

CANADA / JUDGMENT

Lamperstorfer v. Plett

2018 BCSC 89

COURT

Supreme Court of British Columbia

DECIDED

22 January 2018

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2018 BCSC 89 Lamperstorfer v. Plett

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lamperstorfer v. Plett,

2018 BCSC 89

Date: 20180122

Docket: S-M-13 3703

Registry: Victoria

Between:

Helmuth Reiner Richard Lamperstorfer

Plaintiff

And

Myron Elliot Plett Executor of the Estate of Helmuth Peter Lamperstorfer aka Halmuth Lamperstorfer, aka Helmut Peter Lamperstorfer, aka Helmut P. Lamperstorfer, aka Helmut Lamperstorfer, aka Peter Helmuth Lamperstorfer, Robert Wolf aka Robert Wolf Lamperstorfer, Adelheid Elisabeth Lamperstorfer, Karolina Maria Huber, Christine Karolina Haselwarter,

Stephan Christoph Haselwarter, Dario Sebastian Haselwarter,

Dominik Felix Haselwarter, Tim-Oliver Haselwarter and

Helmut Joseph Bernhard Sertl

Defendants

And

Robert Wolf aka Robert Wolf Lamperstorfer

Plaintiff by Counterclaim

Before: The Honourable Madam Justice Donegan

Reasons for Judgment

Counsel for the Plaintiff:

B.A. Marlatt

Counsel for the Defendants, Karolina Maria Huber, Christine Karolina Haselwarter, Stephan Christoph Haselwarter, Dario Sebastian Haselwarter, Dominik Felix Haselwarter, Tim-Oliver Haselwarter and Helmut Joseph Bernhard Sertl :

R.A. Kasting

Counsel for the Defendant and Plaintiff by Counterclaim, Robert Wolf aka Robert Wolf Lamperstorfer:

P. Newman

Counsel for the Defendants, Myron Elliott Plett, Executor of the Estate of Helmuth Peter Lamperstorfer aka Halmuth Lamperstorfer, aka Helmut Peter Lamperstorfer, aka Helmut P. Lamperstorfer, aka Helmut Lamperstorfer, aka Peter Helmuth Lamperstorfer:

S. Parkin

Counsel for the Defendant, Adelheid Elisabeth Lamperstorfer:

K.L. Simmons, Q.C.

Place and Date of Trial:

Victoria, B.C.

June 26-28, 2017

Place and Date of Judgment:

Victoria, B.C.

January 22, 2018

INTRODUCTION

- [1] Helmuth Peter Lamperstorfer ("Peter") was born in Germany in 1929. He died at a care facility in Victoria, British Columbia on February 3, 2013, at the age of 83. He was survived by his two adult children, Robert Wolf Lamperstorfer ("Robert") and Helmuth Reinhard Richard Lamperstorfer ("Richard"), as well as his former wife, Adelheid Elisabeth

Lamperstorfer ("Heidi"), and several relatives from Germany. Because some of the parties share a common surname, I will refer to them by their first names for simplicity, without intending any disrespect.

- [2] This proceeding was commenced by Richard, who seeks a variation of his father's will under the provisions of the Wills Variation Act, R.S.B.C. 1996, c. 490 [WVA]. By way of counterclaim, Robert advances claims against his father's estate as well for unjust enrichment and for variation under the WVA.
- [3] As a beneficiary and one of the named defendants, Heidi supports her sons' claims to vary Peter's will. She takes no position on Robert's claim for unjust enrichment. As beneficiaries and other named defendants, several of Peter's relatives from Germany (the "German Defendants") oppose the relief sought by both Richard and Robert.
- [4] The executor of Peter's estate, Myron Plett (the "Executor"), is a lawyer who takes no position on the claims other than to argue that Robert's claim for compensation arising from unjust enrichment is statute-barred by the passage of time.

PRELIMINARY ISSUES

Suitability for Summary Trial

- [5] Richard and Robert each bring their applications for final judgment under Rule 9-7 of the Supreme Court Civil Rules, B.C. Reg. 168/2009. All parties agree these applications are suitable for summary trial determination.
- [6] The documentary evidence tendered in this three-day summary trial is extensive. While some admissibility issues have been raised, there are very few factual controversies in the evidence. Where there are such controversies, I find I am able to resolve them or their resolution is immaterial to the issues raised. Overall, I agree with the position taken by experienced counsel and conclude I am able to find the facts necessary to decide the issues of fact and law on the evidence tendered and that it would be just to do so in this case.

Admissibility Issues

a) Peter's Medical Records

- [7] By way of Notice to Admit served on all parties, Richard seeks to tender a number of his father's medical records pertaining to the state of his physical and mental health and the care he received over the last several years of his life. No party disputes the authenticity of these records. The controversy lies in their admissibility.
- [8] Richard, supported by Robert, argues that these records are admissible for their truth of the facts and opinions contained within them because they are relevant to an issue and are admissible as business records under s. 42 of the British Columbia Evidence Act, R.S.B.C. 1996, c. 124 and/or by operation of s. 5 of the WVA.

- [9] Richard and Robert emphasize the purpose for tendering these records is not in respect of their father's testamentary capacity. The parties have agreed that Peter's will is valid. Rather, Richard and Robert submit that these records will help provide important context in respect of one of the central issues in this case - whether their father had valid and rational reasons, logically connected to the dispositions made in his will.
- [10] I agree that the information and opinions contained within the records tendered is relevant for this purpose. As these reasons unfold, it will become clear to the reader that some of the information contained within the records does indeed help provide important context for some of Peter's views, choices and behaviour, as well as important context for certain choices made by his family members.
- [11] I have no concerns about the reliability of these records given the positions taken by the parties. I am of the view that their admissibility lies in the operation of s. 5 of the WVA. Section 5 provides:
- 5 (1) In an action under section 2 the court may accept the evidence it considers proper of the testator's reasons, so far as ascertainable,
- (a) for making the dispositions made in the will, or
 - (b) for not making adequate provision for the wife, husband or children,
- including any written statement signed by the testator.
- (2) In estimating the weight to be given to a statement referred to in subsection (1), the court must have regard to all the circumstances from which an inference may reasonably be drawn about the accuracy or otherwise of the statement.
- [12] It is clear that through this provision, the legislature intended to ensure that a court could rely upon any evidence it considers proper, including evidence that would be inadmissible if the usual rules of evidence were to apply. The language of s. 5 is broad and inclusive and is not limited to statements made by the testator. The weight to be given such evidence is to be determined by the court's view of its accuracy: *Bell v. Roy Estate* (1993), 75 B.C.L.R. (2d) 213 (C.A.) at 221; *Kelly v. Baker et al*, [1996] B.C.J. No. 3050 at paras. 20 and 29-33; *Brown v. Pearce Estate*, 2014 BCSC 1402 at para. 13; and *LeVierge v. Whieldon*, 2010 BCSC 1462 at para. 25.
- [13] In the result, I find the medical records tendered admissible for the purpose for which they have been adduced. It may be that little to no weight will be given to some of the information and opinions contained within the records, but the records contain information which may be helpful to the court in its search to ascertain, if it can, what Peter's reasons were for making the testamentary dispositions he did.
- b) Specific Admissibility Objections

[14] Counsel for the German Defendants has, at page 9 of his written submissions, outlined several admissibility objections in both Richard and Robert's Affidavit evidence. Specifically, Mr. Kasting writes:

36. The Plaintiff's affidavit contain hearsay evidence which is not admissible in a summary trial. This evidence is:

Affidavit #1: para. 12 (2nd sentence), 29 (2nd sentence), 35 (last sentence),

Affidavit #2: para. 12

It also contains enhanced rhetoric/opinion, which should not be considered by this court:

Affidavit #1, para. 55 and 56.

37. Robert Wolf's affidavits contain hearsay evidence, which is not admissible in a summary trial. This evidence is:

Affidavit #1: paras. 7, 8, 9, 13, 14, 22, 23

Affidavit #2: para. 46-49

It also contains enhanced rhetoric/opinion: Affidavit #2, para. 48 and argument disguised as evidence: Affidavit #3.

[15] Having reviewed those specific portions of those Affidavits, I agree with Mr. Kasting and insofar as the impugned evidence contains inadmissible hearsay or rhetoric/opinion, I will not consider it.

FACTS AND CHRONOLOGY

[16] The following facts reflect evidence that was not, for the most part, in dispute. Where disputed, my findings are based on consideration of the evidence as a whole. I will explain the reasoning behind my findings where the evidence conflicts on material points or where I draw a particular disputed inference from the evidence.

[17] Peter was born in Germany on June 18, 1929. His sister, and one of the defendants in this action, Karolina Maria Huber ("Karolina"), was about three years old when Peter was born. Karolina has remained living in Germany throughout her life and is currently 91 years old.

[18] Peter and Karolina's father died in 1936 and their mother did her best to support the family during World War II and its aftermath. After the war, Peter trained as an electrical engineer and began employment with IBM in Munich.

[19] Peter and Heidi married in 1956. They had Robert in 1955 and Richard in 1957. Robert is currently 62 years old, Richard is 60 and Heidi is 80. Peter has no living siblings other than Karolina.

- [20] Peter, Heidi and Robert immigrated to Canada in 1956, the year before Richard was born. They lived in Toronto. Peter kept in touch with Karolina for many years through letters and postcards. He returned to Germany to visit in 1960, 1966 and 1973.
- [21] In 1967, Peter started an electronics company, Lanico Industries Limited ("Lanico"), in the basement of their family home. Lanico manufactured, assembled and designed electronics, and also made printed circuit boards. Peter initially had a partner in Lanico, whom he bought out in 1972.
- [22] Heidi took a two-year program to become a psychiatric nurse and also started a flower selling business.
- [23] In 1969, Peter and Heidi divorced. Heidi continued her flower business, soon opening a flower shop. Peter relocated Lanico to another location in Toronto and continued to operate it. Peter and Heidi remained in contact after their divorce and, as will be seen, Peter came to rely very heavily upon Heidi in his later years. Peter lived alone for the rest of his life and never re-married.
- [24] Robert helped his father at Lanico in his teenage years to the point that, at Peter's insistence, Robert dropped out of high school to help Peter run Lanico. Feeling as though he had no choice in the matter, Robert began working full-time for his father at Lanico in February 1973. By using this employment as an apprenticeship and taking high school classes at night, Robert was eventually able to obtain a journeyman designation of electronics' mechanic and his high school diploma in 1976, the year following his move from his mother's home at the age of 19. Unfortunately, the journeyman courses Robert took were very specialized and designed for his needs at Lanico. The certificate Robert attained is not recognized by any association, such as those for an electrician or any other trade.
- [25] From 1974 until Peter left Ontario in 1990, Robert not only assisted Peter at Lanico, he also helped him by doing maintenance and repairs on Peter's homes.
- [26] Lanico's business always struggled. Its yearly sales barely covered expenses. Robert did get paid, but not always on time. He was not paid for hundreds of hours of overtime.
- [27] In 1979, Karolina came to Canada for the first time to visit her brother. By this time, Peter was suffering from a long-standing addiction to alcohol and was in ill-health. It was at this time that Peter began working fewer hours at Lanico. Robert worked more hours to compensate.
- [28] Richard graduated from high school and worked a short time at Lanico as well. He then worked selling real estate for A.E. LePage for a few years, followed by a period of time working with his mother in her flower business. He worked with her until 1985 or 1986, when he fell ill with chronic fatigue syndrome.

