such as birthdays and Chinese New Year. William thought his mother sent money to her village in China and his mother's sister in San Francisco but did not know the sums.
- [136] As discussed, William recalled his mother had a number of property-related expenses over the years (e.g., mortgage payments; insurance; gardening; furnace repairs; gutter cleaning; plumbing; roofing; balcony repair, painting; and a new washer/dryer). William testified that his mother's rental income was used up on her property expenses and her own expenses. After a review of the evidence as a whole, I have essentially accepted this explanation.
- [137] However, what remains unresolved on the evidence before me is how the mother had a mortgage debt of \$228,132.34 on the East 18th Property at the time of her death, given that the mortgage on that property was only \$76,391.78 in December 31, 2000. Part of this discrepancy can be explained because, in 2010, William transferred the remaining mortgage on the Family Home to the East 18th Property; at the time of the mother's death,

the mortgage transferred from the Family Home had been reduced to \$60,761.71. Deducting that \$60,761.71 mortgage (that was migrated from the Family Home) from the total of the mortgage debt on the East 18th Property of \$228,132.32 leaves the sum of \$167,370.63; this was in fact the remaining amount of mortgage debt on the East 18th Property at the time of the mother's death.

- [138] William admitted that none of the \$167,370.63 mortgage on the East 18th Property (i.e., the debt that was not migrated from the Family Home) arose from his mother's own spending. This evidence is supported by the evidence of a number of witnesses who testified that Mrs. Law was frugal, lived a simple lifestyle and incurred few expenses. Accordingly, William did not plausibly explain how the mortgage debt on the East 18th Property increased from \$76,391.78 in December 2000 to \$167,370.63 at the time of his mother's death (i.e., an increase of \$90,978.85). Again, this raises an issue surrounding William's credibility. The evidence before me does not plausibly support the conclusion that this increase was a result of the mother's personal expenditures of the expenses from the rental properties.
- [139] Ginny also underscores that their mother had access to significant lines of credit, in the amount of \$673,600. She claims that William benefited from the use of these credit resources over the years, the details of which are not known to Ginny. The evidence before me does not establish that William used these lines of credit and he denies their use for his personal benefit. Further, there is an insufficient factual matrix supporting a reasonable inference that William used these credit resources for his own benefit. That is, I am unable to conclude that William benefited from the use of these lines of credit while his mother did not.
- [140] Nevertheless, I am satisfied that a substantial amount of debt was added to the mortgage on the East 18th Property, which William could not reasonably explain.
- [141] I should note at this juncture that there were also a number of transactions on the record before me which raise unanswered questions regarding possible additional benefits given to William by the mother. These include:
- a) \$36,960.00 from BMO account number ending in 492 (a joint account between William and his mother) to BMO account no. ending in 827 (personal account of William) on July 14, 2017;
 - b) \$65,000.00 loan obtained and applied to debt owing on a joint line of credit account no. ending in 480 on September 18, 2018;
 - c) \$134,350 advance from joint line of credit account no. ending in 480 on February 14, 2019;
 - d) \$135,764.61 transfer from joint line of credit account no. 22095804147 to joint line of credit account no. 22190454480 on March 27, 2020; and
 - e) interest payments made to service joint line of credit accounts paid from joint BMO account no. ending in 920 (the account which received Mrs. Law's pensions).

[142] Ginny does not dispute that these transactions were undertaken with Mrs. Law's knowledge and approval, "either specifically or in a general way" and asserts that "where such action benefited William such benefit was a gift made by Mrs. Law (i.e., without expectation of reimbursement)". However, upon review of the evidence before me, I am unable to draw any conclusions about these specific transactions or make a reasonable inference that they amounted to specific additional gifts to William.

3. Legal Principles and Discussion

A. Hearsay Statements of the Deceased Mother

[143] I have considered and scrutinized Ginny's evidence regarding the statements made to her by her mother that it was her mother's intention to leave most, if not all, of her estate to William because he was the son. I have also considered the evidence, including that of Ginny, Janey Lee and Linda, that Mrs. Law made statements reflecting Mrs. Law's preference of sons over daughters, as discussed earlier in these Reasons. I found this evidence not only necessary and reliable, but also compelling and instructive. I elaborate on my Reasons as follows.

