
CANADA / JUDGMENT

McHale v. McHale Estate

2015 BCSC 993

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 993 Mchale v. Mchale Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McHale v. McHale Estate,

2015 BCSC 993

Date: 20150514

Docket: S137564

Registry: Vancouver

Between:

Rena Doris McHale

Plaintiff

And

Wayne George McHale, Executor under the last Will

and Testament of George McHale, the said Wayne George McHale,

Cynthia Lee Amundsen, Executrix under the last Will and Testament of

George McHale, and the said Cynthia Lee Amundsen

Defendants

Before: The Honourable Madam Justice Harris

Oral Reasons for Judgment

Counsel for Plaintiff:

T.J. Maledy

J.D. Maledy

Counsel for the Defendants:

J. Wingson

G.T. Reeves

Place and Date of Summary Trial:

Vancouver, B.C.

April 17, 2015

Place and Date of Judgment:

Vancouver, B.C.

May 14, 2015

Introduction

- [1] In this unfortunate case, a long term spouse brings a summary trial application to contest the will of her late husband under the Wills Variation Act, R.S.B.C. 1996, c. 490, on the grounds that the will did not properly provide for her. The two adult children of the deceased, who were the main beneficiaries of the estate, acknowledge that the husband owed a moral duty to his spouse, but dispute that a legal duty was owed.
- [2] The plaintiff spouse submits that the will should be varied to provide her with a fee simple interest in the matrimonial home and 50% of the remainder of the estate. The defendant children submit that, in the circumstances, she is not entitled to more than 25% of the net value of the estate, in addition to the survivor pensions she received following her husband's death.
- [3] For the reasons that follow, I have determined, pursuant to section 2 of the Wills Variation Act, adequate provision for the plaintiff has not been made in the will and that provision should be made for her which reflects a 50% interest in the matrimonial home, less the \$30,000 bequest provided to her in the will.

Background

- [4] There is no significant dispute as to the relevant facts.

The Plaintiff's marriage to George McHale

- [5] The plaintiff is Rena McHale. She is now 85 years of age and lived with her late husband, George McHale (the "testator"), for 38 years. They were married for the last 25 of those years.

- [6] The plaintiff and the testator began living together in 1975 and married in 1988. The testator died on August 11, 2013.
- [7] It was a second marriage for both and each had children from their first marriages. The testator's first wife, Irene McHale, did not receive any assets on their divorce but received alimony in the amount of \$100 per month, which he paid until her death in May of 2010.
- [8] The plaintiff has a grade 10 education. She worked as a customer services representative at the time they commenced cohabitation and continued in that position until 1986 when she stopped due to a medical condition. While she worked for a short period after she recovered, the testator did not want her to work.
- [9] The testator had a career in the Canadian military and subsequently worked for Canada Post. He received a retirement pension from both places of employment.
- [10] In 1983, the testator purchased land on Alouette Drive in Coquitlam for \$55,000. In the year following, a house was built on the Alouette Drive property. It was mainly built by the testator and his brother, although the plaintiff provided some assistance (e.g. gardening, painting, cleaning and making meals). The defendant Wayne McHale also provided some assistance.
- [11] At the insistence of the testator, the plaintiff and the testator executed a marriage agreement prior to their marriage in 1988.
- [12] Their marriage was a traditional one, in the sense that the plaintiff cooked the meals, did the cleaning and household chores, and bought the groceries, while the testator paid the bills and looked after the home maintenance. The testator provided the plaintiff with an "allowance" to pay for food and other expenses. The allowance was for their joint expenses and was initially \$500 a month. It was later increased to \$700 and then \$800. She generally used her own money for personal expenses and gifts.
- [13] They kept separate bank accounts during the marriage. When she received a small inheritance from her sister, she gave the testator \$4,000 as repayment for money he had lent to her to pay her Visa bill.
- [14] The plaintiff and the testator lived modestly. They took a few trips within and outside the Province.
- [15] At the time of the late Mr. McHale's passing, the plaintiff had savings of approximately \$3,716 and received a monthly income of CPP and Old Age Security, in the amount of \$883.
- [16] After his death, she received survivor pension benefits and Registered Retirement Income Fund ("RRIF"), payments, which increased her monthly income to \$3,332. She also received an Old Aged Security payment of \$6,236 and life insurance proceeds of \$10,000. A \$30,000 bequest was provided in the testator's will.

- [17] The plaintiff wishes to move to a two bedroom apartment in a retirement home in Penticton, at a cost of \$3,265 per month. Should her health decline, she will incur additional expenses for specialized senior care and support.

The Defendants

- [18] The defendant beneficiaries are the children of the testator's first marriage. Wayne McHale and Cynthia Amundsen.
- [19] Wayne McHale is 59 years of age and is employed by Gourmet Baker and earns an income of \$60,000. He and his wife own their home. Its assessed value is \$550,100. There is no mortgage on his home. There is a line of credit with a balance of approximately \$35,000.
- [20] Cynthia Amundsen is 63 years of age and is a retired kindergarten teacher. She received a pension of approximately \$58,895. She owns her home jointly with her husband. Its assessed value is \$677,800. It also has a line of credit, with a balance of approximately \$119,000.
- [21] The testator enjoyed a close relationship with his children and grandchildren. The plaintiff had positive relationship with the defendants during her marriage to the testator.