- [29] Throughout the 1980s, Peter's health continued to deteriorate. He continued to drink alcohol, with Robert as his "drinking buddy". Fortunately, Peter was able to quit drinking alcohol in 1988.
- [30] In 1986, Karolina again came to Canada to visit her brother. For this visit, she brought her children, two of the other named defendants, Christine Karolina Haselwarter ("Christine") and Helmut Joseph Bernhard Sertl ("Helmut").
- [31] In 1989, Heidi sold her flower business and moved to Victoria, British Columbia. Richard stayed behind in Toronto until the sale of the business completed and then he moved to Victoria as well. That same year, Peter was hospitalized for a period of time at a psychiatric hospital in Ontario. Robert described Peter's condition as a "complete mental breakdown." Richard found his father's hospitalization unsurprising because over the years, Richard witnessed the effects of his father's addiction to alcohol and the decline of his mental health.
- [32] After his release from hospital in approximately 1989, Peter did not work again. He expressed a desire to move to Vancouver Island. To that end, Peter and Robert met with an accountant to discuss selling Lanico. Peter wanted to retire and Robert wanted to change his career path. Told that the business was virtually unsaleable, Robert was asked if he would buy Peter's share of Lanico for \$25,000.00. Robert declined the offer for lack of funds and inability to renew the \$20,000.00 annual lease.
- [33] In late 1989, Robert was forced to lower Lanico's overhead. He did this by reluctantly moving the business into his own small home and by letting go of Lanico's one employee. By doing these two things and running Lanico himself, Lanico could continue to operate, providing both he and Peter with an income, provided Lanico's main contract remained intact. Lanico continued to provide an income to Peter until Peter reached age 65.
- [34] In 1990, in order to carry out Lanico's downsizing, Robert moved most of the company's inventory and equipment into his home and into storage. He spent many hours culling the inventory. He then ran the business on his own, working very long hours.
- [35] Peter moved to British Columbia in 1990, when he was 60 years old. Around this time, he gave Richard \$10,000.00, which Richard believed represented some sort of "equalization payment" because his father had given Lanico to Robert.
- [36] While Peter was preparing for his cross-country move, he tasked Richard with finding him a suitable property on the west coast. Richard found one property on Salt Spring Island that pleased his father, but after Richard purchased the property, Peter changed his mind. Richard later sold this property and soon found a home that was more to Peter's liking. The home was located on Cobble Hill, between Shawnigan Lake and the ocean at Mill Bay on Vancouver Island (the "Cobble Hill Property").

- [37] On April 19, 1990, Richard purchased the Cobble Hill Property for \$127,500.00. Peter moved in right away and reimbursed Richard the full purchase price on or about June 2, 1990. The Cobble Hill Property was then transferred into Peter's name. The Cobble Hill Property was not encumbered by any mortgage.
- [38] Peter continued to live a fairly solitary life, but did keep in some contact with family. Richard helped his father with home maintenance from time to time and would regularly visit him in the summer to swim together in Shownigan Lake. During these visits, Richard felt his father's mental health was not good. He believed his father was depressed and suffering from some paranoia.
- [39] Robert also kept in contact with his father, but to a lesser degree than Richard due to the geographical distance between them. In 1991, Robert travelled to British Columbia to visit both of his parents. When he visited his father at the Cobble Hill Property, Robert found him engaged in odd behaviour such as covering the interior walls of the house in marker ink with religious writings.
- [40] Karolina and her son, Helmut, visited Peter at the Cobble Hill Property in 1993.
- [41] In about 1995, Peter decided he wanted to move to Tofino on the west coast of Vancouver Island. Richard travelled there with him to view a lot at 1308 Lynn Road (the "Tofino Property"). That fall, Peter purchased the Tofino Property. Having not yet sold the Cobble Hill Property, Peter gave Richard a limited power of attorney to handle the sale of the Cobble Hill Property for him. Richard accepted this task and carried out his father's various telephone instructions. This limited power of attorney did not concern anything other than the sale of the Cobble Hill Property. Richard and his father, throughout their lifetimes, did not share details of their personal finances to one another.
- [42] Richard sold the Cobble Hill Property for his father in August 1996 and the sale proceeds were deposited directly into Peter's bank account.
- [43] Peter wanted to build his dream house on the Tofino Property, a full-cut log house. With Richard's help, he did just that. Richard and Peter worked together on construction of the home until it was nearly complete in 1996. Richard was not paid for his help.
- [44] While Richard was helping his father build the home, he noticed Peter's mental health seemed to be deteriorating again. He observed that Peter became increasingly angry and critical.
- [45] Richard provided one striking example of Peter's mental health challenges during this time. One day, when their work on the house was nearing completion, Peter inexplicably went inside and called police. Richard was unaware he had done this and did not know why. Based on information given to him by police who attended the call, Richard came to understand that his father believed that Richard was trying to kill him. Police took no action. Understandably confused and upset by his father's erroneous perceptions, Richard left Tofino and returned to Ontario, where he continues to live today.

- [46] While Richard and Peter were building the home on the Tofino Property, Robert was in the process of winding up Lanico back in Ontario. Lanico lost its main contract in late 1995, so Robert was forced to wind it up in August 1996. Robert soon started his own business, Lanico Partners, which he then ran for many years.
- [47] After Richard left Tofino, approximately six months passed before Richard and Peter made contact again by telephone. From then on, they maintained regular telephone contact which, for Peter, was about six times per year.
- [48] When Peter moved to Tofino, he met James Roth, a lawyer. Mr. Roth became Peter's lawyer for many years and, over the course of time, also became Peter's friend.
- [49] Mr. Roth first started to act for Peter in approximately October 1995, in relation to Peter's purchase of the Tofino Property. Their communications for this transaction occurred largely in writing. The men met in person in 1996. Mr. Roth acted as Peter's solicitor for the sale of the Cobble Hill Property, and then regularly saw Peter for years when Peter would attend to his office to sign statutory declarations required by Peter's pension fund in Germany.
- [50] Mr. Roth also prepared a will for Peter in 1996. In April 1996, the men met for this purpose. Peter expressed considerable anger at his two sons and his ex-wife, telling Mr. Roth that he believed they had tried to have him declared incapable of managing his financial affairs. From what Peter was telling him, Mr. Roth was left with the impression that it was his family's attempt to have him declared incapable of managing his financial affairs that prompted Peter's decision to move to Tofino.
- [51] While I do not doubt that Peter communicated these sentiments to Mr. Roth, I find there is no evidence to support the suggestion that Peter's family attempted to have him "declared incompetent" or that his family's conduct in any way prompted Peter's decision to move to Tofino. In fact, the unanimous evidence of Peter's immediate family supports a finding to the contrary. As will be seen, the evidence establishes that Peter was a solitary man who suffered from mental health difficulties periodically throughout the last few decades of his life, including bouts of paranoia and unfounded feelings of persecution. His immediate family did their best to help and support Peter over many years, while at the same time trying to respect the boundaries that he imposed.
- [52] In any event, Peter told Mr. Roth that he did not wish to leave anything to his sons or his former wife. He wanted the Salvation Army to be the beneficiary of his estate and have the Public Guardian appointed executor of his will and trustee of his estate. Mr. Roth raised with Peter the possibility that by leaving his sons and wife nothing, a WVA challenge might be brought. Nevertheless, Peter's wishes remained the same and Peter executed a will, disinheriting his sons, on April 25, 1996 (the "1996 Will").

- [53] Robert visited his father in Tofino in 2001. Consistent with his perceptions of his father's mental health through previous years, Robert observed that Peter was "very paranoid that others were trying to take advantage of him." Robert also noticed that his father would get more and more agitated and irritated as the day progressed. To assist his father's frame of mind and give him privacy, Robert went so far as to sleep on a couch on the porch area of his father's home during this visit.
- [54] This visit was to be Robert's last in-person visit with his father. After 2001, Robert booked several trips to see his father again over the years, but ended up cancelling each visit either on his mother's advice or his father's suggestion that he would prefer to visit over the telephone. Robert respected his father's wishes and took Heidi's advice. Robert and Peter did speak regularly on the telephone.
- [55] Richard's last in-person visit with his father was in 2005. As with Robert, Peter tried to discourage Richard's visit, but Richard went anyway. This visit was brief. Richard stayed at a hotel and only for one night. Unfortunately, Richard's health conditions prevented him from air travel after this; however, he and his father kept in regular telephone contact from then on. Richard's impression from their telephone conversations was that, at times, his father seemed to be managing fine, but at other times he seemed paranoid and communicated that he saw his son's telephone calls as "an intrusion".
- [56] In the spring of 2006, Karolina was unfortunately diagnosed with colon cancer and underwent surgery in Germany. While she recovered and over the next seven weeks, Peter called her every day.
- [57] Heidi maintained regular contact with Peter after his move to Tofino. She spoke to him by telephone approximately once a month and visited him when he was in hospital. This pattern continued until 2006, when Peter's health problems became more serious and debilitating for him. From that time forward, Heidi's involvement with caring for Peter and providing him with some companionship became more frequent and significant. Heidi's devotion to her ex-husband's care and well-being, particularly in the last several years of his life, is admirable. She conducted herself without any hope for, or expectation of, compensation.
- [58] Peter unfortunately spent the last several years of his life in and out of hospitals. On September 27, 2006, he was admitted to Tofino General Hospital. He was discharged on September 29, 2006. On October 12, 2006, Peter was admitted to West Coast General Hospital in Port Alberni, where he was diagnosed with colon cancer, as his sister had been diagnosed several months earlier. Later that same month, Peter was admitted to Victoria General Hospital where he underwent surgery related to this diagnosis.
- [59] Heidi contacted Karolina in Germany to advise her of Peter's condition. Within a few weeks or less, Karolina, her daughter, Christine, Christine's husband (and another of the defendants), Stephan Christoph Haselwarter ("Stephan"), and one of their children (and another of the defendants), Tim-Oliver Haselwarter ("Tim-Oliver"), travelled from Germany

to see Peter in hospital. Heidi met all four German relatives at the hospital. They stayed in Victoria for about a week until Peter's discharge on November 6, 2006. Since Heidi had travelled to Tofino the day before Peter's discharge from hospital to prepare and clean Peter's home for his arrival, the visiting German relatives drove Peter to Tofino when he was discharged. Karolina and Christine stayed in Tofino at a hotel for about a week after that.