[144] Out-of-court statements, such as those made to Ginny by her mother, are considered hearsay when they are adduced to prove the truth of their content, in the absence of an opportunity to cross-examine the declarant. It is well established that such evidence is presumptively inadmissible, generally because of inability to test the reliability of such a statement through cross-examination: see, e.g., *R. v. Baldree*, 2013 SCC 35 at paras. 30-31.

[145] Where the evidence in question does not fall under a traditional exception to the hearsay exclusionary rule, the Supreme Court has reasoned that the evidence may still be admitted under the "principled approach" in assessing the admissibility of the evidence. The principled approach requires that an out-of-court statement satisfies the twin criteria of reliability and necessity before it is found to be admissible evidence: *Khelawon* at para. 42; *Modonese* at paras. 79-81; *R. v. Mapara*, 2005 SCC 23 at para. 15; *R. v. Khan*; *R. v. Smith*; and *R. v. Bradshaw*.

[146] The principled approach is of particular assistance in assessing the admissibility of evidence in estate cases that involve statements made by will-makers to various witnesses. In the instant case, I have found the principled approach was necessary to ensure that the fact-finding process was not impeded, and was made more accurate, particularly with respect to my assessment of the statements made by the deceased concerning the disposition of her assets prior to and after her death.

[147] In *Modonese*, Justice Groves' reasons, affirmed by our Court of Appeal, expanded on the requirements of necessity and reliability in the principled approach:

(i) Necessity

[89] The principle of necessity does not mean that the hearsay evidence must be necessary in order for a party to prove his or her case. As described by the Court in *Smith* at 933, the criterion of "necessity" refers to the necessity of the hearsay evidence to prove a fact in issue. To satisfy necessity, the party adducing the evidence must prove that hearsay is the only available means of putting that evidence before the court. Necessity is obviously made out in this case. If Regina's statements are to be adduced at all, they can only be presented in hearsay form because of her death.

(ii) Reliability

[90] When assessing the reliability of a hearsay statement, the court should adopt a functional approach. Starting from the premise that hearsay statements are presumptively inadmissible, it should then search for indicia of trustworthiness sufficient to displace the general exclusionary rule. In each case, the focus of the inquiry must be on the particular dangers arising from the hearsay nature of the evidence: *R. v. Blackman*, 2008 SCC 37 at para. 42, [2008] 2 S.C.R. 298.

[91] This requirement can be satisfied in one of two ways: First, where there is an absence of any real concern about the truth of the statement because of the circumstances in which the statement was made; and second, where the truth and accuracy of the evidence can be sufficiently tested by means other than contemporaneous cross-examination: *Khelawon* at paras. 62-63.

[148] The onus is on the party tendering the hearsay evidence to establish necessity and reliability on a balance of probabilities: *Khelawon* at para. 47. As noted earlier in these Reasons, Ginny has satisfied that onus.

[149] Where the declarant is deceased, the criterion of necessity is established: *Modonese*, at para. 82 and *Anderson v. Anderson*, 2010 BCSC 911 at para. 56.

[150] In this case, the actual intentions and reasons that the testator expressed regarding the distribution of her assets and estate are important considerations. The reasoning of Justice Dardi in *Anderson* is instructive in this regard:

[57] The reporting of some of the Deceased's statements by interested parties raises a concern regarding the reliability of those statements. This evidence must be carefully scrutinized. Adopting the approach in *Stephens v. Austin*, 2003 BCSC 341, I have nevertheless determined that the Deceased's statements adduced in evidence meet the threshold requirement of reliability. I conclude that the fact that some of the witnesses relating the statements are interested parties may be adequately dealt with in the determination of the weight to be attributed to any particular statement.

