
CANADA / JUDGMENT

Miller v. Millir

2011 BCSC 29

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 29 Miller v. Millir

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Miller v. Millir,

2011 BCSC 29

Date: 20110111

Docket: 10-0553

Registry: Victoria

Between:

Audrey Marie Miller

Plaintiff

And:

Rika Millir, as Executor of the Estate of

Robert Charles Miller, Rika Millir,

Roy Charles Miller and Randal James Miller

Defendants

Before: The Honourable Mr. Justice Macaulay

Reasons for Judgment

Counsel for the Plaintiff:

M. R. Mark

Counsel for the Defendants:

Rika Millir, as Executor of the Estate of

Robert Charles Miller

K. B. Friesen

Appearing on his own behalf:

R. Millir

Place and Date of Hearing:

Victoria, B.C.

October 21 and 22, 2010

Place and Date of Judgment:

Victoria, B.C.

January 11, 2011

- [1] The plaintiff, Audrey Marie Miller, age 86 at the time of summary trial, married Robert Charles Miller in February 2005. It was Mr. Miller's second marriage; his first wife died in June 2003. Mr. Miller and his first wife had three sons, who are now adults and named as the co-defendants: Rika Millir, Roy Charles Miller and Randal James Miller. Mr. Miller died in August 2009, more than four years after marrying the plaintiff. He was age 81 when he died.
- [2] On February 8, 2010, Mrs. Miller commenced this proceeding seeking a variation under the Wills Variation Act, R.S.B.C. 1996, c. 490 ("WVA"), for such provision as the court thinks "adequate, just and equitable in the circumstances" for her proper maintenance and support (s. 2). Rika Millir has defended the proceeding on his own behalf and, in his capacity as executor of his father's will, on behalf of the estate. His two brothers were served with the plaintiff's pleadings but never filed appearances.
- [3] Rika Millir now applies, pursuant to Supreme Court Civil Rule 9-7, for summary judgment dismissing the plaintiff's claims. No question is raised as to the suitability of the matters for final determination at a summary trial. As will be seen, the amounts at issue are relatively modest and there are no significant factual disputes. The issues are accordingly appropriate for summary judgment.
- [4] On October 21, 2008, Mr. Miller executed a will in which he named Rika Millir as executor. After the payment of debts, funeral and testamentary expenses, plus any duties or taxes, the will provides for any computer and automobile owned by Mr. Miller at the date of his death to be delivered to his son, Roy Charles Miller. The balance of the estate goes to Rika Millir for his own use absolutely. The will also contains the following provision:

It is my wish that my wife, Audrey Marie Miller, be allowed to stay in my house after the date of my death for a reasonable period to allow her sufficient time to relocate without undue time pressures. I have also discussed this with my Trustee and he is aware of my concern.

With apparent regard to the provisions of the WVA, Mr. Miller also made a statutory declaration at the same time as his will to which he attached a handwritten letter regarding his reasons for dividing his estate as he has.

[5] The content of the letter is significant. It states:

To whom it may concern. Please excuse the arthritic writing.

It is my purpose in adding this letter to my will to ensure that sons Randal and Roy are not included in my monetary will. My son Rika has full authority of my remaining estate a[s] he is the only one with the objectivity to carry out my wishes.

Randal has by his own choice never contacted the family for years except coming from Vancouver for his mother's funeral. He has isolated himself me [and] his mother and saddened her in her last years, being an invalid.

Roy has been [a] constant load on family finances for years. We felt obligated to aid his family as his wife was the breadwinner. She eventually took the children and left him. We then paid his rent for the next 2 [years] as he had no job and was on welfare. When his mother died he moved in with me though he was unneeded [sic]. He had free board [and] room. In the few jobs he did get and got paid he disappeared overnite [sic]. He then reported he was an alcoholic. After a year [and] a half I remarried. He left the home [and] moved to my new wife's old apartment. We paid the rent for 2 months [and] when that ran out he moved back to the apartment he had left where his daughter was living. I arranged a bank account of \$2000 for him to help sustain him until he got a job. He treated his friends to the casino, etc. and blew it in 3 [weeks]. He then told us that he had a gambling addiction.

