

CANADA / JUDGMENT

Philp v. Philp Estate

2017 BCSC 625

COURT

Supreme Court of British Columbia

DECIDED

18 April 2017

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2017 BCSC 625 Philp v. Philp Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Philp v. Philp Estate,

2017 BCSC 625

Date: 20170418

Docket: S144263

Registry: Vancouver

Between:

Ian James Philp

Plaintiff

And

David Craig Demetrick, as Executor of the Will and Trustee

of the Estate of Lois Elaine Philp, Deceased,

David Craig Demetrick, in his personal capacity,

Jeffrey Scott Demetrick, Dana Lynn Sammartino,

Douglas James Demetrick, James Robert Demetrick,

Aidan Victor Demetrick (minor), Amy Olivia Demetrick (minor),

Gabrielle Ginger Demetrick (minor), Lisa Michelle Sammartino,

Mia Katelyn Lydia Sammartino, Luke Wesley Goretsky,

Melanie Gayle Demetrick (minor), Selina Diane Demetrick (minor),
Allessandra Marie Demetrick (minor), Rachelle Katherine Demetrick (minor),
Laurel Alexandra Demetrick (minor) and Nicholas Scott Demetrick (minor)
Defendants

Corrected Judgment: this judgment was corrected on page 1 on December 15, 2017

Before: The Honourable Madam Justice Burke

Reasons for Judgment

Counsel for the Plaintiff:

H.H. Low

Counsel for the Defendants D.C. Demetrick, J.S. Demetrick, D.L. Sammartino, D.J. Demetrick and
J.R. Demetrick:

S.T. Rule

Counsel for the Defendants L.M. Sammartino, L.M. Sammartino as litigation guardian for A.V.
Demetrick, A.O. Demetrick, G.G. Demetrick, S.D. Demetrick, A.M. Demetrick and N.S.
Demetrick; M.K. Sammartino, R.K. Demetrick, L.A. Demetrick, L.W. Goretsky and M.G.
Demetrick:

G.W. White

Place and Date of Trial:

Vancouver, B.C.

November 14-18, 2016

Place and Date of Judgment:

Vancouver, B.C.

April 18, 2017

INTRODUCTION

- [1] Dr. Ian Philp is 84 years old and the surviving spouse of Lois Philp. The couple were married for 31 years. Mrs. Philp died in 2013.
- [2] Dr. Philp brings a claim under s. 2 of the Wills Variation Act, R.S.B.C. 1996, c. 490 [WVA], maintaining Mrs. Philp did not, by her will, make adequate provision for him.

- [3] The defendants are Mrs. Philp's children from her first marriage and their children. They maintain that Mrs. Philp made adequate provision for her husband and ask this Court to uphold her will as she intended.
- [4] This application was brought under Rule 9-7 of the Supreme Court Civil Rules -- the summary trial procedure. The material was voluminous. While I have considered all of the material, I only reference that sufficient to set out my analysis in this matter.

ISSUES

- [5] Did Mrs. Philp, by her will, made adequate provision for Dr. Philp?
- [6] If not, what is the adequate, just and equitable provision that should be made for him by the court?

OVERVIEW

Background

- [7] Dr. Philp, born April 25, 1932, is currently 84. He was a physician in general practice for nearly 50 years prior to retiring at 82 in May of 2014.
- [8] Dr. Philp has two adult daughters from a previous marriage: Sharon Isaak and Barbara Obonsawin.
- [9] Dr. Philp was diagnosed with dementia in the summer of 2015. He was therefore represented by a litigation guardian in this proceeding, Ms. Isaak. Dr. Philp gave no affidavit evidence, but his daughters gave evidence on his behalf based on what they knew and what he told them. This has raised some evidentiary concerns, but other material filed in this matter has assisted in setting out the necessary background.
- [10] Mrs. Philp separated from her first husband Victor Demetrick in 1979. She began living with Dr. Philp sometime in 1980. The couple married on June 25, 1982.
- [11] During their marriage, the couple lived on an 18-acre property located at 8108 Whetzell Drive, in Coldstream, British Columbia (the "farm property"). The property is largely barren land with various outbuildings including the family home, a detached garage, two horse barn/stables and a horse paddock/shelter. It is fenced and also has a riding ring.
- [12] Mrs. Philp owned the farm property before the marriage, having received it as part of the divorce settlement from her first husband. Mrs. Philp and Victor Demetrick divided the family farm and other family assets between them. Their settlement was incorporated in an order of his Honour Judge Arkell, L.J.S.C. made June 17, 1982.