The Will and the Estate

- [22] The will is dated March 20, 2001. It provided that the plaintiff would receive a "the sum of \$30,000" and the "all benefits payable in the event of my death under any Registered Retirement Income Fund". The remainder of the estate was left to be split between Wayne McHale and Cynthia Amundsen.
- [23] The value of the estate had been set by the Executors at \$909,582, as of September 20, 2013. It includes approximately \$675,000 in property (the Alouette Drive property in Coquitlam); \$230,182 on deposit; and \$2,500 in a Canada Pension Plan (CPP) death benefit; an automobile valued at \$1,900. An additional \$37,000 was recently found in another bank account. After expenses, the value of the estate is estimated at approximately \$850,000.
- [24] The testator had a RRIF which was worth \$39,812 at the time of his death. It passed to the plaintiff outside of the will. It is paid out to the plaintiff in a monthly amount of \$319.
- [25] The 2015 Property Assessment Notice estimates the value of the Alouette Drive property at \$634,000.

The Marriage Agreement

- [26] The testator required the plaintiff to sign a marriage agreement before he would marry her. At the time of the marriage agreement they had been living together for 13 years. The marriage agreement is dated July 29, 1988.

- [27] The marriage agreement provided that each party would separately retain the property acquired before the marriage. The agreement stated that it constituted "a full and final settlement of all issues concerning division and ownership of property", "notwithstanding the occurrence of any of the events enumerated in section 43 of the Family Relations Act".
- [28] The testator and the plaintiff listed the assets which were to be attributed solely to each of them in Schedule A and B, respectively. Property which was stated to be the sole property of testator in Schedule A included: household furnishings in 436 Alouette Drive; a Bank of Montreal RRSP with a balance of approximately \$125,000; a 1987 Astro Van; a Bank of Montreal Savings Account with a balance of approximately \$10,000; CPP Pension; pension interest in the Canadian Forces Plan; pension interest in the Public Service Superannuation Plan, and pension interest in the Government of Canada Old Age Pension.
- [29] The parties did not list the matrimonial property on Alouette Drive in Schedule A but it was referenced in the body of the marriage agreement as having been purchased with the testator's funds and solely owned by him. The agreement provided that it was the testator who had sole responsibility for the cost and maintenance of the Alouette Drive property, including mortgage payments. It also provided that the testator "shall alone be responsible for satisfying all of the living expenses of himself and Rena, so long as they cohabit as husband and wife".
- [30] Property which was stated to be the sole property of the plaintiff in Schedule B included: a 1975 Vega car; household furnishing in 436 Alouette Drive acquired before the date of the marriage; CPP pension; and a Bank of Montreal Savings Account with a balance of \$500.
- [31] Property acquired after the marriage was to be held jointly by the plaintiff and the testator, provided that any property acquired in substitution for or from the proceeds of the sale of property identified as separate property, would remain separate property.
- [32] The marriage agreement provided that there was to be no constructive, resulting or implied trust acquired in relation to the separate property. All income and earnings acquired during the marriage was to remain the separate property of the party acquiring the earnings and/or income. The parties were to be responsible for their own debts, unless debts were incurred jointly.
- [33] The marriage agreement also provided that the parties renounced all right, title, and interest in and to the estate of the other and "all right to participate in, benefit from or administer the estate of the other, and neither shall commence any proceedings whatsoever under the Estate Administration Act, the Wills Variation Act or any other statute, or otherwise, against the estate of the other...". However, the agreement stipulated that the testator shall designate the plaintiff as his beneficiary for "those benefits of his various pension plans, identified in Schedule A".

- [34] The marriage agreement further provided that each has general knowledge of the other's financial affairs and was fully advised as to his or her entitlement to obtain information on the same.
- [35] The agreement represented that both parties had independent legal advice. There were certificates appended confirming that the plaintiff and the testator received independent legal advice in respect of the agreement. The plaintiff's certificate is dated July 29, 1988, the date the marriage agreement was executed. The testator's certificate is dated on October 4, 1988, which was after the marriage agreement was stated to have been executed.

Position of the Parties

- [36] The position of the parties can be summarized as follows.

Plaintiff

- [37] The plaintiff submits that the will did not adequately provide for her, as it did not account for the legal and moral obligation owed to her.
- [38] In that regard, the plaintiff asserts that the marriage agreement should be given little or no weight because it was manifestly unfair to the plaintiff. The plaintiff contends that the marriage agreement did not ensure that the economic consequences of marriage breakdown would be shared equitably in circumstances where: they lived together for 38 years; the matrimonial home was acquired after they had been together for 8 years; she assisted in the building of the matrimonial home; they did not exhibit an intention to follow the agreement; the agreement did not account for her not working during the marriage; it did not provide for spousal support; and it did not properly account for her need for financial independence.
- [39] The plaintiff asserts under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), and the Family Relations Act, R.S.B.C. 1996, c. 128, the plaintiff would have been entitled to spousal support and at least a 50% share of the family assets had the parties separated. The testator, therefore, owed a legal duty to the plaintiff. The plaintiff notes that the testator owed no legal duty to his adult children.
- [40] The plaintiff submits that the legal duty owed by the testator is in addition to the strong moral obligation he owed her to make provision for her, as his dependent spouse. In that regard, the plaintiff submits that the testator had a duty to ensure that she could live independently and comfortably for the remainder of her life.
- [41] On this basis, the plaintiff submits that a just and equitable distribution of the estate would provide that she received a fee simple interest in the matrimonial home and 50% of the remainder of the estate.