- [60] At the time of their visit, Heidi recalled Peter telling her that these relatives would take him to Germany "to cure me once and for all".
- [61] Karolina recalled only one conversation with her brother about his estate plans. She does not recall exactly when, but remembered that Peter told her about the 1996 Will provisions disinheriting his sons and told her he was angry with them. Karolina told Peter that he should make testamentary provisions for his sons, even if he was angry with them. Karolina also recalled Peter asking her, in 2006, for the names and addresses of his German family, which she provided. Peter did not say why he wanted their information.
- [62] In October 2006, Peter reported to hospital staff that he was being physically "poisoned" by his sons. This was clearly a false belief since Peter had not seen Richard for at least a year and not seen Robert for approximately five years at this point.
- [63] From October 2006 through to February 2007, Mr. Roth visited Peter in hospital a number of times either as a friend or for the purpose of taking instructions as his lawyer.
- [64] It was during the German relatives' October/November 2006 visit that Mr. Roth met Christine and Stephan. While Christine, Stephan and Karolina visited with Peter at Victoria General Hospital, Peter told them about the 1996 Will where he left everything to the Salvation Army. Peter told them that his lawyer had advised to leave something to his children or his will could be challenged. He asked Stephan and Christine to contact his lawyer, Mr. Roth, to advise that Peter was ill and would like Mr. Roth to contact him about making a new will. Christine and Stephan delivered a letter written by Peter on October 9, 2006, to Mr. Roth at his office. In this letter, Peter communicated his wish to change the 1996 Will, asked Mr. Roth to give Christine and Stephan some of his time, and to send Peter the bill. The letter also indicated that Mr. Roth's discussion with Christine and Stephan was to include that Peter wanted a funeral (no cremation) and wanted an executor appointed.
- [65] When Christine and Stephan met with Mr. Roth they explained to him that Peter was ill, wanted to make a new will and wanted to possibly move to a nursing home in Ucluelet. They did not give Mr. Roth specific instructions about the dispositions because Peter did not share his intentions with them. Mr. Roth's notes of this meeting reflect that Christine and Stephan discussed questions Mr. Roth would pursue when he met with Peter, questions such as whether Peter wanted to change his will, have Mr. Roth as executor, add a clause regarding a funeral, change his gift to the Salvation Army, send a letter to Heidi advising her Mr. Roth was to be the executor and where Peter would go upon leaving the hospital.

- [66] Mr. Roth discussed all of these questions with Peter at a later time, which I will return to later in this chronology.
- [67] During his October/November 2006 hospital stay, staff noted at various times that Peter was "confused", "dizzy", held "unusual suspicious beliefs" and had a recent occurrence of "paranoid/delusional" behaviour. On November 7, 2006, Peter gave directions to allow Christine information about him. On November 8, 2006, he gave directions for his medical condition to be treated confidentially, but given to Stephan.
- [68] From 2006 until his death in early 2013, Heidi was the primary contact person for Peter's doctors. She spoke with Peter at least twice a week and travelled to see him regularly until a 2010 car accident (on her way to deliver Peter groceries) prevented her from any further cross-island road trips.
- [69] In 2007, Peter granted Heidi a limited power of attorney for his financial matters. From then on, Heidi looked after paying Peter's expenses on his behalf until his death. Again, she did so diligently and willingly, without any hope for, or expectation of, remuneration.
- [70] Peter was not home long after his bowel surgery in the fall of 2006. On December 4, 2006, he was admitted to Royal Jubilee Hospital in Victoria. Again, Heidi visited and helped care for him during this hospital stay. He was discharged on December 8, 2006.
- [71] In January 2007, Peter was admitted to three hospitals - in Tofino, Nanaimo and Victoria. Upon his first admission, he was found to be in poor condition and unable to look after himself. He was later found to be suffering from a subdural hematoma and required surgery, a right craniotomy, which was performed on January 19, 2007. He was discharged on February 1, 2007. During this period of hospitalization, Heidi again attended to Peter every day to help him eat. During this time, Heidi noticed that Peter would only speak German and was very afraid of the dark.
- [72] On February 1, 2007, Peter returned to Tofino, but was admitted to Tofino General Hospital that same day. He remained there until March 4, 2007.
- [73] Also on February 1, 2007, Christine and Stephan sent a typed letter by fax to Mr. Roth where they advised Mr. Roth that Peter had asked them to contact him about changing Peter's will and appointing Mr. Roth executor and trustee. They provided a telephone number for the Tofino General Hospital to contact Peter and told Mr. Roth they would be calling him in the next few days. Christine had possession of the 1996 Will at some point.
- [74] Mr. Roth met with Peter to discuss his wishes for a new will. Although he does not specifically say when these discussions occurred, the timing of the February 1 fax and the date that Peter executed his new will leads me to the only conclusion that the men met while Peter was in Tofino General Hospital in February 2007. Mr. Roth described his conversation with Peter in the following terms:

31. In discussing his wishes for a new will, I again introduced the subject of a possible claim for variation of his will from either or both his sons. At that time I believe he was on better terms with his former wife. I arrived to visit Helmuth one day and his former wife had just been to see him. I never saw Helmuth's sons and he never mentioned that he had seen his sons or that they had visited him.
32. When I raised the issue of benefitting his sons in his Will, Helmuth was again upset by my suggestion that he should leave some portion of his estate to each of his sons. He was not as angry as he was in 1996 though. My impression was that over the time period from 1996 to 2006/2007, his anger at his family had somewhat diminished, but he was still upset that he was required to benefit his sons in his will.
33. He asked me how much he should leave to his sons and I said that he should leave as much to each of his sons as would prevent them from bringing a claim against his estate. His instructions to me ultimately was that he wished to leave 25% of his estate to each of his sons, for a total of 50% of his estate, and 10% to his former wife. The remainder of his estate was left to his relatives in Germany, including Stephan and Christine, who received 5% and 10% respectively.
- [75] In accordance with Peter's instructions, Mr. Roth prepared a new Will, which Peter executed on February 23, 2007 (the "2007 Will") at Tofino General Hospital. There are no specific bequests in the 2007 Will. It provides for the transfer of the following shares of the residue of Peter's estate to the following persons:
- 25% to Robert;
 - 25% to Richard;
 - 10% to Heidi;
 - 5% to Karolina;
 - 10% to Christine;
 - 5% to Stephan;
 - 5% to Christine and Stephan's son, Dario Sebastian Haselwarter ("Dario");
 - 5% to Christine and Stephan's son, Dominik Felix Haselwarter ("Dominik");
 - 5% to Tim-Oliver; and
 - 5% to Helmut.
- [76] In short, each of Peter's sons were to receive 25%, Heidi 10%, and Peter's German relatives, identified above, collectively 40% of the residue of the estate.

- [77] In and around the same timeframe, Peter instructed Mr. Roth to prepare a limited power of attorney to Heidi, as I have discussed earlier. This limited power of attorney was signed by Peter on February 6, 2007.
- [78] On February 20, 2007, Heidi drove to Ucluelet to meet with Mr. Roth to discuss and sign the limited power of attorney. After that meeting, she visited Peter in hospital and suggested to him that since he trusted her with his power of attorney that he should consider her as executor of his will. Peter declined the invitation and told Heidi that she could not be executor because she was in the will in a small way, and that it was "too late in any event." Heidi then told Peter that she did not need to be in his will. The two never discussed Peter's will or estate again.
- [79] Peter's health struggles continued. He also expressed suspicion about medication/drug companies and demonstrated non-compliance with his prescribed medication regime on occasion.
- [80] On April 20, 2008, Peter executed a living will where he directed his family, his physician, his lawyer and others who may be responsible for his health, welfare or affairs to allow him to die and not be kept alive by artificial means or "heroic measures". He asked for, and obtained, signatures on the living will from Heidi, Richard and Robert.
- [81] In 2009, during one of Heidi's trips to see Peter in Tofino, Peter complained of dizziness. Heidi urged him to see his doctor, Dr. Armstrong, to follow up after his craniotomy surgery. Peter resisted doing so. Heidi marks this event as the beginning of Peter's ongoing distrust of doctors and medications, deposing that Peter's "life long paranoia was now very pronounced and became directed at doctors who he suspected were poisoning him."
- [82] As a result of her 2010 car accident that now prevented her from travelling to see Peter to help him and clean his house, Heidi arranged for a private housekeeper for Peter. This arrangement did not last long because Peter found it too hard to have a stranger in his home.
- [83] 2010 was also a year that saw Mr. Roth retire from the practice of law. He transferred his legal practice and files to Mr. Plett.
- [84] On September 29, 2010, Peter was admitted to Tofino General Hospital where he stayed until October 13, 2010. Within a few days following his discharge, Peter was back in hospital again, this time at Royal Jubilee Hospital in Victoria. This hospital stay saw the loss of his left third and fourth toes through amputation as a result of significant ischemic necrosis related to his underlying condition of diabetes. Heidi visited Peter during his hospitalization and found him to be agitated, complaining of a "drowning death experience" and an "erroneous administration of fluid" to his lungs.