He now has a steady job at the hospital. This was obtained by his step-brother's wife. He has not contacted me since 2005 and we have no new address. Prior to this he told me he had lost his paycheck [sic] [and] I loaned him the money to pay his rent, etc. No payback.

This seems to prove that he is irresponsible and does not deserve any amount of money.

During the last 3 years I have a stroke [and] cancer treatment [and] never heard a thing from him.

Robert C. Miller

15 Oct 2008

P.S. Anything forthcoming other than prior declared is up to my executor.

As is apparent, there is nothing in the letter explaining why Mr. Miller chose not to leave any of his estate to his wife.

- [6] Mr. Miller did own a car at the time of his death. The vehicle was worth about \$8,500 and was transferred to Roy Miller in accordance with his father's wish. The only other significant asset in the estate was the former matrimonial home originally owned by Mr. Miller and his first wife valued at \$472,000. Overall, net assets at the date of death were valued at \$483,944.
- [7] Ultimately, in late June 2010, the house sold for \$522,000. The net payable to the estate was \$510,750.
- [8] Following the death of his first wife, Mr. Miller continued to live in the former matrimonial home. In September 2004, the plaintiff moved in. She and Mr. Miller lived together continuously thereafter until his death. Following his death in August 2009, the plaintiff remained in the home, with the agreement of the executor, until April 2010 when she moved back to an apartment in the same building she lived in before September 2004.
- [9] As earlier set out, the plaintiff and Mr. Miller married in February 2005. During their four and a half years together, they enjoyed a close and happy relationship that included as much travel as possible. The standard of living that the couple enjoyed was, in the case of the plaintiff, a significant improvement over what had been available to her beforehand. Mr. Miller paid most, if not all, of the couple's household expenses as well as for their travels.
- [10] The parties agreed that at the time of the marriage, the plaintiff had savings of about \$15,000. When Mr. Miller died, the plaintiff still had about the same total amount in her savings and chequing accounts. During the marriage, the plaintiff used her funds primarily to pay for personal care and clothing. She was able to retain her funds because Mr. Miller paid their daily living expenses. As well, during the marriage, the plaintiff contributed \$5,000 to an investment account held jointly with Mr. Miller.
- [11] Since moving back into her building, the plaintiff has lived in a subsidized apartment. Her income is largely restricted to CPP and Old Age Security, together with a small Workers' Compensation pension of \$72 per month arising from a work-related injury before 1997. Her total annual income from these sources is approximately \$13,000-\$14,000; it was the same before and after Mr. Miller's death and has continued to be so through to the present.
- [12] The plaintiff was well aware of Mr. Miller's intended disposition of his estate. She deposed that she never questioned his decision to leave the house to his son, Rika, but also that Mr. Miller effectively assured her that he would always look after her. During her examination for discovery, she agreed that she "was just fine" with what he intended in his will.
- [13] Rika Millir corroborated the plaintiff's evidence about Mr. Miller's assurance. Rika Millir deposed that his father discussed his testamentary intentions with him and also said "he would take care of Audrey." As to Rika's brothers and their children, his father said it was "up to [Rika] how best to look after them." Rika understood that the house "would be provided for [Rika] to distribute at [his] discretion" and with respect to the plaintiff "[his father] indicated that she would be receiving funds outside the will and estate."