Defendants

- [42] As noted above, the defendants acknowledge that the testator owed a moral duty to the plaintiff. However, they submit that there was no legal duty owed and the moral duty would be satisfied by allowing the plaintiff a cash payment of \$166,000 from the Westminster Savings Credit Union account, which would effectively allow her to receive approximately 25% of the share of the estate.
- [43] In that regard, the defendants rely on the marriage agreement in which the parties determined that they would keep their finances separate, that the Alouette Drive home and his other assets would remain the testator's property after they were married, and the plaintiff would not share in the property in the event of divorce or upon his death. The defendants submit that the agreement was not unfair, as the testator agreed to provide for her during the marriage and to make her the beneficiary of his pension plans.
- [44] The defendants note that it was the testator who purchased the property for the Alouette Drive home and that it was his expressed wish that this property pass to his children. The defendants submit that preservation of a testator's estate is often the impetus for entering into a marriage agreement and that the testator's intentions should be respected - particularly, where the bulk of the testator's estate was acquired before the marriage.
- [45] The defendants contend that the marriage agreement completely addressed any obligation that the testator owed to the plaintiff. It was in place for 25 years and guided the parties' financial affairs.

Issues

- [46] In considering the claim of the testator, the following issues arise:
1. Is this matter appropriate for summary trial?
 2. Has the testator made adequate, just and equitable provision in his will for the proper maintenance and support of the plaintiff, within the meaning of the Wills Variation Act?
 3. If not, what provisions should be made for the plaintiff out of the estate?

Legal Framework

- [47] The legal principles involved in a determination of this case are not in serious dispute.

Appropriateness of Summary Trial

- [48] The principles governing summary trial applications under Rule 9-7 of the Civil Rules are set out in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), decided under former Rule 18A. McEachern C.J.B.C. (as he then was) outlined the applicable principles:

- i. the chambers judge cannot give judgment unless he or she can find the facts necessary to decide the issues of fact or law;
- ii. even if the chambers judge can decide the necessary factual and legal issues, he or she must not, if it would be unjust to do so;
- iii. in deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, *inter alia*, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters;
- iv. judgment may be granted on an issue or generally; and
- v. the chambers judge is not obliged to remit a case to the trial list just because there are conflicting affidavits. While he or she should not decide an issue of fact or law solely on the basis of conflicting affidavits, it may be the case that, notwithstanding sworn affidavit evidence to the contrary, other admissible evidence will make it possible to find the facts necessary for judgment to be given.

Wills Variation Act

[49] Section 2 of the Wills Variation Act ("WVA") provides that:

- 2. Despite any law or statute to the contrary, if a testator dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance of and support of the testator's spouse or children, the court may, in its discretion, in an action by or on behalf of the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the testator's estate for the spouse or children.

[50] *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, is the leading authority in British Columbia on wills variation. In that case, the Supreme Court of Canada identified the two fundamental interests protected by the WVA. The main statutory objective is the adequate, just and equitable provision for a testator's spouse and children; the other is the testator's testamentary autonomy. The statute permits 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.

[51] 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.

[52] The determination of what is "adequate, just and equitable" to provide for the proper maintenance and support of a spouse or child is to be made according to contemporary norms, including a testator's legal and moral obligations. As stated by the Court in Tataryn:

28 If the phrase "adequate, just and equitable" is viewed in light of current societal norms, much of the uncertainty disappears. Furthermore, two sorts of norms are available and both must be addressed. The first are the obligations which the law would impose on a person during his or her life were the question of provision for the claimant to arise. These might be described as legal obligations. The second type of norms are found in society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards. These might be called moral obligations, following the language traditionally used by the courts. Together, these two norms provide a guide to what is "adequate, just and equitable" in the circumstances of the case.

[53] "Legal obligations" include those that would have been imposed by the law if maintenance and property division were considered under the Family Relations Act, (or Family Law Act, S.B.C. 2011, c. 25), the Divorce Act, and the law of unjust enrichment had the testator and spouse separated before the testator's death. "Moral obligations" are based on society's expectations of what a judicious person would do in the circumstances.

[54] Legal obligations will generally prevail over moral obligations, and moral obligations are to be weighed against each other according to their relative strengths and weaknesses taking into account the changes to the claims which arise from the testator's death, *Orr v. Orr*, 2013 BCSC 208, at para. 30. It is not a "strict needs based test". Where the estate permits, all claims should be met, Tataryn.

[55] The existence of a marriage agreement is a factor to be considered in evaluating the claim of a surviving spouse. A marriage agreement may reduce or nullify any legal obligation owed to the plaintiff, leaving only a moral obligation, *Lobe v. Lobe Estate* (1996), 13 E.T.R. (2d) 126 (B.C.S.C.), *Morgan v. Pengelly Estate*, 2011 BCSC 1114.

[56] Only where the testator has chosen an option which falls below his or her obligations as defined by reference to legal and moral norms, should the court make an order which achieves the justice the testator failed to achieve. The freedom of a testator to dispose of assets as he/she chooses "is to be interfered with not lightly but only in so far as the statute requires", Tataryn, para. 33.

[57] If it is concluded that the testator has not met his/her legal and moral obligation to the surviving spouse, the court may vary the will.