- [13] Pursuant to the order, Mrs. Philp received 18 acres of bare land at 8108 Whetzell Drive, while Victor Demetrick received the rest of the family farm. She also received a further \$72,000 as part of the settlement of the division of family assets. Pursuant to Judge Arkell's order, each of Mrs. Philp and Victor Demetrick had a right of first refusal on the other's property for the benefit of their five children until the youngest of their children attained the age of 25, at which point the right of first refusal belonged to the children.
- [14] Mrs. Philp's five children from her first marriage were all raised on the farm property. They have since left the property and are now all financially independent adults.
- [15] Dr. Philp and Mrs. Philp purchased and lived in a manufactured home on the farm property from about 1983 to Mrs. Philp's death in 2013. While Dr. Philp says he alone purchased the manufactured home, the purchase agreement lists both him and Mrs. Philp as purchasers.
- [16] Dr. Philp wrote cheques for \$8,828 in total for the home. The remainder of the purchase price of \$52,400 was financed by a mortgage of \$43,872. There is no evidence of who made the mortgage payments. While there is also evidence of a cash outlay of approximately \$29,000 for items necessary to establish the manufactured home on the property, there is no evidence of who made those payments. Ultimately, however, the evidence establishes the couple co-mingled funds throughout their marriage.
- [17] Mrs. Philp had a passion for horses and operated a horse breeding, training and boarding business on the farm property. She did not earn an income apart from what she received from her husband's medical practice earnings and modest earnings from the farm, which consistently resulted in losses.
- [18] The parties differ on the extent of Dr. Philp's contribution to the farm property and the horse business. There is no doubt, however, that Dr. Philp worked regularly around the farm throughout the marriage, undertaking many activities associated with the farm. This included hauling horses for sale; filling water barrels for the horses and hauling those barrels around the property; spreading sand on the riding ring situated on the farm property; assisting with building infrastructure on the farm property; and regularly undertaking a variety of maintenance on the property.
- [19] Affidavits filed by individuals outside the family confirm that Dr. Philp assisted with maintaining the farm property and the horse business. In particular, reference is made to Dr. Philp's transportation of horses and hay to various locations throughout the United States and Alberta. He was also observed undertaking tasks around the farm including fixing various equipment, fences and other structures and general assistance with maintenance of the property.
- [20] Furthermore, in 2008 Mrs. Philp, in correspondence to the Canada Revenue Agency concerning GST, indicated that Dr. Philp worked approximately 20 hours a week in the farm business.

- [21] Much of the major infrastructure work on the farm was, however, undertaken by others including Tony Sammartino, a journeyman carpenter and Mrs. Philp's son-in-law. He attests to constructing improvements on the property over the years including the skirting and two decks of the manufactured home, two shed rows consisting of six stalls each, a double garage and five horse shelters. Documents were filed as part of these proceedings reflecting that payments for these jobs were made from Mrs. Philp's chequing account.

Financial Contributions

- [22] Dr. Philp also says he used his income as a physician to subsidize the horse business. The evidence reflects a letter from the couple's joint accountant at KPMG which reviewed the couple's income taxes from 1987 to 2012. That review concludes that the horse business over the years had an aggregate net deficit of approximately \$2,748,557. Ms. Isaak attested to her own calculations based on the couple's tax returns, which found an aggregate net deficit of approximately \$2,907,178.
- [23] Ms. Issak attested that Dr. Philp told her that after he married Mrs. Philp, he spent the majority of his earnings on the couples' living expenses, the horse business and the farm property, and had little savings remaining for his retirement. He said he cashed in retirement savings plan monies at Mrs. Philp's request because she needed the funds for her horses and that he needed to work into his 80s because he did not have enough savings to retire. She also says her father told her that when Mrs. Philp asked him to cash in his retirement savings, she promised he would be well taken care of after her death. After seeing Mrs. Philp's will after her death, Dr. Philp realized she had left him with nothing of financial significance, and became very worried about his future.
- [24] The evidence on this point however is somewhat lacking.
- [25] The review from the accountant at KPMG states that the calculation of the net farm losses was based on "the documents you provided us regarding personal taxes, and more specifically, farm losses incurred by you and Lois." The letter does not indicate the documents relied upon nor were they provided in evidence. It reflects farm losses reported on tax returns. These do not establish the amount of the contributions made by Dr. Philp nor its impact. As noted by the defendants, these losses may well have reduced the couple's tax burden created by Dr. Philp's income.
- [26] The evidence also includes accounting information from Dr. Philp's registered income account, an investment account, which provides a summary of Dr. Philp's total withdrawals made in the approximate ten years before his wife's death. These amounts totalled approximately \$836,346. It is difficult, however, without more, to attribute these directly to the operation of the farm.
- [27] While Dr. Philp filed emails from some time ago that reflect his concern with monies being consumed as part of the horse farm operation, he also participated in and enjoyed many aspects of the horse farm operation. No doubt stresses existed because of the reality that the