- [14] Mr. Miller did make arrangements outside his will for the plaintiff. She conceded that he arranged his financial affairs to provide for her by way of survivorship. She made a similar provision for him respecting her bank accounts but did not use her funds for a family purpose. After Mr. Miller's death, the plaintiff received survivorship assets, including bank and investment accounts, totaling about \$169,000.
- [15] In the result, the only major asset in Mr. Miller's estate was his home worth about \$511,000, which has since been sold. In contrast, the financial investments outside of the estate had a value of about \$169,000 at the time of death. For the purpose of my later analysis of Mr. Miller's legal obligation to the plaintiff, I consider the bank and investment accounts and the home to be putative family assets worth about \$680,000.
- [16] Including additional investment and interest income, the plaintiff now receives about \$16,000-\$17,000 per year. In 2009, however, the plaintiff also collapsed an RIF account that increased her income for that year by a further \$45,309. The evidence is incomplete but her tax return suggests that she also claimed a deduction of the same amount. I conclude, as a result, that the plaintiff will also be drawing down funds each year from the RIF account and thereby increasing her income.
- [17] During her examination for discovery, the plaintiff agreed that the will and the arrangements for her to have survivorship rights on the bank and investment accounts were parts of an overall plan that she agreed to at the time. She further agreed that she was satisfied with the financial arrangements that Mr. Miller had made for her. The plaintiff did not, at any time before Mr. Miller's death, object to any of the arrangements or question the adequacy of the provisions that he made for her.
- [18] I infer from the evidence that Mr. Miller had a good understanding of the extent of his assets at the time he made the overall plan. The evidence does not disclose whether he knew the probable market value of the matrimonial home nor does it demonstrate the overall value of his financial assets at the time. Perhaps he thought they were roughly equal, perhaps not. It is evident that the relative value of his remaining financial assets at the time of his death was less than half the value of the house.
- [19] According to the plaintiff, Mr. Miller's health began to decline in 2008 and, for that reason, they discussed the possibility of moving to an assisted living facility. They visited some facilities but never moved. The plaintiff says that the cost of the facilities they visited started at \$2,750 per month, roughly equivalent to \$33,000 per year. According to the plaintiff, she can no longer afford the expense of those facilities and, as a result, deposed: "the balance of my life will be far below what I had hoped for and expected in my marriage to [Mr. Miller]."

- [20] Mr. Miller's 2008 Notice of Assessment shows a total income of \$49,354. The evidence does not otherwise disclose whether he considered the cost of assisted living necessary or reasonable. Obviously, at the time Mr. Miller prepared his will in 2008, he expected the plaintiff to remain in the house for a period of time after his eventual death. It does not appear that Mr. Miller made any final commitment for either himself or the plaintiff to move into assisted living.
- [21] According to Rika Millir, the expenses quoted by the plaintiff relate to "luxury housing." As well, it is apparent on reviewing the plaintiff's examination for discovery that the plaintiff has not adequately considered other alternatives that may be suitable, including government funded assisted living.
- [22] Finally, the plaintiff's evidence is that she does not currently need assistance with managing her daily living tasks. I am not persuaded that she has a demonstrable need for any assisted living arrangement, let alone one that is likely at the more expensive end of the spectrum.
- [23] In brief, the plaintiff relies on principles distilled from *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, and contends that Mr. Miller made inadequate provision for her in all the circumstances. She says that the funds available to her upon her husband's death are totally inadequate to address her legitimate expectations including being able to move into an assisted living facility costing \$2,700 per month or more. Further, she says that the only other moral obligation of Mr. Miller in the circumstances is a secondary one owed to Rika Millir. The plaintiff seeks an order varying the will such that 60% of the net proceeds from the sale of the home be payable to her along with special costs from the estate.
- [24] Rika Millir argues that *Tataryn* is not directly applicable in the circumstances and that the plaintiff and Mr. Miller had an agreement similar to a pre-nuptial or marriage agreement under the Family Relations Act, R.S.B.C. 1996, c. 128 ("FRA"), that was fair in the circumstances. Rika Millir also contends that the court must consider the moral obligations that his father owed to all three sons and their children. In the result, he says that the plaintiff is not entitled to any further monies. Alternatively, Rika Millir says that the plaintiff is only entitled to 25% of the overall estate that Mr. Miller held immediately before his death.
- [25] Section 2 of the WVA states:
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 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.