- [58] In my view, the real issue with some of the evidence and the weight to be accorded to it is whether the statements were in fact made by the Deceased. The Court must first find on a balance of probabilities that the statement was made before it goes on to determine the treatment and weight of such evidence: *Creutz v. Winther Estate*, 2007 BCSC 1463. In essence, this assessment turns on the reliability of the various witnesses: *Halfpenny v. Holien* (1997), 37 B.C.L.R. (3d) 186 (S.C.).
- [151] In the instant case, not only do I accept Ginny's evidence regarding what her mother told her, I find that her evidence carries substantial weight. I accept Ginny's evidence that her mother told her William was entitled to her assets because of William's gender. I also accept that these conversations involved intimate conversations with her mother that were repeated and affirmed over time. Having reviewed the evidence, including that of William and the witnesses who testified on his behalf, I am unable to find any compelling evidence or reason that undermines the reliability of Ginny's memory, or her truthfulness that these statements were made repeatedly by the mother to Ginny. However, I found William's assertions that his mother did not favour him because of his gender, at best, unpersuasive. Ginny was undoubtedly a sincere and reliable witness. I accept her evidence about her observations and experiences over the years regarding how William was preferred by his mother because of his gender.
- [152] I have also considered the testimony of other witnesses supporting William's position relating to the deceased's statements made to them some years ago. This evidence, like all the evidence before me, must also be carefully scrutinized. Having done so, I find Ginny's evidence, regarding both her mother's intentions relating to the distribution of her assets and her mother's gender-bias, remains strong and un-compromised.

B. Legal Framework regarding Wills Variations

a) What is Just and Equitable in the Circumstances

- [153] Section 60 of the WESA provides that a court may vary a will if, in the court's opinion, the will-maker does not make adequate provision for the proper maintenance and support of the spouse or children and, further, the court may make an order that is just and equitable in the circumstances:

60 Despite any law or enactment to the contrary, if a will-maker dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the will-maker's spouse or children, the court may, in a proceeding 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 will-maker's estate for the spouse or children.

- [154] In the seminal case of *Walker v. McDermott*, [1931] S.C.R. 94, 1930 CanLII 1, the Supreme Court of Canada expressly addressed the meaning of the phrase "proper maintenance and support" and affirmed the phrase is not limited to the necessities of life but is to be determined in light of a "variety of circumstances":

- [3] What constitutes "proper maintenance and support" is a question to be determined with reference to a variety of circumstances. It cannot be limited to the bare necessities of existence ...
- [155] In the same vein, the Supreme Court of Canada in *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, at paras. 24-25, did not accept the proposition that financial need is a necessary condition for a successful wills variation claim brought by an independent adult child: see also *Richter v. Richter Estate*, 2023 BCSC 105 at para. 33.
- [156] In *Walker*, the Court also reasoned that, in giving effect to wills variation claims, the court is to proceed from the point of view of the judicious parent, seeking to discharge their parental duty, and considering the situation of the family members, including their standard of living: see also *Tom v. Tang*, 2023 BCCA 221 at para. 31. Where adequate provision is not made, the Court in *Walker* stated that it must do what is just and equitable in the specific situation before it, which includes a consideration of the "pecuniary magnitude" of the estate and the "situation of others with claims":
- [3] If the court comes to the decision that adequate provision has not been made, then the court must consider what provision would be not only adequate, but just and equitable also; and in exercising its judgment upon this, the pecuniary magnitude of the estate, and the situation of others having claims upon the testator, must be taken into account.
- [157] Notably, in the instant case, the deceased's estate remains large enough to accommodate a variation of the 2018 Will.
- [158] In *Tataryn*, at para. 13, the Court reasoned that in a wills variation claim there are not two different or competing tests (i.e., whether "adequate provision" has been made by the will-maker, or "what is just and equitable"). Rather, reasoned the Court: "These are two side of the same coin".
- [159] Of significance to the case at bar, the Court's analysis is to be guided by contemporary standards, such that what was thought to be adequate, just and equitable at one juncture in time, may be quite different from what is considered to be just and equitable in contemporary terms. In *Tataryn* at p. 815, the Court opined:

This narrows the inquiry. Courts are not necessarily bound by views and awards made in earlier times. The search is for contemporary justice.