horse breeding business was a money-losing proposition. However, the evidence does not establish Dr. Philp's consistent strong objection to its continued operation. While Ms. Obonsawin says he was forced to purchase the first mare against his will, this is contradicted by the affidavit of James Robert Demetrick ("James Demetrick") who was involved in the purchase and indicated Dr. Philp was a willing participant who filled out the appropriate forms to allow the purchase to proceed.

- [28] Dr. Philp also owned horses previous to his relationship with Mrs. Philp when his own daughters, from his first marriage, participated in riding events. He attended and volunteered at these events and was no stranger to the horse world. Later on it appeared he took pride in the farm operation, known as Crossrail Farm, considering it a hobby business and portraying himself as a partner in advertisements and business cards which were in evidence as part of this proceeding.

Mrs. Philp's Health

- [29] Mrs. Philp was mobile up until her death. Mrs. Philp, however, had a variety of serious health conditions during the marriage including heart attacks, congestive heart failure, and a number of other significant ailments. Although the defendants dispute the extent of his care, it is evident that Dr. Philp, as a physician, provided significant support to his wife throughout these episodes and beyond. Indeed, on at least two occasions, there is no dispute he administered CPR in response to her heart attacks, thereby likely saving her life.

The Will

- [30] Mrs. Philp died on August 23, 2013. Her will dated August 12, 2009 appointed her son David Craig Demetrick ("Craig Demetrick") to be the executor of her will and the trustee of her estate.
- [31] The will gave Dr. Philp a life interest in the farm property. It provided that he would have the personal use, occupation and enjoyment of the residential property on the farm property, owned originally by the couple as joint tenants and by Dr. Philp on her death through a right of survivorship, as a place of residence provided he was responsible for all costs relating to the maintenance of that dwelling.
- [32] Amongst other provisions, Mrs. Philp provided that the trustee was not entitled to sell, lease or otherwise transfer or encumber the residential property without the unanimous consent of Dr. Philp and each of her children alive at that time. She also provided for a right of first refusal to purchase the property first to her son James Demetrick and then to two of her granddaughters.

- [33] The will also gave Dr. Philp the income generated from the residue of the estate until his death, with power for the trustee to pay Dr. Philp amounts out of the capital of the estate as the trustee in his absolute and uncontrolled discretion thinks fit, and an interest as a discretionary capital beneficiary of the residue of the estate.

Value of the Estate

- [34] The most significant aspect of the estate by far is the farm property. The parties dispute the value of the property at the time of Mrs. Philp's death. At that time, the executor, Craig Demetrick, in a document sworn on December 3, 2013, valued the farm property at approximately \$1.2 million. The affidavit material of the executor, however, indicates that was an overestimate, based on the opinion of a realtor and not a professional appraiser. He now values the asset at \$660,000 at the time of death.
- [35] The other assets in the estate at the time consisted of two bank accounts totaling approximately \$17,000, horses and other receivables. These have, however, since been used to pay estate liabilities and expenses.
- [36] Even on the lower valuation of the property, Dr. Philp argues Mrs. Philp had more value in total assets at the time of her death than him.
- [37] Dr. Philp also argues there is no current appraisal of the farm property. He says the only way, therefore, to determine the fair market value of the farm property is to sell it on the open market.
- [38] The affidavit material however, filed by the respective parties attaches two different appraisals. These were both undertaken recently and value the property on or close to the pertinent date -- of Mrs. Philp's death. Hugh Rogers, an accredited appraiser, appraised the farm property on behalf of the defendants at \$660,000 as of the date of Mrs. Philp's death. This included the outbuildings but not the manufactured home. Paul J. Sullivan, also an accredited appraiser, appraised the property on behalf of Dr. Philp at \$750,000. This appraisal includes the manufactured home and outbuildings but is dated August 2014, one year after the death of Mrs. Philp.
- [39] There is not a significant divergence of opinions in these appraisals, and I find them to be reasonably accurate in their valuations. I am therefore able to use them to come to a conclusion as to the value of the property. I will return to this issue later.
- [40] While Dr. Philp asks me to rely on the original estimate by the executor of \$1.2 million instead of the amounts in the appraisals, I accept the executor's evidence that that was more or less a guess at the time and should not be relied upon. This is borne out by each of the appraisals, which fix a much lower amount to the farm property.