Family Relations Act / Family Law Act

[58] In *Hartshorne v. Hartshorne*, 2004 SCC 22, the Supreme Court of Canada considered the operation of the Family Relations Act, in the context of a contested marriage agreement. In reviewing Part 5 of the Family Relations Act, which deals with the division of assets on

marital breakdown, Mr. Justice Bastarache confirmed that if there is a marriage agreement, the terms of the agreement represent the spouses' presumptive entitlement - which presumptive entitlement may be reviewed for fairness under section 65 of the Act. Section 65 provides that:

65 (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to

- (a) the duration of the marriage,
- (b) the duration of the period during which the spouses have lived separate and apart,
- (c) the date when property was acquired or disposed of,
- (d) the extent to which property was acquired by one spouse through inheritance or gift,
- (e) the needs of each spouse to become or remain economically independent and self-sufficient, or
- (f) any other circumstance relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

[59] Thus, the Court said, a marriage agreement provides the "starting point for the court", but it is subject to review for fairness. It noted that the deciding inquiry under section 65 should be "whether or not the agreement is substantively fair at the time of application to the court", considering the parties' rights, entitlements and obligations at the that moment, in light of the section 65(1) factors:

[78] I believe the proper approach to determining whether a division of family assets under a marriage agreement is fair is for a judge to assess the division in light of the s. 65(1) factors. The original intention of the parties is relevant insofar as it points the court towards how the parties chose to address the requirements of fairness. If the parties fairly addressed the enumerated factors through other provisions in the agreement, that should be taken into account. That being said, the parties' original intention is not determinative at this stage. Fairness is a concept that is independent of any agreement. If a court establishes that a marriage agreement is fair in light of the s. 65(1) factors, it will stand. If it is not, the court will redress it. For greater certainty, a judge redressing the unfairness resulting from a marriage agreement may want to test the result of his or her s. 65(1) reapportionment by comparing it to the division the judge would have established had there been no agreement. Since the criteria are the same, the share apportioned to each spouse should be similar whether there is a contract or not.

[Emphasis added.]

- [60] The court noted that the original intentions of the parties may be particularly problematic in the case of agreements executed years earlier. Therefore, fairness "must be established based on a contemporaneous evaluation of the factors set out in the FRA", as what the parties view as fair at the time of executing the agreement may become unfair as the relationship evolves and circumstances change.
- [61] In section 93 of the Family Law Act, the court retains a similar discretion with respect to the division of property which is subject to a marriage agreement, however, the basis for the review is somewhat different, and arguably narrower, than under the Family Relations Act. The Family Law Act establishes a two-step approach which considers, first, whether the agreement was procedurally fair at the time it was made based upon the factors set out in section 93(3) and, second, whether it is significantly unfair based upon a consideration of the criteria set out in section 95(3).

Analysis

1. Is the matter appropriate for Summary Trial?

- [62] While neither party disputed the suitability of this matter for summary trial, I must be satisfied that it is appropriate to be determined in this manner.
- [63] I have reviewed the affidavits and discovery transcripts filed and conclude that there are no significant issues of credibility or conflicts in the evidence which would preclude the matter being determined on the basis of this evidence. I am satisfied that I can find the facts necessary to determine the legal issues in this case.
- [64] Further, in my view, given the size of the estate and the age of the plaintiff, it is just and appropriate to proceed in a summary trial rather than a conventional trial.
2. Has the testator made adequate, just and equitable provision in his will for the proper maintenance and support of the plaintiff, within the meaning of the Wills Variation Act?
- [65] As noted above, under the WVA, if a testator dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's spouse or children, the court, in its discretion, may order that provision be made out of the estate that the court thinks "adequate, just and equitable" in the circumstances.
- [66] In order to determine what is adequate, just and equitable, the court is to consider both the legal and moral obligations owed by the testator, as both provide guidance to the court.
- [67] Although in this case, the defendants acknowledge that the testator owed a moral duty to the plaintiff, following the approach outlined in Tataryn, I must first determine whether any legal duty was owed to her.

Which legislation applies: Family Relations Act or Family Law Act

[68] The question of whether any legal duty is owed involves a consideration of the marriage agreement in the context of the claims that might otherwise be available under the applicable family law legislation. The question is whether the Family Relations Act or Family Law Act applies.

[69] As noted above, the plaintiff submits that the Family Relations Act applies, while the defendants submit that the Family Law Act applies. In that regard, the defendants note that, at the time of the testator's death, the Family Law Act was in force. It came into effect on March 18, 2013.

[70] The plaintiff notes that the marriage agreement was made before the Family Law Act was in force. In such circumstances, the transition provisions of the Family Law Act provide that the Family Relations Act continues to have application:

252 (1) This section applies despite the repeal of the former Act and the enactment of Part 5 [Property Division] of this Act.

(2) Unless the spouses agree otherwise,

(a) a proceeding to enforce, set aside or replace an agreement respecting property division made before the coming into force of this section, or

(b) a proceeding respecting property division started under the former Act

must be started or continued, as applicable, under the former Act as if the former Act had not been repealed.

[71] This section of the Family Law Act was considered by both the Court of Appeal in *Halliday v. Halliday*, 2015 BCCA 82 and by this court in *Fan v. Zhang*, 2015 BCSC 311. In *Halliday*, Mr. Justice Goepel held that the effect of section 252 is to maintain the property regime under the Family Relations Act for separation agreements finalized before it was repealed:

[42] The effect of s. 252(1) of the FLA is to allow parties that would otherwise have been subject to the FLA property regime at the time they filed their claim to proceed under the old FRA regime despite it having been repealed. In essence, s. 252(1) preserves the FRA regime as it concerns property division for any separation agreements that were finalized before the FRA was repealed, unless the parties elect to proceed under the FLA.