- [85] It was during this hospital stay that Peter gave Robert, Richard and Heidi each a \$9,000.00 gift. Robert referred to this as a "thank you" gift. Peter tried to give similar gifts to hospital staff that were helping him.
- [86] On January 7, 2011, Peter attended to Tofino General Hospital emergency department complaining of shortness of breath. In February 2011, it was confirmed that Peter had long-standing type 2 late-stage diabetes.
- [87] On February 5, 2011, Peter was admitted to Tofino General Hospital where he stayed until late April 2011. At Peter's request, Heidi called Karolina to let her know her brother was in hospital again.
- [88] As a result, in March 2011, Karolina and Christine travelled from Germany to Tofino to visit Peter. Details of their visit are sparse in the evidence, but it was during this visit that Peter instructed Mr. Plett, his new lawyer, to prepare a codicil to the 2007 Will.
- [89] Mr. Plett received a document entitled "Statement of Peter Lamperstorfer", dated March 15, 2011, outlining that Peter now wished to be cremated and to be transferred to Germany to be buried in Munich. It also communicated that Peter wished to have Mr. Plett act as executor in place of Mr. Roth, and sought to correct spelling mistakes in two of the German beneficiaries' names.
- [90] Mr. Plett met with Peter in his hospital room to discuss these instructions. Karolina and Christine were there when Mr. Plett arrived, but quickly left and gave Peter and Mr. Plett privacy. Following discussions about Peter's family, assets and liabilities, the changes identified in the written document described above were then incorporated into a codicil, which Peter signed in hospital on March 18, 2011 (the "Codicil"). The parties have agreed the Codicil is valid.
- [91] The same month, Peter called Richard and told him he thought people were trying to murder him. Richard tried to calm and reassure his father that his concerns were unfounded.
- [92] Peter was discharged from Tofino General Hospital on April 26, 2011. Again, he did not remain in his home for long.
- [93] Throughout the rest of 2011, Heidi spoke to Peter by telephone each week. She found that during these calls, Peter was either rambling or speaking clearly about murders and police in the hospital, things Heidi knew to be untrue.
- [94] On November 25, 2011, Peter was admitted to Tofino General Hospital for about a week. He was admitted again on December 9, 2011. On January 8, 2012, Peter was admitted to hospital under a mental health certificate and three days later was transferred to the psychiatric ward of St. Joseph's Hospital in Courtenay where he was diagnosed with vascular dementia, psychosis and schizoid compulsive personality disorder. During this period of hospitalization, Heidi continued to speak to Peter by telephone as she always had, until

January 24, 2012. On this day, Peter's psychiatrist called her to inform her that Peter expressed a desire to kill her and the psychiatrist. The psychiatrist told Heidi not to call Peter for awhile. She complied with this direction.

- [95] The mental health certificates holding Peter in hospital were cancelled in April 2012. Peter returned to Tofino General Hospital on April 27, 2012, where he stayed for three months. It was during this time that Heidi, as a result of a request from a social worker, began to search for a long-term care facility for Peter. Peter was ultimately placed at Oak Bay Lodge, a long-term care facility in Victoria, near Heidi's home.
- [96] From the time Peter moved into Oak Bay Lodge on July 26, 2012, until he died in February 2013, Heidi visited Peter every day. Peter did not have access to a telephone during this time.
- [97] In December 2012, Heidi, Robert and Richard decided to sell Peter's Tofino Property on his behalf as it was clear that he would never return home and it was costing money. Richard had been paying the insurance and utility bills on the Tofino Property since January 2012, from the money his mother regularly sent him. As well, significant clean-up was required in order for it to be sold. These costs were again paid for by Richard from the funds supplied by his mother.
- [98] Peter died on February 3, 2013.
- [99] On April 23, 2013, the gross value of Peter's estate was \$720,099.83. On April 29, 2013, a grant of probate of the 2007 Will and Codicil was made to Mr. Plett.
- [100] As of April 9, 2017, the value of Peter's estate was \$635,598.39.
- [101] What is clear from the unanimous evidence of those closest to Peter - Heidi and his two sons - is that Peter was a difficult man. He lived a fairly reclusive lifestyle and was intensely private. He had mental health difficulties, including bouts of paranoia from time to time, particularly pronounced in the last several years of his life. His health conditions required him to rely heavily on the generosity of his ex-wife in his later years. Peter's contact with her and his sons was on his terms, generally preferring telephone visits.
- [102] Peter had strongly held opinions throughout his life and unfortunately suffered from persecutory delusional beliefs from time to time, particularly in his last several years, all of which impacted the quantity and quality of the time his ex-wife and two sons could spend with him. Heidi, Richard and Robert's evidence in this regard is well-supported by the medical evidence.
- [103] I find there was never any estrangement between Peter and his sons, only a period where Peter was angry with them for an erroneously held belief that either or both of them and his ex-wife has conspired against him to have him declared mentally incompetent. Nevertheless, his family stood by him and helped him in ways they could and under the terms he allowed.

- [104] I also find nothing nefarious in the visits and involvement of Peter's German relatives. Karolina and Christine kept in touch with Peter over the telephone and visited when they could. They came to see him when they thought they may not see him again. No doubt Peter found comfort in their visits, including a visit by Stephan, a cardiologist.
- [105] This concludes my narrative, chronological findings of fact. I will make additional findings in the analysis portion of these reasons as the need arises.

OVERVIEW OF LEGAL PRINCIPLES

- [106] Section 2 of the WVA provides that if, in the court's opinion, a will fails to make adequate provision for the proper maintenance and support of the testator's spouse or child, the court is empowered, in its discretion, to vary the will to make provision that it considers adequate, just and equitable in the circumstances.
- [107] In *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, McLachlin J., as she then was, outlined the principles underlying the WVA and considerations that should inform its application. She identified two fundamental interests protected by the WVA - the main objective of the adequate, just and equitable provision for a testator's spouse and children and the other protected interest of a testator's testamentary autonomy.
- [108] Madam Justice Ballance summarized the conceptual essence of this statute as explained by the Court in *Tataryn in Dunsdon v. Dunsdon*, 2012 BCSC 1274 at para. 130, in part:

The conceptual essence of the statute is to permit judicial interference with testamentary freedom where adequate provision has not been made in respect of a narrow protected class. Testamentary freedom is, therefore, subordinate to the main objective of the WVA and must yield to the extent required to achieve adequate, just and equitable provision for the applicant spouse and/or children. That said, the judicial approach is not to start with a "blank slate and write a will designed to right all the perceived wrongs of the past, nor interfere only to improve upon the degree of fairness of a will, if the testator has met his obligations under the [WVA]": *Chan v. Lee (Estate)*, 2004 BCCA 644 at para. 43.

- [109] In assessing the adequacy of a testamentary provision, the court is to bear in mind that the concept of adequate provision is a flexible notion and highly dependent on the circumstances of an individual case. To measure the adequacy of a testamentary provision, the court is to ask whether the testator has acted as a judicious parent (or spouse as the case may be) using an objective standard informed by current societal legal and moral norms: *Dunsdon* at para. 131.
- [110] As explained in *Tataryn*, legal norms are the obligations that the law would impose upon the testator during his or her life if the question of provision for a spouse or child were to arise. This means that a testator's legal obligations that could have arisen in relation to support, division of family property and the law of constructive trust/unjust enrichment are relevant to the court's assessment. As Ballance J. observed in *Dunsdon*, the Court in *Tataryn*

left open the prospect that an independent adult child might have a legal claim against a parent based upon unjust enrichment: Dunsdon at para. 132.

[111] As the Court also explained in Tataryn, a testator's moral norms are "to be found in society's reasonable expectation of what a judicious person would do in the circumstances, by reference to contemporary community standards": Tataryn at p. 821.

[112] In Dunsdon, Ballance J. conveniently summarized a number of the overlapping considerations accepted in the post-Tataryn jurisprudence as informing the existence and strength of a testator's moral duty to independent children:

[134] In the post-Tataryn era, the following considerations have been accepted as informing the existence and strength of a testator's moral duty to independent children:

*relationship between the testator and claimant, including abandonment, neglect and estrangement by one or the other;

*size of the estate;

*contributions by the claimant;

*reasonably held expectations of the claimant;

*standard of living of the testator and claimant;

*gifts and benefits made by the testator outside the will;

*testator's reasons for disinheriting;

*financial need and other personal circumstances, including disability, of the claimant;

*misconduct or poor character of the claimant;

*competing claimants and other beneficiaries:

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

[113] The Tataryn Court recognized that the overall assessment under the WVA necessarily involves balancing competing claims and, where the size of the estate permits, emphasized that the court should strive to ensure all legal and moral claims are satisfied. However, in circumstances where complete satisfaction of all claims is not possible, a court must then prioritize the claims. Claims that would have been recognized as legal obligations of the testator should generally be given priority over moral claims. Any competing moral claims should be ranked according to their relative strength: Tataryn at p. 823.

[114] The Tataryn Court also recognized that a court's assessment in any given case would produce a range of options for the distribution of assets that may be appropriate. A court should only vary a will where the testator has chosen a distribution that falls outside of this range: *J.R. v. J.D.M.*, 2016 BCSC 2265 at para. 87. In other words, there is no single way for a

testator to divide her estate in order to meet her legal and moral duties under the WVA. It is only where the testator has chosen a division that falls below her obligation as informed by reference to the contemporary notion of legal and moral norms that a court will vary a will so as to achieve the "justice the testator failed to achieve": *Tataryn* at pp. 823-824 and *Dunsdon* at para. 137.

- [115] It is important to remember that the court should not approach its application of the WVA as a mechanism to "right all the perceived wrongs of the past" or "to improve upon the degree of fairness of a will" if the testator has met her obligations under the WVA: *Chan v. Lee (Estate)*, 2004 BCCA 644 at para. 33 and *J.R.* at para. 84.
- [116] As Madam Justice Dardi observed in *J.R.*, the post-*Tataryn* jurisprudence also establishes that in determining whether a testator has fulfilled his obligations, a court may consider gifts made or arrangements to facilitate the passing of assets outside the will. In some cases, a testator's inter vivos gifts to individuals other than the claimant may intensify the moral duty owed to a claimant. In other cases, a moral duty owed to a claimant may be diminished or negated entirely when a testator has made gifts to that claimant either before death or in consequence of it: *J.R.* at para. 88.

POSITIONS OF THE PARTIES

- [117] The plaintiff, Richard, contends that his father breached his moral obligation to him by failing to make fair and adequate testamentary provision to him. Given his circumstances as a 60-year-old man who has been, and remains, incapable of self-sufficiency for many years, Richard says that 25% of his father's estate in all of the circumstances of this case does not fall within the range of what a judicious parent would consider appropriate.
- [118] Richard submits that if the court does not make an award in constructive trust for his brother, the 2007 Will and Codicil should be varied to distribute Peter's estate as follows:
- 43% to him;
 - 43% to his brother;
 - 10% to his mother; and
 - 4% to be shared between all of the German Defendants.
- [119] Alternatively, Richard argues that if the court does make an award in constructive trust to his brother, Peter's estate would not be large enough to provide a percentage interest in the residuary to the German Defendants such that the court ought to vary the 2007 Will and Codicil to provide \$1,000.00 to each of the German Defendants with 10% of the residuary to his mother, 50% of the residuary to him and the remaining 40% of the residuary to Robert.
- [120] The defendant and plaintiff by counterclaim, Robert, submits that he is entitled to an amount based upon unjust enrichment, payable in damages, on two bases: (1) in relation to unpaid work he performed on Peter's properties; and (2) in relation to the contributions

that he made to Lanico and related income paid to his father during his father's lifetime that he expected to be accounted for in Peter's will. In addition to, or in the alternative, Robert says that Peter also failed to meet the moral obligation he owed to him in all of the circumstances and in accordance with community standards. He argues that the 2007 Will and Codicil should be varied to provide him with no less than 40% of his father's estate.