- [41] The material filed also indicated the value of the property at the time Mrs. Philp brought it into the relationship was either \$110,000 as per the purchase and sale agreement settling Mrs. Philp's divorce or \$130,000 as per a recent property appraisal by Mr. Rogers valuing the property at that time (in 1980). Either way, these values are close enough to use in ultimately assessing the legal and moral obligations in this case.
- [42] Based on the above, I conclude the value of Mrs. Philp's estate at the time of her death was \$677,000, reflecting the value of the property at \$660,000, as appraised by Mr. Rogers, and \$17,000 in other assets as reflected above.
- [43] In arriving at this conclusion, I preferred the amount appraised by Mr. Rogers as it does not include the manufactured home, about which there was initially some debate as to ownership. Furthermore, the higher amount of \$750,000 as appraised by Mr. Sullivan reflects the property at a later date, i.e. August 2014, rather than the pertinent date in August 2013.

Dr. Philp's Assets

- [44] The parties ultimately agreed that at the time of Mrs. Philp's death, Dr. Philp had total assets of approximately \$600,000. This included a few vehicles with a total value of approximately \$27,000, a residential rental property in Vernon, British Columbia (purchased during the marriage) with an assessed value of \$229,000 and an outstanding mortgage of \$28,213.80, a Registered Retirement Income Fund ("RRIF") with an estimated value of \$258,956.35 (albeit as of September 30, 2013), bank accounts with a net after debt balance of approximately \$42,000, retained earnings in his personal medical practice company of less than \$10,000 and the manufactured home on the farm property which recently sold for \$50,000 in 2016.

Circumstances after Mrs. Philp's Death

- [45] Dr. Philp was 81 years old when Mrs. Philp died. In her affidavit, Ms. Obonsawin says when her father saw Mrs. Philp's will after her death, he was distressed about his financial circumstances. He advised her he had depleted his savings in order to support Mrs. Philp, the horse business and the farm property and that he understood from conversations with Mrs. Philp that she was going to provide for him in a greater way than what she had in fact done.
- [46] This view is, however, disputed by Craig Demetrick. He maintains Dr. Philp was well aware of Mrs. Philp's estate plan that he would not be left the farm property and that she intended to leave the property to her children. In March 1996, Mr. Demetrick says he was advised by Dr. Philp that Mrs. Philp was not leaving him the property and requested Mr. Demetrick assist him with purchasing a property that he could leave to his own children. He ultimately purchased property in Vernon which he used over the years as a rental property.

Needs of the Parties

- [47] Dr. Philp lived in the family home on the farm property until August 2015. At that time he was no longer able to live independently and moved to Victorian Retirement Residence, an independent seniors' residence in Vernon, British Columbia.
- [48] Due to an unfortunate decline in his mental capacity, he was asked to leave the facility in September 2016. He is now living in Vernon at Chartwell Carrington Place, a private assisted living facility with 24/7 care. The costs are estimated to be close to \$7,000 per month. His two daughters are considering moving him to a facility in Vancouver, British Columbia to be closer to Ms. Isaak. This, Ms. Isaak argues, will significantly increase the cost of his living and care expenses in excess of \$100,000 per annum.
- [49] At present his funds amount to approximately \$444,567.72. He has an annual pension of \$19,000 (comprising of his Canada Pension Plan and Old Age Security pensions) and is utilizing withdrawals of about \$19,000 per annum from his RRIF account for expenses.
- [50] No income or capital payments have been made to Dr. Philp from Mrs. Philp's estate. Indeed, the estate is operating at a net loss, meaning there are more debts owed by the estate than there are assets.
- [51] By comparison, all of Mrs. Philp's children are financially independent adults. Their circumstances are as follows:
- (a) Dr. Douglas James Demetrick, the eldest of the deceased's children, was born October 17, 1958. He is an academic physician. He is married to Dr. Lisa DiFrancesco and they have one minor child and two attending university full-time. They live in Calgary, Alberta.
 - (b) Dana Lynn Sammartino ("Dana Sammartino") was born on November 5, 1959 and is an ultrasound technician. She is married to Tony Sammartino and they have two adult daughters, Lisa Sammartino and Mia Sammartino. She lives in Coldstream, British Columbia.
 - (c) Craig Demetrick was born on January 9, 1961 and is a real estate agent. He is married to Sherry Demetrick and they have three minor children. He lives in Coldstream, British Columbia.
 - (d) Dr. Jeffrey Scott Demetrick ("Jeffrey Demetrick") was born on November 7, 1962 and is a surgeon. He is married to Alison Pontifex and they have three children, all of whom are attending university or college. He lives in Coldstream, British Columbia.
 - (e) James Demetrick was born on August 10, 1964 and is a farmer. He is in a common law relationship with Allison Covert. They do not have any children. He lives in Kelowna, British Columbia.