[43] There is no evidence that the parties agreed that the dispute be governed by the FLA rather than the FRA. Accordingly, an application such as that brought by the Wife to set aside or replace a separation agreement made before the FLA came into force and dealing with property division must be resolved under the FRA. Procedurally, this means that s. 198 of the FLA, the section upon which the Husband relies, could not be used as a means of dismissing the Wife's proceeding to set aside the property provisions of the Separation Agreement.

[72] In my view, this interpretation of the effect of section 252 applies equally to marriage agreements as to separation agreements, which were finalized before the Family Law Act came into force. Accordingly, I do not accept the defendants' position that the Family Law Act applies to the consideration of the marriage agreement between the testator and the plaintiff. I agree with the plaintiff that it is the Family Relations Act which applies.

Whether the testator owed a legal duty to the plaintiff

[73] In considering whether the testator owed any legal duty to the plaintiff which the law would impose during his lifetime if provision for the plaintiff were to arise, it is necessary to determine the effect of the marriage agreement on any claims that might otherwise be available under the Family Relations Act.

[74] The Family Relations Act governs the division of property on marital breakdown. It recognizes marriage agreements as a mechanism to govern the division of property upon dissolution of marriage. However, to be enforceable such an agreement must operate fairly at the time of distribution. If it does not, judicial reapportionment of property will be available to achieve fairness, Hartshorne, para. 35.

[75] In this case, the marriage agreement stated that the parties wished to bring certainty to their financial arrangements and to provide a complete and final determination of the ownership of their property. In section 7 the parties acknowledged their rights under the Family Relations Act and agreed to release any right to property they may have under that or other legislation. In section 11, the parties also relinquished any interest in the estate of the other and agreed that they would not commence any proceedings under the WVA or other legislation.

[76] While these covenants do not bar the plaintiff's claim under the WVA, they must be given some effect in the analysis of the legal and moral obligation owed to her by the testator, Morgan at para. 186.

[77] As noted above, the parties disagree as to what weight should be given to the marriage agreement. The plaintiff asserts the marriage agreement was manifestly unfair to the plaintiff and should be given little, if any, weight. The defendants submit that it bars the plaintiff claiming any legal duty owed to her by the testator. In this circumstance, I consider it appropriate to apply the principles established in Hartshorne to determine whether the marriage agreement operates unfairly against the plaintiff.

[78] Hartshorne establishes a two part test: the court is first to determine the financial entitlements of each spouse under the marriage agreement and any claims which might otherwise be available to them and then, consider the factors listed in section 65(1) of the Family Relations Act.

[79] In respect of the first part of the test, I note that the marriage agreement provided for a financial separation of the parties' assets and financial lives. The parties were only to share in property which was acquired after the marriage, provided that such property was not acquired in substitution for or from the proceeds of sale of property acquired before the marriage.

[80] In considering whether the plaintiff would have been entitled to spousal support or a share of the matrimonial home, I find the following has been established in evidence:

i. The marriage agreement was made in 1988. It was the plaintiff who wanted to get married. The testator agreed to marry her but wanted a marriage agreement.

ii. At the time of the agreement, the plaintiff had been living with the testator for 13 years and had been living in the matrimonial home since it was built in approximately 1984.

iii. The marriage agreement was intended to protect the testator's assets acquired before the marriage. It contained a description of the parties' assets. From the description it is evident that the plaintiff had no significant assets at the time of the marriage agreement was entered into, while the testator had significant assets, including the matrimonial home on Alouette Drive, a \$125,000 RRSP and an interest in a number of pension plans. The marriage agreement does not identify the value of his pensions or the value of the matrimonial home.

iv. The testator claimed the matrimonial home as one of his assets on the basis that it was purchased with his funds.

F. George is the sole registered owner of the lands and premises located at 436 Alouette Drive, in the District of Coquitlam, in the Province of British Columbia ("the Alouette Drive Property") such being purchased solely from George's separate funds and which are intended to be the matrimonial premises of the parties.

5(a) The property set out in Schedule "A" and the Alouette Drive property shall be the separate and sole property of George and shall remain such notwithstanding the occurrence of any of the events enumerated in Section 43 of the Family Relations Act.

v. The matrimonial home was acquired and built during the period the testator and plaintiff were living together.

vi. The matrimonial home was mainly built by the testator and his brother, with some help from the defendant, Wayne McHale. The plaintiff also provided some help in the building of the matrimonial home (e.g. cleaning up, painting, gardening and cooking meals for the testator and his brother).

vii. Although the plaintiff had worked before 1986 and for a short period in 1994, the testator did not want her to work. In accordance with his request, she stopped working. She was, therefore, unable to improve her financial position during the marriage.