[121] Heidi supports the positions of her sons with respect to their claims to increase their percentage share of Peter's estate. She specifically adopts the proportionate distributions suggested by Richard and takes no position on Robert's legal claim based upon unjust enrichment.

[122] Heidi is of the firm view that her former husband failed to make adequate, just and equitable provisions in the 2007 Will and Codicil for their sons. If the Court does vary the distributions, she only asks that the Court consider her significant assistance to Peter over the years and not vary the distribution he made to her. Heidi argues that by leaving 10% of his estate to her, Peter was clearly recognizing that he owed her a moral obligation, a societal notion, for all of her years of service and friendship to him.

[123] The German Defendants all submit that this action should be dismissed. They argue that by leaving 50% of his estate to his two adult children, children he had previously disinherited, Peter was acting both rationally and in the manner of a judicious parent in the circumstances. The 2007 Will and Codicil distribution should not be disturbed, they say, as such a distribution falls within the range of possibilities that render the distribution adequate, just and equitable to both Richard and Robert.

DISCUSSION

Robert's Legal Claim

[124] Robert asserts a legal claim against his father's estate founded in unjust enrichment.

[125] Although the Executor and the German Defendants raise a preliminary matter, a limitations defence, I find it unnecessary to address this defence in light of my conclusions about the merits of Robert's unjust enrichment claim.

[126] Of the two bases he asserts, Robert's central claim revolves around his work at Lanico. He asserts that he held a legitimate expectation that his father would compensate him by a larger testamentary bequest for his sacrifices at Lanico that benefitted his father and correspondingly deprived him.

[127] Robert emphasizes that he dropped out of high school at his father's insistence to help him run Lanico and was compelled to adjust his career expectations to accord with his father's wishes. He assumed most of Lanico's operations in 1979 and says he worked without adequate compensation. He ran Lanico alone between 1989 and 1994, after his father stopped working in 1989, even though Peter continued to draw dividends and a salary during this five-year period. Robert submits that his father drew 60% of the dividends and

30% of the wages paid out by Lanico.

- [128] The financial statements for Lanico for the years between 1979 and 1984 are unavailable, but based on the records he has located, he contends that his father received \$176,737.00 during the period he did not contribute to Lanico's operation. After accounting for the value of the business (\$25,000.00), Robert claims the first \$151,737.00 of Peter's estate.
- [129] Robert submits that his father received a clear and obvious benefit here. He drew an income without having to expend any effort or time. The detriment to him is also clear and obvious - he gave up the opportunities to pursue another career and the full income from Lanico to which he was entitled during those years. Finally, Robert submits that no juristic reason exists for Peter's estate to keep the enrichment.
- [130] Robert's secondary argument revolves around the labour he provided on Peter's real properties between 1974 and 1990. He adduces no evidence about the value of these efforts.
- [131] The Executor submits that Robert does not allege that his father ever promised him anything concerning compensation from the estate for the work Robert performed, either at the residences or through the operation of Lanico. The Executor observes that Robert deposed that he and his father did not speak about the details of their personal finances and that Peter would merely thank Robert for his work at the residences, but did not pay him, nor did Robert ask for payment. The Executor further says that no evidence exists that Robert performed any work after 1994 that may have enriched Peter or his estate. The executor highlights that no evidence has been tendered that Peter and Robert agreed that Robert would be compensated for his work from the estate, nor did Peter ever promise such a thing.
- [132] The German Defendants submit that Robert's claim for unjust enrichment is likely subsumed within the quantification of Peter's moral obligation toward his son. If the unjust enrichment claim is seen to be independent, the German Defendants say that the facts alleged fail to support such a claim.
- [133] The German Defendants refer to *Moses v. Lower Nicola Indian Band*, 2015 BCCA 61 for the proposition that "enrichment" in this context requires a person to receive a demonstrable financial benefit or save inevitable expense that is tangible and capable of restoration to the claimant in specie or by money. A clear and manifest enrichment must occur, otherwise it would be wrong to make the defendant pay, as the defendant might have otherwise declined the benefit if given the choice. The requirement of corresponding deprivation must have the same qualities as an enrichment. The German Defendants say that no such enrichment of Peter occurred and no such evidence exists, other than the bare assertion of Robert, which is insufficient. A similar bare assertion by Robert that he was deprived of a benefit is also insufficient proof.

- [134] The German Defendants highlight several cases in which courts rejected a claim of unjust enrichment that was attached to a wills variation claim because insufficient evidence existed to support the enrichment and the deprivation aspects, including *Kuzyk v. Czajkowski*, 2016 BCSC 1109; *Robillard v. Robillard Estate*, 2015 BCSC 1417; and *Philp v. Philp Estate*, 2017 BCSC 625.
- [135] Unjust enrichment arises where one party receives a benefit, the other party suffers a corresponding deprivation, and there is no judicial reason for the benefit and deprivation: *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 30.
- [136] The Court in *Kerr v. Baranow*, 2011 SCC 10 reviewed and explained these three elements:
- [36] The first and second steps in the unjust enrichment analysis concern first, whether the defendant has been enriched by the plaintiff and second, whether the plaintiff has suffered a corresponding deprivation.
- [37] The Court has taken a straightforward economic approach to the first two elements -- enrichment and corresponding deprivation. Accordingly, other considerations, such as moral and policy questions, are appropriately dealt with at the juristic reason stage of the analysis: see Peter, at p. 990, referring to *Pettkus*, *Sorochan v. Sorochan*, [1986] 2 S.C.R. 38, and *Peel*, affirmed in *Garland v. Consumers' Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629, at para. 31.
- [38] For the first requirement -- enrichment -- the plaintiff must show that he or she gave something to the defendant which the defendant received and retained. The benefit need not be retained permanently, but there must be a benefit which has enriched the defendant and which can be restored to the plaintiff in specie or by money. Moreover, the benefit must be tangible. It may be positive or negative, the latter in the sense that the benefit conferred on the defendant spares him or her an expense he or she would have had to undertake (*Peel*, at pp. 788 and 790; *Garland*, at paras. 31 and 37).
- [39] Turning to the second element -- a corresponding deprivation -- the plaintiff's loss is material only if the defendant has gained a benefit or been enriched (*Peel*, at pp. 789-90). That is why the second requirement obligates the plaintiff to establish not simply that the defendant has been enriched, but also that the enrichment corresponds to a deprivation which the plaintiff has suffered (*Pettkus*, at p. 852; *Rathwell*, at p. 455).
- (2) Absence of Juristic Reason
- [40] The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case: see *Pettkus*, at p. 848; *Rathwell*, at p. 456; *Sorochan*, at p. 44; *Peter*, at p. 987; *Peel*, at pp. 784 and 788; *Garland*, at para. 30.

- [41] Juristic reasons to deny recovery may be the intention to make a gift (referred to as a "donative intent"), a contract, or a disposition of law (Peter, at pp.990-91; Garland, at para. 44; Rathwell, at p. 455). The latter category generally includes circumstances where the enrichment of the defendant at the plaintiff's expense is required by law, such as where a valid statute denies recovery (P.D. Maddaugh, and J. D. McCamus, *The Law of Restitution* (1990), at p. 46; *Reference re Goods and Services Tax*, [1992] 2 S.C.R. 445; *Mack v. Canada (Attorney General)* (2002), 60 O.R. (3d) 737 (C.A.)). However, just as the Court has resisted a purely categorical approach to unjust enrichment claims, it has also refused to limit juristic reasons to a closed list. This third stage of the unjust enrichment analysis provides for due consideration of the autonomy of the parties, including factors such as "the legitimate expectation of the parties, the right of parties to order their affairs by contract (Peel, at p. 803).
- [137] In *Garland*, Iacobucci J. explained that the juristic reason stage of the unjust enrichment analysis proceeds in two sub-steps. At the first step, "The plaintiff must show that no juristic reason from an established category exists to deny recovery": para. 44. These established categories are those identified at para. 41 in *Kerr* above: an intention to make a gift, a contract, or a disposition of law. If no juristic reason from an established category exists, then the plaintiff has made out a *prima facie* case: *Garland* at para. 44.
- [138] The Court in *Garland* went on to explain the second sub-step of the juristic reason stage of the analysis:
- [45] The *prima facie* case is rebuttable, however, where the defendant can show that there is another reason to deny recovery. As a result, there is a *de facto* burden of proof placed on the defendant to show the reason why the enrichment should be retained. This stage of the analysis thus provides for a category of residual defence in which courts can look to all of the circumstances of the transaction in order to determine whether there is another reason to deny recovery.
- [46] As part of the defendant's attempt to rebut, courts should have regard to two factors: the reasonable expectations of the parties, and public policy considerations. It may be that when these factors are considered, the court will find that a new category of juristic reason is established. In other cases, a consideration of these factors will suggest that there was a juristic reason in the particular circumstances of a case which does not give rise to a new category of juristic reason that should be applied in other factual circumstances. In a third group of cases, a consideration of these factors will yield a determination that there was no juristic reason for the enrichment. In the latter cases, recovery should be allowed. The point here is that this area is an evolving one and that further cases will add additional refinements and developments.
- [139] The authorities the German Defendants rely upon where the court rejected an unjust enrichment claim for insufficient evidence - *Kuzyk*, *Robilland* and *Philp* - are factually distinguishable, but are helpful in terms of general principles and how they are applied.