LEGAL PRINCIPLES

[52] The language of the WVA confers a broad discretion on the court to make orders that are just, taking into account the circumstances of the case and conforming to contemporary community standards: *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807.

[53] The present matter is governed by s. 2 of the Wills Variation Act -- now s. 60 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 -- which provides as follows:

Maintenance from estate

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.

[54] As per *Tataryn*, where a spouse or child challenges the will of a testator/will-maker under s. 2 of the WVA (or its contemporary equivalent), two types of obligations must be examined: legal and moral. Legal obligations are those that would be imposed by law on the will-maker if the question of provision for the claimant arose during his or her life. Moral obligations are "society's reasonable expectations of what a judicious person would do in the circumstances": *Tataryn* at 821. What is just and adequate will vary greatly based on the circumstances of each case.

[55] The Court in *Tataryn* spoke about balancing two competing interests in cases such as these - the "adequate, just and equitable provision for the spouses and children of testators" and testamentary autonomy: at 815. The Court stated:

The Act did not remove the right of the legal owner of property to dispose of it upon death. Rather, it limited that right. The absolute testamentary autonomy of the 19th century was required to yield to the interests of spouses and children to the extent, and only to the extent, that this was necessary to provide the latter with what was "adequate, just and equitable in the circumstances." [Emphasis in original.]

[56] Summarizing the decision in *Tataryn*, Ballance J. made the following comments in *Dunsdon v. Dunsdon*, 2012 BCSC 1274 at para. 133:

[133] All legal and moral claims should be satisfied where the magnitude of the estate permits. In cases where complete satisfaction of all claims is not possible, the competing claims are to be prioritized. Claims that would have been recognized as legal obligations during a testator's lifetime should generally take precedence over moral claims: *Tataryn*, at 823. The court must also weigh the competing moral claims and rank them according to their strength. While claims of independent adult children may be more tenuous than those of a spouse or dependent child, where the size of the estate permits, some provision should be made for them unless the circumstances negate such an obligation: *Tataryn*, at 822 - 823.

- [57] In balancing the conflicting claims, the Court in Tataryn noted one should take into account the important changes consequent upon the death of the will-maker. As there is no longer a need to provide for the will-maker, the reasonable expectations may differ following a death than in a separation: at 823.
- [58] The relevant time for determining whether the will-maker has made adequate provision for a spouse or child is at the date of his or her death -- 2013 in this case.
- [59] The court may consider the circumstances of the plaintiff, including any reasonably foreseeable changes in the circumstances, as at the date of death, when determining whether adequate provision has been made.