[Emphasis added.]

- [160] I should note that while the decisions in *Walker* and *Tataryn* were decided under the previous Wills Variation Act, R.S.B.C., 1979, c. 435, the wills variation provision at s. 2 of that act is substantially similar to s. 60 of WESA, and both *Walker* and *Tataryn* remain leading authorities.

b) Testamentary Autonomy

- [161] I am very mindful that courts should not only assess what is just an equitable but must also carefully consider the importance of testamentary autonomy. The Court in *Tataryn* addresses the two interests at stake as follows:
- [16] The two interests protected by the [Wills Variation Act] are apparent. The main aim of the Act is adequate, just and equitable provision for the spouses and children of testators. The desire of the legislators who conceived and passed it was to "ameliorat[e] ... social conditions within the Province". At a minimum this meant preventing those left behind from becoming a charge on the state. But the debates may also be seen as foreshadowing more modern concepts of equality. The Act was passed at a time when men held most property. It was passed, we are told, as "the direct result of lobbying by women's organizations with the final power given to them through women's enfranchisement in 1916". There is no reason to suppose that the concerns of the women's groups who fought for this reform were confined to keeping people off the state dole. It is equally reasonable to suppose that they were concerned that women and children receive an "adequate, just and equitable" share of the family wealth on the death of the person who held it, even in the absence of demonstrated need.
- [17] The other interest protected by the Act is testamentary autonomy. The Act did not remove the right of the legal owner of property to dispose of it upon death. Rather, it limited that right. The absolute testamentary autonomy of the 19th century was required to yield to the interests of spouses and children to the extent, and only to the extent, that this was necessary to provide the latter with what was "adequate, just and equitable in the circumstances." And if that testamentary autonomy must yield to what is "adequate, just and equitable", then the ultimate question is, what is "adequate, just and equitable" in the circumstances judged by contemporary standards. Once that is established, it cannot be cut down on the ground that the testator did not want to provide what is "adequate, just and equitable".
- [Emphasis added.]
- [162] The reasons of our Court of Appeal in *Tom v. Tang*, at para. 51, are also instructive, particularly in relation to the question of whether the unequal treatment of adult children by a testator ought to be followed "without regard to the objective standard of a reasonable testator and current social norms":
- [51] In summary, *Bell CA*, *Kelly* and *Hall* do not stand for the principle that a testator's unequal treatment of adult children must be deferred to, without regard to the objective standard of the reasonable testator and current social norms, as long as the subjective reasons given for the unequal distribution are valid and rational. These cases recognize instead that a testator's moral duty to adult children must be assessed from the viewpoint of a reasonable testator, and that the moral duty may be negated where there is just cause.