- [140] In Kuzyk, the plaintiff sought to vary her deceased husband's will and also claimed for unjust enrichment. During their marriage, she had performed the housework and looked after her husband, including when his health declined. The two shared living expenses, maintenance and other expenses, but the husband paid for most of them. The husband also purchased a home and registered it in both his and the plaintiff's name as joint tenants. The plaintiff did not contribute to the home's purchase price.
- [141] In that case, Mrs. Kuzyk argued that the services she provided to her late husband saved him a considerable amount of money and otherwise he would have had to deplete his assets. She retained an expert to value the services she provided, based on information that she provided. In the analysis, the Court found that the plaintiff had exaggerated the level of care her deceased husband required. Mr. Justice G.P. Weatherill concluded:
- [161] I agree with the defendants that there is no basis for the plaintiff's claim for unjust enrichment. The plaintiff has received the full benefit of any contributions she made to the Deceased's economic success by obtaining full ownership of the Sandalwood Home.
- [162] On the whole of the evidence, I conclude that the plaintiff cared for the Deceased not under a sense of obligation or with an expectation of payment, but because she loved him and based on her cultural background, she accepted it as her role in the relationship.
- [163] The care that she provided to the Deceased was a continuation of the role she had performed throughout their relationship. She received the reciprocal benefit of the Deceased providing for her financially throughout.
- [164] There is no evidence that the plaintiff suffered any material deprivation. She provided care to the Deceased because she loved him and felt she was duty bound to provide it in her role as his wife.
- [165] The gift of the Sandalwood Home satisfies and provides a juristic reason for any enrichment the Deceased may have received.
- [142] In Robillard, the plaintiff sought to vary his mother's will on the basis of his contributions to his mother's care during her life and to her estate. The Court concluded the plaintiff had greatly assisted his mother, but had also misappropriated her funds for his own use. In Mr. Justice Punnett's assessment, he expressed grave doubts about the plaintiff's credibility, noting his bad conduct during the proceedings, and ultimately rejected the plaintiff's evidence about the extent of his contributions. Justice Punnett concluded:
- [103] While the plaintiff did not plead unjust enrichment or a claim in quantum meruit he submitted that his contribution to the estate of the testator by way of his care of the testator and his enhancement of the value of the condominium found such claims. There is no evidence to indicate that the plaintiff has built-up the estate. Instead he has depleted it. Given that and the other findings made above, I cannot find that any contribution of this sort justifies enhancing his entitlement under the Will.

- [143] In *Philp*, the plaintiff made an unjust enrichment claim against his deceased wife's estate, arguing that he had contributed to her farm property and horse business. He adduced evidence of the withdrawals he made from an investment account, ostensibly to help keep the farm business running and the farm losses reported on tax returns. The Court noted in its assessment that these alone did not establish the extent of Mr. Philp's financial contribution to the farm. Madam Justice Burke also concluded that the farm was a hobby farm, and the funds invested in it were to maintain a particular lifestyle. The farm consistently lost money, so the funds did not contribute to the value of the property, which was primarily in its land value. Madam Justice Burke concluded:
- [88] While at first glance, Dr. Philip may appear to have at least an arguable case with respect to a claim in unjust enrichment, I find there was insufficient evidence adduced in support of his contributions to the property. Although there was evidence on the amount of funds and labour he contributed, as noted earlier I have serious concerns with the quality of that evidence sufficient to sustain such a claim and the documentation on which it relies. There were also gaps in the documentation filed in this court in support. Ultimately, I am not prepared to find that the test in *Kuzyk* has been made out on the evidence before me.
- [144] *Gould v. Royal Trust Corp. of Canada*, 2009 BCSC 1528, aff'd 2010 BCCA 424 is an example where a court found an unjust enrichment. In this case, the plaintiff removed her aging mother from Canada to live with her in Guatemala. The mother had dementia and could no longer live on her own. The plaintiff did not inform her three brothers that she was taking their mother as she knew they would object to the plan. One of the brothers was his mother's designated legal representative, as the mother was no longer legally competent. The plaintiff then incurred a number of expenses to care for her mother in Guatemala during the last four years of her mother's life. After their mother died, the plaintiff sought to vary the distribution to her in her mother's will. Part of her claim included a declaration of constructive trust against her mother's estate for the medical expenses she incurred, based upon unjust enrichment.
- [145] The plaintiff failed to produce receipts to support her claim that she spent \$154,070.00 on her mother's medical care. However, she prepared a memorandum a year before the trial that set out these expenses. She deposed to the memorandum's accuracy in her Affidavit and attached it as an exhibit. She also provided Affidavits that confirmed that she had arranged for medical care for her mother, but those Affidavits did not verify the cost of that care.
- [146] Mr. Justice Pearlman assessed the various expenses claimed and found that some of the amounts were excessive; however, he was satisfied that the plaintiff "did expend monies for her mother's care that did result in an enrichment of her mother's estate": para. 127. He found that, had she remained in Canada, the plaintiff's mother's estate would have been reduced by the healthcare expenses that would have been required to be paid. The Court then considered the juristic reason stage of the analysis extensively and concluded that the plaintiff had a legitimate expectation that she would be partially compensated for the costs

of her mother's care and there was no juristic reason to deny partial recovery. The Court ultimately awarded \$75,000.00 in restitution for unjust enrichment.

[147] In the case at bar, I find that the evidence adduced by Robert falls short of proving this claim.

[148] I will begin with Robert's secondary claim, as it is the simplest to resolve. Robert adduced very little evidence and his counsel spent very little time in submissions on this aspect of the claim. Robert's evidence was very general. He deposed to helping his father from 1974 to 1990 with maintenance and repairs on Peter's homes. The list of work he provided is general in nature and is common to the help that many adult children would provide their parents. Robert adduced no evidence about the value of such work. I find Robert has failed to prove his claim here.

[149] Although Robert adduces more evidence in support of his claim based upon his work at Lanico, I find the evidence too uncertain and tenuous to support this claim.

[150] Starting with the years 1979 - 1984, Robert asserts Peter was enriched and that he was correspondingly deprived, but adduces no financial records from Lanico during this time, no evidence about the number of hours or reduced workload of Peter, no evidence about his number of hours or how and in what manner his workload increased as a result. There is an insufficient evidentiary basis upon which to assess the part of Robert's claim based upon these years.

[151] For the years 1985 - 1994, Robert derives calculations for Peter's enrichment and his detriment from two sources - the unaudited financial statements of Lanico from 1985 to 1995 attached to his Affidavit and two of his own personal tax documents (his 1991 tax return and his 1993 T5 - Statement of Investment Earnings). By his comparing these two tax documents to Lanico's financial statements, Robert believes that because he received 70% of the wages paid by Lanico and 40% of the dividends, Peter must have received 30% of the wages paid and 60% of the dividends.

[152] Based on this, Robert summarizes the dividends and wages that he says Lanico paid to Peter between the years 1985 to 1994 in the following table:

Year

Dividends

Testator's share at 60%

Wages

Testator's share at 30%

Total Enrichment to Testator

1995

25,198

1994

39,745

11,923

1993

3,333

1,999

37,461

11,238

1992

3,333

1,999

35,051

10,515

1991

10,240

6,144

70,398

21,119

1990

9,050

5,430

50,262

15,078

1989

5,174

3,104

55,797

16,739

1988

8,285

4,971

48,574

14,572

1987

12,800

7,680

26,541

7,962

1986

6,311

3,786

40,818

12,245

1985

13,000

7,800

41,446

12,433

Total

42,913

133,824

\$176,737

Less estimated value of Testator's share

-25,000

\$151,737

- [153] While at first blush Robert appears to have an arguable case that Peter was enriched and he was correspondingly deprived for those years, the deficiencies in this evidence are such that I conclude Robert has not proven his claim.
- [154] First, for the years 1985 - 1989, leaving aside issues related to the absence of evidence about the accuracy of the unaudited financial statements and whether Robert's interpretations of them are correct, Robert's calculations for these years fail to take into account that Lanico had another paid employee. This employee was let go in 1989. What were her hours, what was she paid? Robert's calculations for these years also fail to take into account that Peter remained working at Lanico those years. The evidence does not reveal his hours or pay, but as he was working in some capacity, he was obviously entitled to some pay. In the result, I am not satisfied Robert has established any enrichment to Peter for those years.
- [155] Second, for the years after Peter left Lanico and continued to draw a salary and receive dividends (1990 - 1994), assuming I could accept Robert's calculations as accurate, Peter would have received a total of \$85,445.00 from Lanico while Robert was its sole operator and employee. From this figure, Robert properly says that the value of Lanico, a company that Peter established and left with Robert in 1989, should be deducted to arrive at the value of Peter's enrichment. Robert proposes to use the value of \$25,000.00. He obtains this figure from what an accountant suggested he might pay for Peter's interest in Lanico in 1989. The name of the accountant and the basis for which he arrived at this figure is unknown. This evidence is hearsay and provides no basis upon which the Court could ascertain its reliability.
- [156] What has, however, been proven is that Peter left Lanico in 1989, leaving it entirely in Robert's hands. Robert continued to work there, himself drawing an income until 1996. Robert paid nothing for the assets of the business. When Robert eventually wound up Lanico in 1996, he started his own business, Lanico Partners. There is no evidence about what Robert did with Lanico's assets other than that he kept the name "Lanico" for his new business, kept its telephone number and also kept "some" of Lanico's "goodwill". Robert then operated his new business, Lanico Partners, until early 2013, earning modest incomes each subsequent year.
- [157] I find on the state of the evidence that it is not possible to properly assess and evaluate what enrichment Peter may have obtained, if any, by the payments he received from Lanico while Robert worked there alone between 1990 and 1994. In other words, I cannot find a clear and manifest enrichment of the testator on the evidence adduced. It is similarly not possible to evaluate any corresponding deprivation, if any, to Robert. He received a business from his father, the value of which is unknown. While Lanico paid his father for four or five years from his continued operation of the business, Robert received the benefit of Peter's business and its goodwill for many years beyond this.

- [158] Even if I could find a clear and manifest enrichment and corresponding deprivation for these years on the evidence, I think the claim would still fail on a juristic reason analysis. No juristic reason from an established category exists to deny recovery. There is no evidence of any contract between father and son, nor is there any evidence that Robert intended to make a gift of the funds Lanico paid to Peter between 1990 and 1994. Robert's work at Lanico alone while Peter continued to be paid was not performed pursuant to any statutory or equitable obligation. Rather, it is upon consideration of the parties' legitimate expectations where I think the claim would also fail.
- [159] Robert asserts that he held a legitimate expectation that he would be compensated for all of his efforts and sacrifices with Lanico in his father's will. He does not say why he asserts holding this belief. On the evidence, I conclude that it is not a belief that could be seen to be reasonably held. Peter did not discuss his finances with his sons. There is no evidence Peter ever told Robert (or anyone), or led Robert (or anyone), to believe that he would compensate Robert for his efforts. In fact, the totality of the evidence leads to the opposite conclusion. Peter was a reclusive, challenging and, I regret to say, selfish man. He expected his ex-wife and his children to do things for him throughout his lifetime. He never offered or suggested any remuneration for their efforts. He largely ignored them unless he needed them. Given Peter's well-established personality traits, the manner in which he treated his sons, the lack of any suggestion that he planned to compensate Robert and the fact that he gave Robert Lanico to operate, including all of Lanico's assets and goodwill, I cannot accept Robert's assertion that he legitimately expected some form of additional testamentary disposition from his father.
- [160] However, this does not mean that Robert's contributions to Lanico and his father's life generally are irrelevant. To the contrary, Robert's contributions to his father's life are properly considered within the quantification of Peter's moral obligation to Robert and may well serve to increase it.