- viii. The parties generally maintained the separation of their finances. There was no joint bank account. The plaintiff made small contributions to joint living expenses when she could.
- ix. The parties did not acquire any significant assets during the marriage and lived a modest lifestyle.
- x. The marriage agreement provided that the testator would provide "all living expenses" for himself and the plaintiff. What the testator provided was an "allowance" for groceries and household expenses, initially \$500 a month and gradually increasing over the years to \$800 a month. He did not pay for her personal living expenses.
- xi. The plaintiff was dependent on the testator financially during the marriage. The testator repeatedly assured the plaintiff that he would take care of her.
- xii. The testator and the plaintiff lived together for 38 years, enjoying the company of one another. They engaged in many activities with their respective families. There were no periods of separation or acrimony.
- xiii. The marriage agreement states that the plaintiff had a general knowledge of the testator's financial affairs and the plaintiff received independent legal advice in relation to the agreement. However, the testator did not like to talk about financial affairs with the plaintiff and she deposed that she did not know about his finances. The defendant Wayne McHale also deposed that the testator did not talk about his financial affairs.
- xiv. The plaintiff has a grade 10 education and had no involvement with the family finances.
- xv. During the marriage the plaintiff contributed to the upkeep of the matrimonial home by cleaning, gardening and helping the testator with various maintenance projects. The testator paid the household bills and was involved in maintaining and improving the property.
- [81] The marriage agreement did not allow for spousal support in the event of separation or divorce. Madam Justice Martinson in *Steernberg v. Steernberg*, 2006 BCSC 1672, found that the failure to provide for spousal support in a pre-nuptial agreement, given the objectives of spousal support and the court's endorsement of the Spousal Support Advisory Guidelines, resulted in the agreement not meeting the first part of the test in *Hartshorne*:
- 131 I turn next to the spousal support objectives. Mrs. Steernberg obtained advantages as a result of the marriage and cohabitation. She lived a significantly more expensive lifestyle than she otherwise might have. Mr. Sternberg assisted her financially in her efforts to develop her career and to upgrade her professional qualifications. She was in a better financial position just before his death than she was at the time they began cohabiting. She has lived in the matrimonial home for almost two and one half years since the date he died. She received some benefits under the Will. She was gifted an interest in the Derby Road Property.

132 She also suffered disadvantages as a result of the marriage. She gave up her full-time employment in White Rock. She assisted her husband to some extent in his business to the detriment of her own business. The fact that he wanted her to live in Garden Bay and work nearby limited the job opportunities available to her. For the two years before he died, he needed and demanded a lot of attention. She accommodated him and doing so impacted adversely upon her ability to earn an income during that time and after his death.

133 She has work experience and professional training and it is reasonable that she make every effort to re-enter the workplace on a full time basis. It must be kept in mind however that she is now 54 years old, seven years older than she was when she entered the relationship; that may make it more difficult to obtain suitable employment.

134 In my opinion, considering all the factors and in light of the spousal support objectives, Mrs. Steernberg would have been entitled to some spousal support. Quantum would likely have been consistent with what she would be entitled to under the Spousal Support Advisory Guidelines.

[82] A similar conclusion was reached by Mr. Justice Harvey in Morgan regarding spousal support.

202 The Agreement specifically waived the right of the claimant to seek support against the decedent in the event of marriage break up.

203 The claimant's income, since signing the Agreement, has increased. The respondents say that had a claim for support been brought by the claimant prior to Ms. Pengelly's death, the Agreement would have provided a complete answer.

204 With respect, I disagree. Just as agreements such as that signed by the claimant and decedent are not determinative of claims under the WVA, nor are they determinative of claims for support brought under either the FRA or the Divorce Act.

205 Nonetheless, given the length of the relationship, the relative incomes of the parties throughout their relationship, and the provisions of the Agreement, I am of the view the claimant's entitlement would have been modest, whichever model of support were claimed, compensatory or non-compensatory.

[83] In both cases the court found that a legal duty arose from the failure of an agreement to provide for spousal support.

[84] In this case, I note that the plaintiff, at the time of the testator's death, had an income of approximately \$1,100 per month and only a small amount of savings. She had very limited financial means. In these circumstances and given the length of the marriage and the testator's greater financial means, I conclude the plaintiff would have been entitled to spousal support had the parties separated or divorced.

[85] With respect to the second part of the test, I have considered the factors listed in section 65(1) of the Act. When the marriage agreement is examined on the current standard of fairness viewed at the time of the application, I note the following:

- i. The duration of the marriage - The testator and the plaintiff lived together for 35 years and were married for 25 of those years. Apart from a brief period in 1994, the plaintiff did not work during the marriage. It was a traditional marriage in which the testator exercised control over financial and other decisions in the relationship. He did not involve her in financial matters but simply gave her an allowance to cover groceries and household expenses.

When she told him she wanted to get married after they had been living together for 13 years, it was he who insisted on the marriage agreement. She submitted to his decisions regarding the need for a marriage agreement, whether she should work, and what activities she should participate in.

- ii. There were no periods of separation.

iii. The date the property was acquired - The Alouette Drive property, which became the matrimonial home, was purchased and built after they had been living together for approximately 8 years. The property was purchased with his funds. It is not clear on the evidence, when he acquired the money to purchase the property.

- iv. There is no evidence that the property was acquired by gift or inheritance.

- v. The needs of the spouse to become economically independent and self-sufficient - The marriage agreement provided that any income earned would be for the benefit of the person earning the income. However, as the testator did not want the plaintiff to work, she was not able to improve her financial situation. While he repeatedly told her that he would take care of her, under the marriage agreement her future economic needs were restricted to her being named a beneficiary on his pension plans. The agreement does not stipulate the value of the pensions.

As the plaintiff did not have any assets, little income and limited education and skills, she was in a financially vulnerable situation. I note that while the agreement provided that the testator would satisfy all of the "living expenses of himself and Rena, so long as they cohabit as husband and wife", the allowance for groceries and household expenses he provided was modest (e.g. \$500 - \$800 per month). It did not provide for the plaintiff's personal expenses.

- vi. Any other circumstances related to the acquisition, preservation, maintenance, improvement or use of the property - In the marriage agreement he claimed he was the sole owner of the property and that she would not make any claim in respect of the property, even though that they had been living in this property together for approximately four years and living together before that, and even though she had assisted in the building project and its upkeep and maintenance. More significantly, although she contributed to the upkeep and maintenance of the matrimonial home for 30 years after it was built, there was no subsequent revision to the marriage agreement

to grant her an interest in the property. She received no financial compensation for her efforts.