As the Supreme Court stated in *Tataryn*, "The court must ask itself whether the will makes adequate provision and if not, order what is adequate, just and equitable" (at 814).

[26] In *Tataryn*, the Court rejected the more restrictive need-maintenance approach set out in an earlier line of authority and instead affirmed the relevance of contemporary moral considerations. The Court stated:

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 (at 820-821).

As to conflicting claims, all should be met if the estate is sufficient to do so but, if not, claims based upon legal obligations "should generally take precedence over moral claims" (*Tataryn*, 823).

[27] Given Mr. Miller's overall plan for the disposition of his property, of which his will was only one part, the following extract is apposite:

In many cases, there will be a number of ways of dividing the assets which are adequate, just and equitable. In other words, there will be a wide range of options, any of which might be considered appropriate in the circumstances. Provided that the testator has chosen an option within this range, the will should not be disturbed. Only where the testator has chosen an option which falls below his or her obligations as defined by reference to legal and moral norms, should the court make an order which achieves the justice the testator failed to achieve (*Tataryn*, 823-824).

This passage permits some deference to a testator's discretion in choosing how to dispose of his or her property upon death. Subject to the overall dispositions being adequate, just and equitable, it follows that the court should also extend the same deference to Mr. Miller's choice to pass on some of his property by granting a right of survivorship.

[28] In this way, the analysis required by the WVA effectively extends to the overall plan. The court has taken such an approach in other cases, such as in *Bridger v. Bridger Estate*, 2006 BCCA 230, discussed later in these reasons.

[29] It is correct, as counsel for Rika Millir emphasized, that the facts in *Tataryn* were very different than the present case. I will briefly review them and then discuss whether the differences give rise to additional or different considerations.

- [30] Mr. Tataryn and his wife were married for 43 years before his death. They had two adult sons, J. and E. Mr. Tataryn disliked J. and was concerned that if he left his estate to his wife, she would pass it on to J. As a result, Mr. Tataryn structured his will to provide his wife with a life estate in the matrimonial home and made her a beneficiary of a discretionary trust comprised of the residue of the estate. E. was the trustee and residual beneficiary. The residue consisted of a rental property and money in the bank.
- [31] The wife and J. applied to vary the will. The trial judge granted the wife a life estate in the rental property, directed that J. and E. each receive an immediate \$10,000 from the residue of the estate and directed that on the wife's death, the estate be divided one-third to J. and two-thirds to E.
- [32] There was no appeal of the order giving J. part of the estate. The Court of Appeal dismissed the wife's appeal. The Supreme Court of Canada granted the wife's appeal. In the result, she received title to the matrimonial home, a life interest in the rental property and the entire residue of the estate apart from the immediate gifts to the sons. These dispositions left the moral claims of the sons to be satisfied by the immediate gifts of \$10,000 each and a residual interest in the rental property divided one-third to J. and two-thirds to E.
- [33] According to counsel for Rika Millir, an important distinguishing feature is the long-term marriage in Tataryn, in contrast to the short-term marriage in the case at bar. He also emphasizes the agreement that he says is the equivalent of a pre-nuptial agreement. In my view, these differences are factors to consider in determining the extent of the legal obligation that Mr. Miller owed to the plaintiff but they do not, in any way, render inapplicable the legal principles set out in Tataryn. This is evident from a consideration of the principal authority that Rika Millir relies on as next discussed.
- [34] Bridger was an appeal under the WVA of an order varying the will of Mr. Bridger. The will provided that Mr. Bridger's second wife, who had survived him, receive 25% of his net estate of about \$300,000 and, in addition, that she retain all of the proceeds of the sale, while she was alive, of two revenue properties. Mr. Bridger's three adult daughters from his first marriage were the sole beneficiaries under his will and also survived him.
- [35] Mr. Justice Mackenzie, for the majority, commenced with a consideration of the testator's legal obligations to his wife. Because there was no legal obligation for maintenance in the circumstances of the case, Mackenzie J.A. focused closely on the wife's entitlement to an equal share of family assets as though the couple had legally separated immediately before Mr. Bridger's death. Based on that analysis, he concluded that the wife had received less than an equal share.
- [36] As to the moral obligation, Mackenzie J.A. considered that the length of the marriage and the wife's support of Mr. Bridger in his declining years supported the conclusions of the trial judge.