THE PARTIES' POSITIONS

- [60] Dr. Philp maintains the manner by which the intended benefits under the will have been conferred upon him and the manner by which the will has been administered has effectively provided him with no benefit.
- [61] Dr. Philp points out that being permitted to live in the manufactured home for two years after his wife's death was of no benefit to him as he was the sole owner of that home by then. He also says he can now no longer live in the home due to his inability to live independently.
- [62] Furthermore, he says that while the will provides that he is to receive income generated from the estate, no payment has been made since Mrs. Philp's death over three years ago.
- [63] Finally, while he is to be provided with capital payments on the estate, he points out that this is subject to the executor's unrestricted discretion. The executor has an inherent conflict of interest, Dr. Philp says, as he is a remainder beneficiary of the estate, meaning the executor/trustee will benefit personally if no encroachment on capital is made.
- [64] Ultimately, Dr. Philp seeks a variation from his present life interest in the farm property to having title to the property. That, he says, would enable him to actually acquire a benefit from the will as Mrs. Philp intended, by being able to sell the property and keep the proceeds. Further, he says that the defendants will be unjustly enriched if he was denied ownership, arguing that he contributed to the farm property both physically and financially for three decades and that it would be unfair in the circumstances to deny him ownership.
- [65] Dr. Philp argues when assessing the legal obligations referred to in Tataryn, the WVA should not be used as a proxy for divorce proceedings, as per *Kish v. Sobchak Estate*, 2016 BCCA 65 at para. 49. The analysis of legal obligations need not be detailed or exact given the difficulty of drawing a direct analogy between the consequences of a marriage breakdown and the death of a spouse. Dr. Philp also points out he would be entitled to unequal division of the property based on a number of factors including his much greater contribution to the property, as per ss. 95(2) and 96(b) of the Family Law Act, S.B.C. 2011, c. 25.

- [66] Dr. Philp says Tataryn has recognized testamentary autonomy as relevant to an application to vary a will only if the provision in the will has first met the legal and moral obligations to the spouse. If I conclude otherwise, there is no testamentary autonomy for Mrs. Philp to benefit her adult children and grandchildren from the only asset available to make adequate provision for the spouse.
- [67] The defendants point out, however, that the application of the WVA requires a balancing of different principles. It protects two interests: the adequate provision of the spouse and children of the will-maker and the will-maker's testamentary autonomy.
- [68] The defendants point out in determining whether adequate provision has been made and what is adequate, just and equitable, the court must consider the will-maker's legal and moral obligations to spouses and children. In the case of legal obligations to spouses, the court may consider what the surviving spouse's entitlement would be under family law legislation if the marriage had broken down, as well as on the principles of unjust enrichment. The defendants point out however that the comments in Tataryn do not mean both are considered. Rather, in the context of that case and the time, the concept of unjust enrichment was utilized for common-law obligations.
- [69] In this case the defendants say their mother's legal obligation to Dr. Philp has been met as per her potential obligations under the Family Law Act. The initial value of the farm property of \$130,000 would be excluded under s. 85(1)(a) but the value of the increase would be included. Taking the \$660,000 valuation in 2013 and subtracting the excluded value of \$130,000 would leave \$530,000. Assuming that amount would be divided equally, Dr. Philp would be entitled to \$265,000. Knowing that Dr. Philp had assets totaling \$600,000 at the relevant time, Dr. Philp has ended up with more than half of the assets. This, the defendants say, establishes that the will-maker's legal obligation has been met.
- [70] The next question, the defendants say, is whether the will-maker had a moral obligation over and above her legal obligations and whether it has been met. As per Tataryn, if adequate provision has been made, even if it is not generous, but is within the range of options, the claim must be dismissed.
- [71] The defendants do not dispute that Dr. Philp was a loving, caring husband who contributed to his wife's happiness and to the farm property. They maintain, however, that by providing Dr. Philp with a life interest in the farm property, Mrs. Philp chose an option in her estate plan that fell within the range of options available to her to make adequate provision for her husband and her children. The main asset of her estate was the farm property which she brought into the marriage. It has a special significance to both her and the children; Dr. Philp knew this and of her intention to leave the farm to the children.

- [72] The defendants also say Dr. Philp accumulated assets of his own and at the time of Mrs. Philp's death had sufficient resources to provide him with a comfortable retirement. The life estate provided him with an inexpensive place to live for two years following her death and in a notional division under the Family Law Act, he retained at least one-half of the family assets.
- [73] The defendants point out, as per *Saugestad v. Saugestad*, 2006 BCSC 1839 at para. 122, rev'd 2008 BCCA 38, the Tataryn principles need to be adapted in second marriages with children from previous marriages or relationships. They say second marriages present unique difficulties in assessing the moral obligations of the will-maker.
- [74] Furthermore, they say in adapting the Tataryn principles, the court must also consider any agreement or understanding the spouses had that would benefit his or her own children, citing *Kish*. This factor they say is present in this case.
- [75] They maintain that court decisions have recognized the significance a farm property may have in families and the difficulties in satisfying beneficiaries' moral claims to the farm as an intact asset and the claims of the surviving spouse: see *Bath v. Bath Estate*, 2016 BCSC 1239 at paras. 172-173, *Kuzyk v. Czajkowski*, 2016 BCSC 1109. The defendants highlight the unique character of the farm property and point to the children and grandchildren's strong attachment and deep involvement with the farm.