- [86] In my view, the marriage agreement did not reflect the fact that marriage is to be a joint endeavour. The marriage agreement did not relieve against the economic hardship on the plaintiff in the event of marital breakdown; it did not provide for the plaintiff acquiring any interest in the matrimonial home that she helped maintain for almost 30 years; it did not recognize the economic impact on the plaintiff resulting from the testator restricting her from working; it did not reflect the economic interdependence that developed between them over the course of their 35 year union; it did not recognize the plaintiff's contribution to the testator's lifestyle; and it did not allow for the plaintiff to have a measure of financial independence.
- [87] In these circumstances, I conclude that the agreement operated unfairly. I consider that this is one of the situations, referred to in *Hartshorne*, where an agreement becomes unfair with the passage of time, as one spouse's dependence on the other spouse increases. It was not within the contemplation of the parties that she would have no spousal support or any claim in respect of the matrimonial home after living together for 35 years, including 25 years of marriage.
- [88] In that regard, I do not accept the contention of the defendants that the lives of plaintiff and testator unfolded as they had contemplated at the time they entered the marriage agreement. The length of their relationship changed the nature of the testator's legal obligation to the plaintiff. This was particularly the case given the testator's request that the plaintiff not work and his assurances to her that he would look after her. She gave up, at his request, any prospect of improving her financial situation in the years prior to retirement. His assurances to her reflect a change from the original agreement and evidence, in my view, his agreement to accept responsibility for her economic welfare during her lifetime.
- [89] A marriage agreement should not be lightly set aside, particularly where the parties received independent legal advice. However, in this case, having regard to the factors in section 65(1) of the *Family Relations Act*, in my view, had the matter of her entitlement to a share in the matrimonial home been considered immediately prior to the testator's death, I consider there would have been a reapportionment to provide her with an interest in the matrimonial home.

Whether the testator had a moral obligation to the plaintiff

- [90] It is not disputed that the testator had a moral obligation to the plaintiff. The defendants submit, however, that the moral duty of the testator should be limited where:
- i. the claim originates from a second marriage and the assets which constitute the bulk of the estate were owned by the testator before this relationship started, *Morgan, Saugestad v. Saugestad*, 2006 BCSC 1839;

- ii. the plaintiff has an improved financial position as a result of the testator's death on account of the survivor benefits and pensions she has received;
- iii. there was a marriage agreement in place and the parties kept their finances separate;
- iv. there are expectations of the children based upon assurance given to them about leaving them the Alouette Drive property; and
- v. an outright gift to the plaintiff would benefit her children at the expense of the defendants, *Somodi v. Szabados*, 2007 BCSC 857.

[91] The plaintiff submits the following factors support a strong moral duty was owed to the plaintiff:

- i. there is a strong moral obligation on a supporting spouse to make provision for a dependent spouse, if the size of the estate permits, *Tataryn*;
- ii. it is not appropriate for the court to approve a disposition that substantially prefers the moral claims of adult independent children to those of a long-term, caring and dedicated spouse, *Hall v. Korejwo*, 2011 BCCA 355;
- iii. the testator's moral duties extend to ensure that that the plaintiff can live independently and comfortably for the remainder of her life; and
- iv. the moral duties of independent children are subordinate to the duties owed to the plaintiff.

[92] I accept that the factors identified by the plaintiff signal that the testator had a strong moral duty to the plaintiff. While I am also mindful of the mitigating factors identified by the defendants, in my view the size of the estate permits provision for the plaintiff. As the dependent spouse, the plaintiff is entitled to live independently and comfortably for the remainder of her life.

3. What provision should be made for the plaintiff out of the estate?

[93] In considering what provision should be made for the plaintiff that is adequate, just and equitable in the circumstances, I must balance the legal and moral duty owed to her for her maintenance and support against the expressed intention of the testator to leave the bulk of his estate to his children.

[94] The plaintiff is 85 years of age. She wishes to live in a two bedroom suite in a Penticton retirement home and to have the funds necessary to live independently and comfortably, given the prospect of increased health care demands as she ages. Under the will, her entitlement was limited to a cash gift of \$30,000 and to be designated as beneficiary of his RRIF. Although the plaintiff's income has increased as a result of the testator's death, I note that the pension and RRIF income she became entitled to after his death was essentially the same income as the income the testator had been receiving to support them when he was living. Her standard of living has not increased appreciably by the pensions and RRIF being paid directly to her and she will have additional costs associated with moving into a

retirement home and for support as she ages.