- [163] The reasoning in *Tataryn* and in *Tom v. Tang* is particularly instructive in the instant case. The evidence readily establishes that although Ginny and William's mother clearly loved both her children, she held outdated beliefs which led her to favour William, as a son, over Ginny, as a daughter. Furthermore, I find the evidence establishes that the significant disparity in the inter vivos gifts the mother gave to William, as compared to the gifts she gave to Ginny, was predicated on the mother's view that sons are more entitled to the family's estate based on their gender. Such a view is no longer aligned with "contemporary justice". It is precisely the kind of treatment that does not have regard to "the objective standard of a reasonable testator and current social norms". It is treatment that the Supreme Court in *Tataryn* identified as being neither just nor equitable.
- [164] I am mindful that a will-maker is under no obligation to provide equally for each of their children: *Chernecki v. Vangolen* (1996), 28 B.C.L.R. (3d) 33 (C.A); *Price v. Lypchuk Estate* (1987), 11 B.C.L.R. (2d) 371 (C.A); *Gould v. Gould Estate*, 2009 BCSC 1528 at para. 107. Nevertheless, in *Tataryn*, the Court also observed that the language of wills variation legislation confers a broad discretion on the court in determining what is "just and equitable" that may raise questions regarding "the equities as between the beneficiaries", as well as interpretations of the legislation "capable of extending to fair property division".
- [165] In light of these authorities and the factual matrix before me, I am unable to conclude that I must defer entirely to the mother's testamentary autonomy. I am of the view that the 2018 Will must be varied. This conclusion is galvanized by the reasons of our Court of Appeal in *Eckford v. Vanderwood*, 2014 BCCA 261 at para. 38 where, relying on *Tataryn*, the Court reasoned that testamentary autonomy must yield to what is adequate, just and equitable. In the instant case, I am persuaded on the whole of the evidence, that the 2018 Will must be varied to address the gender-based bias subsumed within the deceased's distribution of her assets and estate. Contemporary justice does not countenance preferential treatment towards certain children over others based on their gender: see also *Grewal v. Litt*, 2019 BCSC 1154 at paras. 121-123, 155 and 207.
- [166] Given the unique circumstance of this case, I am of the view that I ought to also carefully assess the degree to which the mother's gender-bias informed the distribution of her estate both before and after the 2004 Will. This is important in my view because the mother not only altered the 1999 Will after her husband died, to effectively disinherit Ginny in the 2004 Will except for the gift of \$2,000, but she also altered the distribution of assets once again in the 2018 Will to increase Ginny's share. By the time of the 2018 Will, however, a significant proportion of the mother's assets had already been sold, and the mother's debts had increased significantly.
- [167] The East 18th Property was encumbered by two mortgage debts, totalling \$228,132.34. Again, this \$228,132.32 debt included what was left of the mortgage on the Family Home that was used to fund Ginny's Gift in October 2002 (after William had transferred the mortgage on the Family Home to the East 18th Property in 2010).

[168] At the time of the mother's death, the mortgage used to fund Ginny's Gift comprised a debt of \$60,761.71 (i.e., Mortgage # BB1736051). As Ginny points out, this had the effect of reducing her original gift of \$120,000 because she must now pay back her half-portion of this \$60,761.71 mortgage debt on the East 18th Property. Of course, Ginny is also required, as is William, to pay the other mortgage debt of \$167,370.63 remaining on East 18th (i.e., Mortgage # BF494015). Still, the 2018 Will clearly placed Ginny in a more financially favourable position than the 2004 Will would have.

[169] This begs the question of why the mother changed her Will in 2018. William gave testimony on this point at trial and at his examination for discovery. His evidence at trial was not as clear as that at his examination for discovery. At his discovery, William testified that his mother told him that the reason she increased Ginny's share in the 2018 Will (as compared to the 2004 Will) was so that Ginny would not sue him. I accept William's sworn evidence at his discovery.

[170] William also testified at his discovery that the distribution of the estate in the 2018 Will between Ginny and himself did not make sense to him. Asked why it did not make sense to him, William responded:

Because I don't know why my mom needed to make the change, but that's not my decision.

[171] On the evidence before me, including William's evidence, I am satisfied that the mother changed the 2004 Will and made the 2018 Will in large measure to protect William from being sued, after having already gifted her son with most of her assets by 2018. Her doing so for this reason reflects another facet of gender-based preference.

c) Competing Moral Obligations

[172] I have also taken guidance from the reasons of the Supreme Court of Canada regarding how to balance conflicting claims and moral obligations. In *Tataryn*, at p. 823, the Court reasons:

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.

[173] There are no legal claims in this case, just the competing claims of Ginny and William based on their mother's moral obligations to them, as described in the jurisprudence and the quote above. As noted earlier in these Reasons, I have considered that a will-maker is under no obligation to provide equally for each of their children: *Chernecki*; *Lypchuk Estate*; and *Gould Estate* at para. 107. I am also mindful that there may a number of ways to distribute assets. In *Tataryn*, the Court warns against unnecessarily interfering with the will-makers intent:

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.