ANALYSIS

Does the Will make Adequate Provision?

- [76] As per *Tataryn*, the first question I must first consider is whether the legal obligations imposed on the will-maker have been met. This is essentially determined by asking the question of what would the plaintiff have been entitled to if the will-maker's legal obligation to him had arisen during her life and whether that obligation has in fact been met.
- [77] The will-maker would have no legal obligation to her five children who are all adults and are financially independent. The issue is her legal obligation to Dr. Philp -- the surviving spouse in this instance.
- [78] As noted, the defendants essentially argue the legal obligation has been met as per their mother's potential obligations under the Family Law Act. Dr. Philp, on the other hand, relies on *Kish* at para. 49 to argue the WVA should not be used as a proxy for divorce proceedings. He also notes the Family Law Act provides for unequal division in any event, and that his contribution over the years to the farm should be taken into account in that respect.
- [79] In considering whether adequate provision has been made, the value of the estate is important. That value is \$677,000. Also relevant is Dr. Philp's assets at the time of Mrs. Philp's death, which totalled \$600,000.

- [80] At the outset, I note the comment in Kish at para. 49 that the WVA should not normally become a proxy for divorce proceedings. Rather, as the Court said, citing Tataryn "guidance concerning the testator's legal obligations while he or she was alive may be found in the Divorce Act, family property legislation, or the law of constructive trusts": at para. 48. This endorses a more nuanced approach inherent in the discretionary provision of the WVA and provides overall guidance.
- [81] As recently confirmed in Ciarniello v. James, 2016 BCSC 1699, legal obligations to a spouse are considered at the time of "notional separation" immediately prior to the testator's death: at para. 32. In considering this, the relevant value of the assets of the plaintiff were \$600,000 and the will-maker's asserts were \$677,000. Accordingly, there is a strong prima facie argument that Mrs. Philp discharged her legal duty to her spouse by this close to one-half division of family assets.
- [82] In terms of spousal support to Dr. Philp, Mrs. Philp's income was very little and likely would not have allowed much spousal support, if any.
- [83] As argued by the defendants, the initial value of the farm property of \$130,000 would likely be excluded under s. 85(10(a) of the Family Law Act, being "property acquired by a spouse before the relationship between the spouses began". As noted above, the net increase in the value of the farm property was therefore \$530,000. The assets of Dr. Philp of \$600,000 are reasonably close when considered against Mrs. Philp's assets of either \$530,000 or \$677,000 (if not excluded).
- [84] Dr. Philp points out, however, his contribution would have allowed for an unequal division of assets based on a number of factors, including his financial and physical contributions to the farm. Further, he argues if his money had not been expended on the farm, the farm property could well have been lost and therefore his earnings essentially acted to preserve the property.
- [85] I conclude, however, as argued by the defendants, that the farm was essentially a hobby farm. The funds that were invested in the farm were consumed to maintain a particular lifestyle, i.e. that of living on a horse farm. The farm consistently lost money. As a result those funds cannot realistically be considered to have contributed to the worth of the property which is largely in its land value. This is as reflected in the appraisals filed in this matter which focus on the value of the land itself as opposed to its commercial value.
- [86] It is therefore difficult to see how a claim for unjust enrichment, as argued by Dr. Philp, would be successful in this matter to further buttress his claims of legal rights to the property.
- [87] The test for unjust enrichment was set out in Kuzyk at para. 154:

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

- (i) an enrichment;