- [37] In dissent, Southin J.A. emphasized that in Tataryn, "no question arose of second marriages, children by prior marriages, and parallel wills" (para. 63). Following a lengthy historical review of the legislation and cases that supported the more restrictive need-maintenance approach to interpreting the legislation, Southin J.A. concluded that the wife had no entitlement. I am not persuaded that I can or should follow the dissent notwithstanding the urging of counsel for Rika Millir.

MR. MILLER'S LEGAL OBLIGATION TO THE PLAINTIFF

- [38] What was Mr. Miller's legal obligation to the plaintiff immediately before his death? The putative family assets were worth about \$680,000. His assets and pension entitlements also generated about \$48,000 per year during the time that he and the plaintiff were together. The plaintiff still had her own financial accounts totaling about \$15,000 and earned income from various sources totaling about \$13,000-\$14,000 annually. I will first deal with property division and then the plaintiff's entitlement to spousal support.
- [39] Assuming a notional separation immediately before Mr. Miller's death, the plaintiff would have been entitled to a one-half interest in the family assets. Mr. Miller and the plaintiff used the home, as well as the bank and investment accounts, for family purposes. The entirety was, accordingly, family assets. The plaintiff's one-half interest was worth about \$340,000, subject to reapportionment as necessary to achieve fairness.
- [40] The court has consistently recognized that determining the legal obligation with respect to property division under the FRA requires a consideration whether reapportionment is necessary to achieve fairness. See, for example, *More v. Wingerter et al.*, 2002 BCSC 920, at para. 27; and also, *Saugestad v. Saugestad*, 2008 BCCA 38, at paras. 19, 31-32.
- [41] Section 61 of the FRA permits a man and woman, before or during their marriage, to make an agreement for the division of family assets upon separation. Such agreements must be in writing and signed by both parties in the presence of one or more witnesses (s. 61(3)). I am not persuaded that there was any marriage agreement in the case at bar. There is no evidence that the parties agreed upon any division of family assets in the event of separation. Mr. Miller discussed his estate planning with the plaintiff and his son, Rika. He never sought a pre-nuptial agreement before the marriage nor did he seek an agreement during the marriage respecting the division of family assets in the event of a separation.
- [42] If Mr. Miller wished a marriage agreement to deal with family assets in the event of separation or dissolution of marriage, I expect that he would have been advised to create a written agreement so as to comply with the FRA. Instead, it appears that he only sought advice respecting the disposition of his estate. I am further reinforced in this view by the plaintiff's evidence that Mr. Miller informed her of his estate plans.
- [43] In spite of the plaintiff's evidence on examination for discovery that the will and the arrangements for her to have survivorship rights on the bank and investment accounts were parts of an overall plan that she agreed to at the time and was satisfied with, the elements of

a clear binding agreement are simply not present here. It is, instead, more likely that the plaintiff simply accepted the financial arrangements that Mr. Miller decided to make for her. The fact that the plaintiff never objected did not create a binding agreement, let alone a marriage agreement.