[174] Nevertheless, I have already concluded that the testator in this case fell below contemporary moral norms as a result of a gender-based bias. However, in addition to the issue of gender-bias, Ginny and William have advanced other competing moral claims to the mother' estate, which I must also consider.

[175] The evidence established that both Ginny and William were loyal and dedicated children, who cared for their mother's various needs, before and after the death of their father. Each responded to the mother's requests for assistance and both took the initiative to ensure her needs were met. While I have found Ginny took a greater role in caring for her mother's medical needs as the years progressed and her mother aged, William also took his mother to medical appointments; he also managed his mother's financial affairs and rental income, while Ginny did not. Yet, my analysis is also informed by my finding that in managing his mother's finances exclusively, William did so notwithstanding Ginny's repeated offers to participate and assist in this regard. I find there was a degree of self-interest involved on William's part and, indeed, his control over his mother financial affairs worked ultimately to his advantage and benefit.

d) Additional Guidance from the Jurisprudence

[176] The jurisprudence is clear that contemporary community standards require the Court to consider all the circumstances before it in assessing the judicious parent's moral obligations towards the children: see *Tataryn* at pp. 818-822. My factual findings in this case and their attendant conclusions are further buttressed by additional factors that are addressed and analyzed in a number of cases, including: *Dunsdon v. Dunsdon*, 2012 BCSC

1274, *Clucas v. Clucas Estate*, [1999] B.C.J. No. 436 (S.C.); *Inch v. Stead Estate*, 2007 BCSC 1249; *McBride v. McBride Estate*, 2010 BCSC 443; *Sharma v. Sharma Estate*, 2016 BCSC 1397; *Wong v. Chong Estate*, 2016 BCSC 953; *Bautista v. Gutkowski Estate*, 2023 BCSC 1485; *Chan v. Lee Estate*, 2004 BCCA 644; *Enns v. Gordon Estate*, 2018 BCSC 705; *Prakash v. Singh*, 2006 BCSC 1545; *Werbenuk v. Werbenuk Estate*, 2010 BCSC 1678; *Mordo v. Nitting et al*, 2006 BCSC 1761.

[177] In *Dunsdon*, Justice Ballance aptly summarizes the factors that have been repeatedly considered and applied in assessing wills variation claims, particularly in the context of adult, independent children. Justice Ballance reasons:

[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;

[135] These considerations tend to overlap and are not approached in isolation as independent, air-tight categories.

[Citations omitted.]

[178] Some of these factors are not applicable in this case, and I have already addressed others. I appreciate that this is not an exhaustive list of factors to consider. As apparent earlier in these reasons, I have also considered other factors raised by both parties.

e) The Dunsdon Factors Applied

[179] I address the Dunsdon factors in their respective order.