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

- [88] While at first glance, Dr. Philip may appear to have at least an arguable case with respect to a claim in unjust enrichment, I find there was insufficient evidence adduced in support of his contributions to the property. Although there was evidence on the amount of funds and labour he contributed, as noted earlier I have serious concerns with the quality of that evidence sufficient to sustain such a claim and the documentation on which it relies. There were also gaps in the documentation filed in this court in support. Ultimately, I am not prepared to find that the test in *Kuzyk* has been made out on the evidence before me.
- [89] All things considered, I conclude that the will-maker satisfied her legal obligations to Dr. Philp under her will.
- [90] Turning to the issue of her moral obligations, I note the comment in *Bridger v. Bridger Estate*, 2006 BCCA 230 at para. 20:
- [20] Tataryn recognizes that there is no clear legal standard to judge moral claims and the test is more nebulous where the surviving spouse is not strictly speaking a dependent spouse and the children are all financially independent adults.
- [91] As set out in *Eckford v. Vanderwood*, 2014 BCCA 261 at para. 56, Dr. Philp's deteriorating health, i.e. dementia, is not relevant to whether Mrs. Philp made adequate provision for him in her will; rather, only those circumstances existing or reasonably foreseeable at the time of the death of the will-maker are relevant. Evidence of cognitive decline "in or about the fall of 2014" was noticed by Ms. Isaak in her affidavit. This, however, was over a year after Mrs. Philp's death, and therefore I find his condition was not reasonably foreseeable.
- [92] Kish noted at para. 60, the "claims of adult children do not and should not overshadow a testator's moral duty to a spouse", especially where the relationship is long. I agree with Saugestad at para. 123, that it is particularly difficult to assess cases where the deceased and surviving spouse have independent adult children from their first marriages.
- [93] Kish also noted at para. 61, however, that as set out in Tataryn, "testator autonomy is one of the two interests 'protected' by the WVA." In this case the defendants argue that testator autonomy reflects Mrs. Philp's clear attachment to the farm and her wish that it should devolve to her children.
- [94] The evidence establishes that Mrs. Philp's desire and wish was to provide the farm to her children. She was passionate about the horse business and spent her entire married life on the farm trying to keep the horse business going. Her children were raised on the farm property -- albeit one much larger than the portion of the farm remaining after the original property was divided in her divorce settlement in 1980. Once the children became adults, the family still spent a significant time on the farm, with the children helping with various tasks and the grandchildren regularly attending the farm.

- [95] These cases are difficult to resolve especially when one sees the deterioration of what was once a loving, supportive relationship between all the parties as a family. It is clear Dr. Philp was part of that family, which encompassed Mrs. Philp and her children and their grandchildren, undertaking many activities together. The grandchildren even considered and referred to Dr. Philp as their grandfather. That has all changed for the worse with the onset of this dispute over the will.
- [96] In balancing these factors and the moral obligations among the beneficiaries, I conclude there is a strong moral obligation owed to Dr. Philp, who assisted throughout in trying to make the farm and horse business a success. Furthermore, he provided significant care for his wife as a physician over and above what most other spouses could do. The marriage was long and his contributions to Mrs. Philp's clearly fervent desire to live on the farm and run the horse business were also significant.
- [97] I conclude therefore that based on her moral obligations to Dr. Philp, the will as presently framed does not make adequate provision for Dr. Philp.

What is Adequate, Just and Equitable Provision?

- [98] Although not relevant to the first question, a change in a plaintiff's health may be considered in determining the award if the court finds that adequate provision has not been made at the time of death: *Eckford, Hall v. Hal*, 2011 BCCA 354.
- [99] There has been a decline in Dr. Philp's mental capacity resulting in significant costs associated with his private assisted living facility and 24/7 care. Those costs are said to presently amount to \$7,000 per month but could be in excess of \$100,000 per annum if Dr. Philp is moved to Vancouver to be closer to Ms. Isaak. The defendants nonetheless objected to much of the evidence on his expenses. I take these to be approximate amounts only in making my assessment in this case. There is no doubt extra amounts are to be incurred in dealing with Dr. Philp's declining health.
- [100] As noted earlier this is a difficult situation due to the nature of the principal asset of the estate -- a farm property with deep meaning and value to the children. While the estate is largely the farm property and therefore not liquid, I conclude an equitable division of that asset in the circumstances, is a lump sum in the amount of \$300,000 to be awarded to Dr. Philp.
- [101] In my view, that result both balances the legal and moral obligations owed by the will-maker to Dr. Philp and gives effect as best it can to her clear intention to keep the farm in the family. In these circumstances, this division provides adequate, just and equitable support to the plaintiff and an equitable result for all involved.

Conclusion

[102] The will of Mrs. Philp is to be varied to provide Dr. Philp with a lump sum payment of \$300,000. Nothing else in the will shall change.

[103] If the parties are unable to agree on costs they are at liberty to request this court to do so within 45 days of this decision.

The Honourable Madam Justice E. Burke

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Prepared on 29 October 2026 · Esheria