- [44] Even if there had been an enforceable marriage agreement, it would only be a factor for consideration and not determinative respecting the division of family assets or the plaintiff's entitlement under the WVA. Even an express waiver in a pre-nuptial agreement of the right to apply under the WVA has been found to be just a factor to consider rather than a bar. See *Steernberg v. Steernberg*, 2006 BCSC 1672, at para. 70, and cases cited therein.
- [45] I accept the reasoning in *Steernberg* that *Hartshorne v. Hartshorne*, 2004 SCC 22, does not entitle pre-nuptial agreements to greater deference in this regard. In an earlier decision also referred to in *Steernberg*, at para. 83, I concluded that a pre-nuptial agreement did not operate as a bar to a WVA claim in spite of a specific waiver of claim in the agreement itself. See *Ward v. Ward Estate*, 2006 BCSC 448. Both *Steernberg* and *Ward* emphasize the need under the WVA to conduct the examination respecting fairness as at the date of death rather than the time at which the agreement was made.
- [46] It follows that I would not reapportion the house entirely in Mr. Miller's favour based on the alleged agreement. The effect of the arrangements made by Mr. Miller was that the plaintiff received \$169,000 or about 25% of the total net estate. The central question is whether, based on the factors set out in s. 65 of the FRA, Mr. Miller was entitled to 75% of the estate to avoid any unfairness?
- [47] The plaintiff and Mr. Miller had a cohabiting relationship and marriage of close to five years in duration. It was a loving, supportive relationship. The plaintiff assisted and comforted Mr. Miller once his health began to decline.
- [48] Mr. Miller acquired his major asset, the former matrimonial home, long before he commenced a relationship with the plaintiff. He and his first wife lived together in the home until her death at which time Mr. Miller acquired her half interest by survivorship. For the most part, Mr. Miller acquired his other financial assets before the relationship, although the evidence does not disclose whether his capital grew or shrank during the period of the relationship.
- [49] As earlier set out, the plaintiff's economic circumstances improved considerably during the marriage to Mr. Miller but have declined since. Her present standard of living is closer to what it was before the marriage than it is to the standard enjoyed during the marriage. I consider it unlikely that her present share of the estate will dramatically improve her standard of living and am satisfied that it will not allow her to achieve the standard that she enjoyed during the marriage. Her personal assets and income sources are relatively nominal.

- [50] I conclude that Mr. Miller would have been entitled to a significant reapportionment but not to the extent of 75%. In my view, a reapportionment of 70% achieves fairness having regard to the factors in the statute. In the result, the plaintiff would have been legally entitled to a further 5% or \$34,000 beyond the provision that Mr. Miller already made for her.
- [51] I turn next to the question of support. Given the relatively short length of the marriage, the role of the plaintiff as a companion and help, and, as well, her age and financial circumstances, I am satisfied that she would have been entitled to minimal compensatory but primarily non-compensatory support under s. 15.2 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). Two objectives of spousal support are to relieve any economic hardship arising from the breakdown of the marriage and, insofar as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time. The plaintiff has suffered some economic hardship and I do not consider the additional property settlement sufficient to promote economic self-sufficiency.
- [52] In the circumstances, any spousal support should be paid as a single lump sum as it is apparent that the amount will have to be funded from the proceeds of the sale of the house. An appropriate award for lump sum spousal support would have been \$20,000.
- [53] I consider Mr. Miller's legal obligation to the plaintiff is satisfied by awards totaling \$54,000, in addition to the monies received by survivorship rights to the financial accounts. With that in mind, I turn next to the moral obligations that Mr. Miller had, starting with his moral obligation to the plaintiff.

MR. MILLER'S MORAL OBLIGATION TO THE PLAINTIFF

- [54] In *Tataryn*, McLachlin J. (as she then was), for the Court, described moral obligations as "society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards" (*Tataryn*, 821). She also adverts to the lack of a clear legal standard by which to judge moral duties and that "these obligations are admittedly more susceptible of being viewed differently by different people" (*Tataryn*, 822).
- [55] In identifying this potential difficulty, *Tataryn* discourages a polyvalent approach that takes into account the variable community standards that may be found within a society as diverse and multicultural as Canada. The court should not finely parse the expectations of individual communities within the larger community no matter how reasonable they may appear to members of the former.
- [56] Here, Mr. Miller clearly acknowledged by his words and conduct that he recognized his moral obligation to provide for the plaintiff. He apparently thought that he met his obligation in that regard by formulating his overall plan in 2008. The plan must, however, be reassessed in light of actual developments to the time of his death in 2009. Canadian contemporary society would expect no less than that he provide his wife with her lawful entitlement to share in a fair distribution of family assets and to receive a measure of additional support.