- [180] As regards the first factor, concerning the relationship between the testator and the claimant, the evidence established that Ginny and her mother were very close. Ginny was in regular contact with her mother throughout the mother's lifetime and took an active role caring for her mother and attending to her needs. I have no difficulty in concluding that Ginny was a dedicated and giving daughter. The evidence does not support a logical reason for abandonment, neglect and estrangement of one or the other.
- [181] The second factor concerns the size of the estate. I am satisfied that the mother's estate at the date of her death was large enough to facilitate a redistribution of assets and also supports the claims of both Ginny and William.
- [182] I have also addressed the third factor regarding the significant extent to which Ginny contributed to her mother's comfort, care and well-being. It is clear to me that Ginny's considerable efforts precluded the mother's personal discomfort, as well as relieved the financial burden of hiring a paid caregiver to assist her mother.
- [183] The fourth factor concerns reasonable expectations. I have no difficulty concluding that Ginny, as a dedicated daughter, had a reasonable expectation that her mother's wealth would be distributed equitably and fairly.
- [184] The fifth factor concerns the standard of living of the mother and Ginny. This consideration is of little assistance in this case. Both Ginny and her mother have lived comfortable middle-class existences.
- [185] The sixth factor concerning the gifts and benefits made by the testator outside the will. This factor is very significant in this case. Dunsdon, among other case authorities, has considered the importance of inter vivos gifts received by other beneficiaries in evaluating what is just and equitable in wills variation claims. Although transfers of assets passing outside a will are not part of the estate, the effect of such gifts has been carefully considered by previous authorities in assessing whether the court should vary the asset distribution under the will: see *Grewall v. Litt*, 2019 BCSC 1154; *DeLeeuw v. DeLeeuw*, 2003 BCSC 1472; and *Ryan v. Delahaye Estate*, 2003 BCSC 1081. Even assets passing as a result of a right of survivorship (such as William's joint interest in the Family Home) have been considered "when assessing, from the perspective of a judicious person, in the circumstances, whether a parent has met her moral obligation to an adult child": *Stead Estate* at para. 70.
- [186] The reasoning is Dunsdon on the question of inter vivos gifts or assets is particularly instructive in the context of this case:
- [185] A testator's moral duty may be diminished or negated altogether where the claimant has received inter vivos gifts or assets on the testator's death outside the framework of the will. Conversely, where such gifts have been made to individuals other than the claimant, either before death or in consequence of it, the moral duty owed to the claimant may be intensified: *Inch v. Battie*, 2007 BCSC 1249; *McBride*.

[Emphasis added.]

[187] In a similar vein, in *McBride Estate*, Justice Ballance reasoned:

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

[Emphasis added.]

[188] I find that the significant pre-death gifts that William received from his mother intensified the moral duty owed by the mother to Ginny. William, in fact, received gifts and benefits from his mother far in excess of what was received by Ginny and this solidifies my decision to vary the 2018 Will.

[189] The seventh Dunsdon factor addresses whether the testator has any reasons for disinheriting. That factor is not strictly applicable in this case. To the extent the mother deviated from an equal division of assets between William and Ginny, as set out in the first 1999 Will, she did not have any valid, rational, just, equitable or moral reason for the disproportionate treatment between Ginny and William.

[190] The eight Dunsdon factor deals with the financial need and other personal circumstances, including any disability of the claimant. Ginny is a healthy, capable, independent adult.

[191] The ninth Dunsdon factor concerns the question of whether the evidence demonstrated "any misconduct or poor character of the claimant". The reverse is true on the facts before me. Ginny has been a dedicated, selfless daughter.

[192] The tenth Dunsdon factor engages a review of the competing claims of other beneficiaries, which in this case is William. As discussed earlier in these Reasons, William like Ginny was a dedicated and attentive son, who cared greatly for his mother and spent considerable time attending to her various needs. The mother's moral obligation toward William in this regard must be weighed in the balance and I had done so.

[193] In *Richter Estate* at para. 49, the court considered the relative financial circumstances of the parties at the time of the will-maker's death. Justice Blake reasoned in *Richter* that while financial need is not a requirement in wills variation claims involving independent adult children, the relative financial circumstances of the parties involved are a relevant

consideration. She cautioned however, that "a free ranging enquiry into the financial minutiae" of the parties is neither appropriate nor required and, further, that an unwarranted invasion of privacy ought to be avoided.