The Moral Claims

- [161] In this case, the only persons to whom Peter owed any moral duty under the WVA were his two sons. He owed no statutory moral duty to any of the other beneficiaries.
- [162] The essential question here, for each son, is the nature and extent of Peter's moral obligation to him and whether, by providing him with 25% of his estate, Peter met his obligation. In other words, with respect to each son, does 25% of Peter's estate fall within a range of adequate provision that is in accordance with society's reasonable expectations of what a judicious parent would do in the circumstances? Such an assessment is based on the circumstances in existence at Peter's death and those reasonably foreseeable to him: Dunsdon at para. 138.
- [163] I turn now to the relevant considerations that inform the existence and strength of Peter's moral duty to each of Richard and Robert.

Size of the Estate

[164] The size of Peter's estate is not insignificant. The executor deposes, and the parties agree, that the gross value of Peter's estate at the date of his death was \$720,099.83.

Personal Circumstances, Relationship with Peter and Contributions

Richard

[165] Richard is now 60 years old. He is not married or living in a marriage-like relationship, nor does he have any children. He lives in Ontario in a house-sitting arrangement where he takes care of the owner's property when the owner is away during weekdays. Richard does caretaking on the owner's home and pays utility bills in lieu of rent.

[166] I have detailed Richard's education and work history earlier in these reasons. In addition to chronic fatigue syndrome, diagnosed in 1985 or 1986, Richard also suffers from other health issues. By early 2006, Richard was unable to work as a result of ear pain and headaches. These conditions also prevented him from air travel which contributed to his inability to see his father when he moved back to Ontario.

[167] In 2009, Richard suffered what he described as his first "mental health breakdown", while at the University of Waterloo. Campus police were involved. Richard described that he was experiencing paranoia, depression and delusions at the time. He was eventually prescribed anti-psychotic, anti-depressant and anti-anxiety medication to treat these conditions.

[168] In June 2010, Richard was admitted to hospital for psychiatric care for about 11 days. Police were involved to bring him under control.

[169] By 2011 and still unable to work, Heidi began to provide money to Richard. She continues to provide money to him to this day as he remains unable to work and provide for himself financially as a result of his disabilities. Self-employed throughout most of his working life, he has no private pension plan and has contributed very little to Canada Pension Plan. Richard estimates having received at least \$100,000.00 from his mother since late 2012 in order for him to survive. He owns only one asset - bare land in Ontario worth about \$73,000.00.

[170] It is clear that Richard and his father share many similar traits. Both men are solitary figures, introverted, have explosive personalities and suffer from mental health challenges that include bouts of paranoia. Both men kept their mental health and financial circumstances generally private and especially private from each other. Their personalities and health difficulties kept them from seeing one another in person the last dozen years of Peter's life. Nevertheless, they kept in touch as best they could and Richard continued to try and help and monitor his father's life and health through telephone calls and through his mother.

- [171] Richard helped his father and contributed in many ways throughout Peter's life. I have detailed things such as his working for a time at Lanico, helping Peter find and purchase properties, doing maintenance and other work at the Cobble Hill Property, assisting in selling the Cobble Hill Property, helping his father build his dream home in Tofino under difficult physical circumstances, tending to bill payments for the Tofino Property while Peter was in hospital, accepting the responsibility (with Heidi and Robert) to make end of life decisions for Peter, arranging the sale and clean up of the Tofino Property so Peter could pay for his care in Oak Bay Lodge and other things. It is clear that Peter did rely on Richard from time to time, despite the physical and sometimes emotional distance between them. In these circumstances, it can fairly be said that while they did not have a close relationship, it was a good one.
- [172] Richard is impoverished. He has had no income for many years and is unlikely to earn any income in the future as a result of his mental and physical health difficulties. He relies on his mother's charity to survive.

Robert

- [173] Robert is currently 62 years old. He lives a modest lifestyle and only through parsimonious choices has he been able to save and live on his savings. At the time of his father's death, he owned a 90 year old home worth \$340,000.00, had RRSPs of \$340,000.00 and held about \$165,000.00 in other assets. He had a modest annual income in the amount of approximately \$19,000.00.
- [174] At the age of 24, Robert was diagnosed with a spinal cord disease, transverse myelitis. He continues to suffer from issues related to this disease, including an overactive bladder, which has impeded his enjoyment of life. He had a bladder tumor resection in 2007. Robert also suffers from depression and osteoarthritis.
- [175] As with Richard, Robert shares some similarities with his father. Both men abused alcohol for many years, enabling one another by being one another's "drinking buddy" when together. Peter stopped drinking at age 60, but Robert continues to struggle to keep his drinking to a moderate level. Robert's challenges with alcohol misuse led him to two impaired driving convictions and one stay at a rehabilitation clinic in 1984, following the second of these convictions.
- [176] It is clear from the evidence that Robert did what his father expected of him, including quitting high school to work for Lanico, taking the career path his father expected and maintaining the business. He also helped his father and contributed in ways I have previously described extensively in respect of Robert's legal claim. Unfortunately, Peter's personality was such that after Peter moved from Ontario to British Columbia in 1990, he never returned to visit Robert (or Richard) in Ontario. All subsequent in-person contact with his father was undertaken by Robert. Robert visited him in 1991, 1995 and 2001. As I have outlined, Robert booked other trips to see his father in later years, but then cancelled

them as a result of Peter's wishes. Nevertheless, Robert continued to have a good relationship with his father by telephone. He also kept up with his father's life through his mother and brother. As with his brother, Robert's relationship with his father in the last years was not overly close, but it was good.

Competing Claims

- [177] Heidi is currently 80 years old. She owns and lives in a home in Victoria, British Columbia, her only significant asset. Her home is valued in excess of \$1,000,000.00 and is encumbered by a \$70,000.00 mortgage from an equity loan. Heidi's only income derives from government sources - approximately \$1,700.00 per month. She uses this income and the equity loan to pay her expenses and to provide Richard with financial assistance from time to time.
- [178] I have detailed Heidi's involvement in Peter's life throughout the chronology. In summary, Heidi remained in Peter's life on a consistent basis following their 1969 divorce. She performed many acts of kindness toward him at significant expense, in terms of her time particularly, that assisted Peter greatly over the years. As her counsel put it, Heidi also "assisted [Peter's] medical team by being a consistently supportive and stable force which allowed the medical team to do the best they could with a challenging individual." Not only did Heidi help Peter and his medical team, she also kept their sons apprised of their father's life and health and contacted Karolina as well when Peter asked her.
- [179] Karolina is 90 years of age. There is no evidence regarding her income and assets. While she only visited her brother in Canada five times between 1979 and 2011, I find that she and her brother shared as close a relationship as her brother and their geographical distance would allow. In their early years, they exchanged letters and postcards. Once telephone communication improved, they maintained regular telephone contact.
- [180] Christine is Karolina's daughter; Peter's niece. She lives in Germany. She is 57 years old and has been a court translator for 30 years. She spoke with her uncle regularly on the telephone and saw him eight times between 1978 and 2011. She had a good relationship with her uncle. There is no evidence with respect to her financial circumstances. Christine is married to Stephan, who is a medical doctor with a speciality in cardiology, internal medicine and vascular diseases. Stephan is 61 years old. He visited Peter four times between 1984 and 2007. As with his wife, there is no evidence with respect to his financial circumstances.
- [181] Dario, Dominik and Tim-Oliver are the children of Christine and Stephan, age 29, 27 and 22 respectively. There is no evidence from these defendants, but their parents' evidence indicates that at least two of them never met their uncle.
- [182] Helmut is Karolina's brother and nephew of Peter. There is no evidence from this defendant.

Peter's Reasons for the 2007 Will Distributions

- [183] While Peter did not disinherit his sons in the 2007 Will, he did give 50% of his estate to a number of persons to whom he owed no moral or legal obligation. There is no statement in the 2007 Will or Codicil, or any other writings by Peter that explains why he made the dispositions he did. However, there is a large body of reliable evidence from which I can draw certain inferences and reach certain conclusions about what motivated and influenced Peter's decision-making.
- [184] Peter originally disinherited his sons in the 1996 Will. He told Mr. Roth at the time that he was doing this because he was angry with them (and with Heidi) for trying to have him declared incapable of managing his financial affairs. This belief, like many other delusional beliefs held by Peter over the years as a result of his mental illnesses, was not true.
- [185] When preparing the 2007 Will, Peter's misplaced anger toward his sons had diminished somewhat, but was not altogether gone. When Mr. Roth, his lawyer, raised the subject of a possible WVA claim from either or both of his sons if he continued to disinherit them, Peter became upset, but asked how much he should leave them. His lawyer did not give Peter any concrete figure, but told him to leave as much to each of his sons as would prevent them from bringing a claim against his estate. Peter chose 25% of his estate for each son, but gave Mr. Roth no specific reason for this choice.
- [186] There is no suggestion that Richard abused his position when given the limited power of attorney for the Cobble Hill Property or in his other responsibilities. There is nothing to suggest that Richard and Robert did not work in Peter's best interest when given tasks by Peter. Both sons devoted time, labour and effort into those tasks. I see nothing in the evidence to support any rational or reasonable reason why Peter expressed anger with his sons and Heidi in 1996 and 2007, and nothing to support Peter's expressed belief that Robert, Richard or Heidi were trying to take control of his money, his property and/or have him declared mentally incompetent. Unfortunately, Peter suffered from a complicated medical and mental health history that included bouts of paranoia, delusions and feelings of persecution, not just in regard to his immediate family, but in regard to doctors and medical staff who were trying to help him. These beliefs led to his misplaced anger against his sons, which underpinned his decision to first leave them nothing and then to leave them each 25% of his estate.
- [187] Peter took no steps to inform himself about either of his sons' financial, medical, or other circumstances when he made the 2007 Will, or at any time thereafter. Peter led a solitary, reclusive life where he took little to no interest in his sons' lives. In the result, Peter was not in possession of all of the pertinent information when he made his testamentary disposition in 2007 or anytime thereafter.
- [188] As I have discussed several times, Peter had a long history of struggling with physical ailments and severe mental health difficulties. Although the parties agree that Peter had the capacity to make the 2007 Will and the Codicil, the evidence shows that Peter was

struggling with significant physical and mental health difficulties at the times he did so. In 2007 and 2011, while in the throes of these struggles, he had visits from some of the German Defendants. I agree with Richard that, given Peter's frame of mind, he was no doubt comforted by his relatives' visits, which included a visit from Stephan, a cardiologist. While not unduly influenced by them, Peter was clearly influenced by their presence in his life at that time. They were at the front of Peter's mind at the time he made his testamentary dispositions.