- [57] At the same time, Mr. Miller's moral obligation was tempered by his acquiescence to the plaintiff's decision to retain her own bank accounts and earnings for her own use. That ensured that she preserved, as a baseline, her economic position from before marriage and adequately reflected the fact that this was, for both, a "twilight" marriage.
- [58] By the terms of his will and accompanying declaration, Mr. Miller also acknowledged a moral obligation to his three adult sons. In spite of his antipathy towards one son who he felt had failed to maintain a relationship with both parents and his concern about another who had demonstrated financial irresponsibility, Mr. Miller still added a postscript to the effect that his executor might decide to share the residue of the estate with them. Rika Millir acknowledges that he accepts a moral obligation in that regard.
- [59] Counsel for the plaintiff contends that I should only consider the moral obligations that Mr. Miller owed to the plaintiff, on the one hand, and to Rika Millir, on the other, as the sole residual beneficiary and the only party to respond to the plaintiff's claim. I disagree.
- [60] In spite of Mr. Miller's unhappiness with the son who failed to maintain a relationship with the family and his concerns about the financial responsibility of the other, he obviously took them into account in deciding the size of the bequest to Rika Millir. That bequest amounted to passing on the whole of the interest in the former matrimonial home. It is commonly recognized in contemporary Canada that parents, where possible to do so, will pass on an interest in the family home. It would be artificial to entirely ignore the interest of the other two sons in weighing that consideration.
- [61] Finally, I take into account the need to respect Mr. Miller's autonomy in making choices about the disposition of his estate. Overall, his approach was defensible but its adequacy must be reassessed based on the eventual size of the estate and consideration of the legal and moral obligations described above to ensure that the provision for the plaintiff was adequate, just and equitable in the circumstances.
- [62] A potential approach is as follows. After Mr. Miller's death, the plaintiff received \$169,000 and retained her own assets worth about \$15,000. Without regard to any additional moral obligation, the legal obligation owed to the plaintiff totals \$54,000.
- [63] In my view, a total payment of \$75,000 out of the net sale proceeds of the house left in the estate would satisfy the legal and the additional moral obligation that Mr. Miller owed to the plaintiff. This would result in the plaintiff obtaining roughly 36% of the overall estate that Mr. Miller held immediately before he died. I consider such a result adequate, just and equitable in the circumstances.
- [64] While this result is less than the percentage that the plaintiff seeks, it is considerably more than the percentage that Rika Millir says represents the plaintiff's maximum entitlement. In determining entitlement solely as a percentage of the net proceeds of the sale of the house, that is, the actual estate, as the plaintiff suggests, there is a risk of losing sight of the fact that the survivorship rights respecting the financial accounts solely benefited the plaintiff. It is

necessary to consider the overall worth of Mr. Miller's estate immediately before death to avoid distortion and ensure fairness. The 25% as proposed by the executor is, however, insufficient to meet Mr. Miller's legal obligation to the plaintiff even without regard to his moral obligation.

- [65] In all the circumstances, I am persuaded to vary Mr. Miller's will to provide for a payment to the plaintiff from the estate of \$75,000. The balance held in the estate is sufficient to satisfy Mr. Miller's moral obligation to his adult sons.
- [66] The payment of \$75,000 to the plaintiff will be reduced by her proportionate 15% share (relative to the estate of about \$511,000) of any additional expenses incurred by Mr. Miller's estate that must be taken into account before final distribution. I exclude from the plaintiff's share of expenses any portion of the expenses that the estate has incurred in defending the action.
- [67] Unless there is an offer to settle that I am required to take into account, in which case counsel may speak to the matter of additional costs payable, the plaintiff is entitled to her costs on Scale B payable by the estate. In the event any additional costs are payable to the plaintiff as a result of a successful offer to settle, I will also address how those costs are to be borne after hearing further submissions.

"M.D. Macaulay, J."

The Honourable Mr. Justice Macaulay

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