- [194] The evidence before me established that William and his family have financially benefitted from the preferential treatment and gifts he received over the years from his mother. For example, at the time of his mother's death, William owned the Family Home in east Vancouver outright. It has been appraised at \$1,500,000 debt-free and has a rental unit upstairs and another rental unit downstairs, both of which have been earning income. William was also a joint account holder on his mother's bank accounts and was the named beneficiary on her RRIF, with a value of \$31,985.73 at the time of the mother's death. As well, I have found that William received \$176,887 from the net proceeds of sale of the Nanaimo and East 26th Properties in 2002 that, when adjusted for inflation and calculated at the time of the mother's death, would have a value of about \$250,517. In reviewing the evidence and submissions of the parties, I accept that William's 50% share of the value of the East 18th Property was approximately \$459,222.33 (subject to the mortgage debt and capital gains).
- [195] Based on the evidence before me, I conclude that William's gifts from his mother, through the 2018 Will and her inter vivos gifts to him totalled approximately \$2,241,724. William also has the additional benefit of the monthly rental income generated from the two units in the Family Home, since the mother's death. Notably, this \$2,241,724 sum does not include any benefit William received from the 2018 Mortgage. This sum also does not take into account the unexplained rise in the mother's debt load on the East 18th Property at the time of her death (as discussed earlier in these Reasons).
- [196] In comparison, Ginny's only inter vivos gift from her mother of \$120,000, when adjusted for inflation, was worth approximately \$169,950 at the time of the mother's death. Adding Ginny's half-share of the value of East 18th Property at the time of the mother's death of \$459,222.33 (subject also to the mortgage debt and capital gain), the total value of all gifts received by Ginny from her mother is \$629,172.33. However, this sum is somewhat inflated because the mortgage debt on the East 18th Property effectively includes two mortgages and one of these mortgages was the mortgage on the Family Home that was used to fund Ginny's Gift of \$120,000. At the time of the mother's death, \$60,761.71 still remained on the mortgage used to fund Ginny's Gift, that had been transferred to and secured against the East 18th Property. Ironically, part of Ginny's gift of \$120,000 is now a debt on the East 18th Property that she has inherited. Ginny is responsible for her half-share of this \$60,761.71 debt, which effectively claws back about \$30,000 of her original \$120,000 gift. Of course, both William and Ginny are accountable for their half-share of the remaining balance of the \$228, 232.34 debt on the East 18th Property; that is, 50% of \$167,370.63.

[197] In sum, it is clear that William received much, much more of his mother's assets. This, in turn, was reflected to some degree in the relative financial circumstances of the parties at the time of their mother's death.

4. Summation and Disposition

[198] I remain very mindful that, in any given case, there may a number of ways to distribute assets adequately, justly and equitably. I have also been careful not to unnecessarily interfere with the will-maker's intent in this case. However, the distinct factual circumstances before me, coupled with the Reasons set out in this judgment, have led me to firmly conclude that the 2018 Will ought to be varied.

[199] I have found that Ginny and William's mother held a gender-based bias that resulted in William receiving most of his mother's assets. This bias influenced and shaped the disposition of the mother's assets, not only through the gifts she gave Ginny and William during her lifetime, but was also reflected in her 2018 Will. While perhaps a common view and standard in ages past, such inequitable treatment is not aligned with contemporary societal standards. Furthermore, my consideration of other factors, such as those in Dunsdon, also informed my assessment. The Dunsdon factors confirmed my conclusion that the 2018 Will must be significantly varied in regard to the disposition of the East 18th Property.

[200] I am satisfied that an adequate, just and equitable distribution would provide Ginny with 85% of the East 18th Property. I am aware that this increase in Ginny's half-share under the 2018 Will still pales in comparison to the total value of all the gifts and benefits William received from their mother during her lifetime. However, I find the circumstances before me do not justify varying the 2018 Will to the extent that William receives no interest in the East 18th Property at all. William was a dedicated and helpful son, and this factor must also be weighed in the balance.

[201] In the final analysis, our courts have repeatedly considered the nature and extent of inter vivos gifts in assessing whether, in all the circumstances, a will should be varied. Furthermore, in this case, the discriminatory effect of the testator's distribution of assets is stark. When assessed in light of the surrounding circumstances, which must necessarily inform the Court's assessment, the distribution of assets as set out in the 2018 Will is not acceptable by contemporary societal standards and is, therefore, not adequate, just or equitable.

[202] William has asked for the opportunity to make submissions on costs. Since Ginny has been successful in varying the 2018 Will, the parties are encouraged to reach an agreement on costs. If the parties are not able to do so, unless they otherwise agreed to in writing, they are to exchange written submissions within 45 days of the release of these Reasons, and to contact Supreme Court Scheduling to arrange a subsequent hearing date.

"Morellato J."

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