- [189] Richard and Robert both say that their father's unique world view, reclusive lifestyle, personality and severe mental health challenges worked together to skew his ability to appreciate the extent of the moral obligations that he owed to each of them under the WVA. They say that his judgment was, overall, hampered at the time he made his testamentary disposition choices and thereafter. I agree.
- [190] Overall, there is no valid or rational reason for Peter's anger at his sons in 1996, 2007 or anytime thereafter. Nor is there is any valid or rational reason for his choice to disinherit his sons in 1996 and/or for any choice to give his sons less than his moral duty to each of them required thereafter.

Gifts Made Inter Vivos or Outside the Will on Death

- [191] Peter made no gifts to anyone outside the 2007 Will upon his death. While he was alive, Peter did not give his sons any extraordinary gifts. He gave Richard \$10,000.00 in 1989 as some kind of equalization payment for Peter giving Lanico to Robert. Peter also gave Richard \$9,000.00 in 2010, at the same time he gave the same amount to both Robert and Heidi. This was a time when they had given Peter support during his many and lengthy hospital stays. The hospital records show that Peter seems to have tried to give a similar amount at that time to hospital staff who provided him care as well.
- [192] I find that Peter's two gifts to Richard (\$19,000.00) and his one gift to Robert (\$9,000.00) are both relatively small amounts and do not negate or diminish Peter's moral obligation to either of his sons. These were the only gifts their father gave them over the years and the only financial assistance he provided his sons over the years. That these small gifts do not negate or diminish Peter's moral obligation to either of his sons is particularly so in light of the various ways that they each assisted their father when he asked them, or when he would let them, throughout Peter's lifetime.
- [193] Viewing all of the facts objectively, I find that as of the date as Peter's death, he owed a high moral duty to each of his sons, with his obligation to them roughly equal. While Robert arguably contributed more to Peter's life through his work at Lanico, Richard's disabilities render his needs higher. I find that a contemporary judicious parent in Peter's circumstances would have informed himself of all of the relevant circumstances of his sons' lives and recognized such a high moral obligation to each son.

- [194] I also conclude there was nothing in the evidence to negate or reduce the strong moral obligation Peter owed to each of his sons. There is nothing in the evidence to support any valid or rational reason for Peter to have reduced or minimized his moral obligation to either son.
- [195] Not a family that visited frequently in-person, Richard and Robert each took whatever steps they could to maintain a close relationship with their father, as close as he would permit. Their lack of physical contact over the last many years of Peter's life was not an estrangement. It was a consequence of Peter's unique, difficult and challenging personality, framed as it was by periodic bouts of paranoia and delusional beliefs. Peter was a solitary man who expected certain things from his children when he needed them, but otherwise largely ignored them as adults. Both sons tried to help Peter and please him when he asked and in ways that they could. They enjoyed as close a relationship as Peter would allow. Their relationship, under these unique circumstances, was a good one.
- [196] By leaving Richard and Robert each 25% of his estate, the question is whether, in light of his high moral duty to each of them, Peter made adequate, just and equitable provision for each son in the 2007 Will. I conclude the answer to this question, for each son, is no.
- [197] Counsel have referred me to many case authorities. The authorities are useful in terms of general principles and how various courts have applied them to specific facts, but as counsel observed, all cases are factually distinguishable. Many of the case authorities provided are distinguishable in a broad sense in that they involve competing claims between a spouse and a child, or between children. In other words, unlike the case at bar, many of the authorities provided involve claims between those who are both (or all) owed a statutory obligation under the WVA. Of course, in the case at bar, the claims are by those who are owed a statutory obligation as against those who are not.
- [198] I have reviewed all of the case authorities and agree with Robert that the authorities most on point include *Graham v. Chalmers*, 2010 BCCA 13, *Moore v. Drummond*, 2013 BCSC 1762, *McEwan v. McEwan*, 2014 BCSC 916 and *Wilson v. Watson*, 2006 BCSC 53.
- [199] In *Graham*, the testatrix had two adult daughters - Janet and Sandi, and three grandchildren. The gross value of her estate at the time of her death was approximately \$643,000.00. In her will, she bequeathed \$25,000.00 to Janet, the plaintiff. She divided the residue of her estate into four equal shares to be distributed between Janet, Sandi, and Sandi's two children. Janet commenced an action under the WVA. At trial, the Court varied the will to provide that the two grandchildren each be paid \$100,000.00 and that the residue of the estate be divided equally between Sandi and Janet. On appeal, the Court varied the trial judge's decision slightly. Instead of awarding lump sums, the Court substituted percentages. The Court varied the will to provide 40% to each of the testatrix's daughters, the only two beneficiaries to whom she owed a moral obligation, and 10% each to the two grandchildren.

- [200] In *Moore*, the testatrix left her entire estate to her neighbours, to the exclusion of her only son. Her son had been the sole beneficiary under an earlier will. She provided a statement saying that she had disinherited her son because he did not visit her and did not need anything from her. She wrote that he was retired and that she believed he had made good money as a logger.
- [201] At trial, the Court found that the testatrix's statement that her son never visited her was factually incorrect. The Court also found that the testatrix knew nothing about her son's income and knew nothing about his financial circumstances in retirement. She had no actual knowledge of her son's financial circumstances and that her statement that he was not in need was speculation. In the end, the Court concluded that his mother failed to meet her moral obligations to him and varied the will to provide the son 50% of the estate. The remaining 50% of the estate was awarded to the neighbours.
- [202] In *McEwan*, the testator left his entire estate to his two granddaughters and disinherited his only son. At the time of trial, his son was 74-years old and had not been employed since the early 1990s. He had been living in a van and was surviving on a very modest income from government sources. Although the testator and his son were estranged, given how the estrangement between them arose, the Court found it did not justify the testator disinheriting his son and the circumstances of that case did not negate his moral duty to his son. The Court found the provision that would be adequate, just and equitable in the circumstances would see his adult son receive 50% of his estate and the two granddaughters receive 25% each.
- [203] In *Wilson*, the testatrix left 1% of her estate to her sole surviving adult son and the residue to her friends. The Court observed that her son was the only person to whom she owed any moral obligation under the WVA. The Court found that Mr. Wilson, although an independent adult, had a modest income of \$45,000.00 from which he supported his wife and child. He had little savings. The Court further found that the estrangement between the testatrix and her son was as a result of the testatrix's wishes, rather than Mr. Wilson's actions. Ultimately, the Court held that the plaintiff met the onus of showing that his mother's reasons for disinheriting him were not valid or rational, and that she failed to meet her moral obligation to him. The Court varied the will to provide Mr. Wilson with 50% of the net value of the estate.
- [204] Viewing the facts of the case at bar, as of the date of Peter's death, I conclude that a contemporary judicious parent in Peter's circumstances, fully informed, would have recognized a strong moral obligation to each son. By leaving Richard only 25% of his estate, Peter did not discharge his high moral obligation to him. Similarly, by leaving Robert only 25%, Peter did not discharge his high moral obligation to him.

- [205] I conclude that the constellation of factors at play involving Peter's personality, his mental health challenges, his reclusiveness from society, all worked together to prevent Peter from appreciating the extent of his moral obligations to his sons and from being a "judicious parent", as that term is understood. Richard and Robert have proven that Peter failed to meet his moral obligation to both sons and, therefore, fell short of the "adequate provision" required by s. 2(1) of the WVA.
- [206] Turning now to the next question: What provisions would be adequate, just and equitable?
- [207] The 2007 Will and Codicil should be varied in a way that achieves the justice Peter failed to achieve while interfering with testamentary freedom only insofar as the statute requires. Providing 25% of his estate for each son falls below the range of options a contemporary judicious parent would have considered appropriate in the circumstances.
- [208] I am satisfied the size of the estate is sufficient to allow Peter's moral obligations to his sons to be met while still respecting Peter's testamentary wish to benefit Heidi and his relatives in Germany.
- [209] I conclude the provision that would be adequate, just and equitable would see Richard and Robert each received 40% of their father's estate. That distribution leaves 20% of the estate to be distributed among the competing beneficiaries.
- [210] I agree with Heidi's position that her 10% distribution should not be disturbed in the re-distribution. Although Peter owed her no legal or statutory moral obligation, I am persuaded that Peter, through his disposition to her, recognized a broad moral obligation to her as a result of her consistent, tireless and significant assistance to him over the years. It is reasonable to conclude that Peter wished to acknowledge that support or benefit by an inter vivos gift and/or a testamentary gift. A testamentary disposition in the amount of 10% is rationally connected to this objective. Peter's wish in this regard should not, in the circumstances, be undermined.
- [211] While I do not wish to denigrate the role played by some of the German Defendants (particularly Karolina and Christine), their involvement in Peter's life was significantly less than that of Heidi. That Peter wished to acknowledge their comfort and support at times he was hospitalized is understandable. However, I agree with Richard's submission that the extent to which he sacrificed the reduction of his moral obligations to his sons is not rationally connected to that objective, particularly in light of the fact Peter had not even met two of them. Rather, I conclude that 10% of his estate is proportionate to that objective in all of the circumstances, divided as follows: 2.5% to Karolina; 2.5% to Christine; 1% to Helmut; 1% to Stephan; 1% to Dario; 1% to Tim-Oliver; and 1% to Dominik.
- [212] In summary then, the 2007 Will and Codicil shall be varied to provide for the following shares of Peter's estate as follows: 40% to Robert; 40% to Richard; 10% to Heidi; 2.5% to Karolina; 2.5% to Christine; and 1% to each of Stephan, Dario, Dominik, Tim-Oliver and Helmut. Thank you to all counsel for their thoughtful and thorough submissions.

COSTS

[213] If the parties are unable to agree as to costs, they may file written submissions implementing a time table of their choosing that incorporates a final deadline of February 28, 2018.

"S.A. Donegan J."

DONEGAN J.

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