- [95] While the \$30,000 bequest and the \$16,236 payment from OAP and life insurance, taken together with the pension income, would improve her financial situation, I have considered the totality of what the plaintiff has received following the death of the testator. I do not consider that these amounts are sufficient to adequately provide for her proper maintenance and support in the circumstances. As noted above, the plaintiff is entitled to live independently and comfortably for the remainder of her life. In that regard, the plaintiff's claim under the Act, should not be determined on a purely need-maintenance approach, *Bridger v. Bridger Estate*, 2006 BCCA 230, at para. 20.
- [96] At the same time, I consider that it would not be just and equitable to divide the estate in such a manner that would unduly diminish the testator's wish to bequeath his property to his children. As noted by the defendants, the testator also owed a moral duty to his children. They enjoyed a close and positive relationship with the testator and I accept that he told them he would be leaving the property to them. They had an expectation of an inheritance based upon such representations. The moral competing claims of the defendants, while subordinate, must also be considered.
- [97] As noted by Madam Justice Russell in *Saugestad*, cases involving second marriages present unique difficulties in assessing the moral obligations of the testator, particularly where the testator has made clear his intention to benefit his children. In that regard, it is perhaps unfortunate that the plaintiff told other family members, shortly after the testator's death, that she wished to leave something for her own children. The defendants submit that, given the terms of the will, the plaintiff should not be entitled to build up her estate for the purpose of benefitting her children and at the expense of the testator's children.
- [98] Tataryn provides that testamentary autonomy should be respected insofar as it is consistent with the objectives of the WVA. Thus, while testamentary autonomy must yield to what is "adequate, just and equitable," it continues to frame the discussion.
- [99] That said, I am mindful of the Court of Appeal's decision in *Bridger v. Bridger Estate* at para. 25 and in *Picketts v. Hall (Estate)*, 2009 BCCA 329 at para. 65. In the latter case, the court said that a plaintiff is entitled "a measure of testamentary autonomy of her own so that she can pass her own estate to whomever she wishes". The fact that the plaintiff's children may benefit from any variation of the will is not, by itself, a basis for denying the plaintiff what she would otherwise be entitled to under the Wills Variation Act.
- [100] The plaintiff and defendants have referred me to a number of authorities to guide my decision.
- [101] The plaintiff places particular reliance on *Picketts*, *Bridger*, and *Orr*. As the *Orr* case did not involve a second marriage or a marriage agreement, I found it of limited assistance.

- [102] Picketts involved a 75 year old widow who had cohabited with the testator for 21 years. It was a second marriage for both. He left the bulk of the \$18 million estate to his sons, with the widow receiving the condominium, \$2,000 per month for life and the use of the vacation property for three months a year. The trial judge varied the will to increase the monthly amount, provide for future nursing costs, and a sum to renovate the condominium. The Court of Appeal overturned the trial judge's decision and awarded the plaintiff, amongst other things, a lump sum of \$5,000,000 to allow her greater control over her financial affairs.
- [103] In Bridger, the testator bequeathed the entire estate to his children from a first marriage. His 76 year old widow, who had been married to the testator for 34 years, challenged the will. The value of the estate was \$300,000 and the plaintiff widow received approximately \$400,000, less capital gains, outside of the will. The trial judge awarded the plaintiff 25% of the value of the estate, which decision was upheld on appeal.
- [104] The defendants note that the Picketts and Bridger cases do not involve marriage agreements. They place particular reliance on Morgan and Lobe v. Lobe Estate (1997), 37 B.C.L.R. (3d) 138 (C.A.).
- [105] In Morgan there was a marriage agreement in place. The 81 year old widower challenged the will which left the bulk of the estate to the testator's three sons from her first marriage. The period of cohabitation was 9 years. The estate was valued at \$2.2 million. The court varied the will, but only to the extent of granting the plaintiff \$225,000, which was approximately 10% of the value of the estate.
- [106] In Lobe, the marriage was 11 years in duration. There was a marriage agreement in effect which the court found was scrupulously followed. The will did not provide for the plaintiff but she received survivor benefits, she was the owner of the house they built together, and she had a life interest in an adjacent property. The court found that there was no legal or moral duty to the plaintiff and dismissed her application in these circumstances.
- [107] While decisions relied upon by the defendants are helpful in that they underscore the significance of a marriage agreement and the legitimacy of a testator's wish to benefit children from a first marriage, the cases do not involve a marriage of the duration involved in the instant case and there was not the same level of financial dependency on the part of the spouse. In Lobe the plaintiff was wealthy in her own right and the marriage agreement was to protect her financial interests as well as his. And, unlike in Morgan, in the instant case the plaintiff did give up career opportunities and the testator did make assurances to her that he would take care of her.
- [108] Although the plaintiff claims a fee simple interest in the matrimonial home and 50% of the remainder of the estate, in my view, this is beyond what would be adequate, just and equitable when considered in the context of the expressed intention of the testator and the competing moral claims of the defendants. While I have found that the plaintiff was owed a legal and moral duty by the testator, as Mr. Justice Harvey stated at para. 250 of Morgan, the

will should be varied "only to the extent to provide justice to the claimant that the Will failed to achieve".

- [109] In weighing the totality of the evidence in light of the principles informing the legal and moral duties owed by the testator, including considering what a judicious person would do in the circumstances having regard to contemporary standards, I exercise my discretion to make provision in the will for the plaintiff in an amount which reflects a 50% interest in the net proceeds of sale from the matrimonial property on Alouette Drive, less the \$30,000 bequest provided to the plaintiff under the will.
- [110] In light of the plaintiff's age, impending move to a retirement home in Penticton, the defendants' willingness to make a cash payment from the estate, and the 2015 assessed value of the matrimonial home, I consider it just and fair that the plaintiff receive a lump sum payment of \$165,000, payable as soon as practicable, with the remaining amount of her share in the Alouette Drive property payable to the plaintiff upon the sale of the home.
- [111] The remainder of the estate is to be shared equally between the two defendants, Wayne McHale and Cynthia Amundsen. I have not varied the will to allow the plaintiff to share in the remainder of the estate given the survivor benefits she has received and the lack of evidence of her specific contribution to the funds in the bank accounts.
- [112] Unless there are pertinent matters which have not been brought to my attention, the plaintiff is entitled to her costs. If there are matters which counsel wish to address, they may make oral or written submissions, by arrangements made through Supreme Court Scheduling.

"Madam Justice Harris"

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