

CANADA / JUDGMENT

Saugestad v. Saugestad

2008 BCCA 38

COURT

British Columbia Court of Appeal

DECIDED

25 January 2008

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2008 BCCA 38 Saugestad v. Saugestad

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Saugestad v. Saugestad,

2008 BCCA 38

Date: 20080125

Docket: CA034716

Between:

Joan Saugestad

Appellant

(Plaintiff)

And

Carl Nicholas Saugestad and Stephen Saugestad, personally and in their capacity as Executors of the Will of Ragnar Saugestad, Deceased

Respondents

(Defendants)

Before:

The Honourable Mr. Justice Hall

The Honourable Mr. Justice Mackenzie

The Honourable Mr. Justice Chiasson

D.F. McEwen, Q.C. and

A.S. MacKay

Counsel for the Appellant

H.H. Low

Counsel for the Respondents

Place and Date of Hearing:

Vancouver, British Columbia

20 November 2007

Place and Date of Judgment:

Vancouver, British Columbia

25 January 2008

Written Reasons by:

The Honourable Mr. Justice Mackenzie

Concurred in by:

The Honourable Mr. Justice Hall

The Honourable Mr. Justice Chiasson

Reasons for Judgment of the Honourable Mr. Justice Mackenzie:

- [1] This appeal is from a judgment varying the will of the late Ragnar Saugestad (the "testator") to provide the appellant widow, Joan Saugestad, with a cash legacy of \$29,000 and a life estate in the testator's one-half interest in a condominium known as the "Electra". The testator left the entirety of his estate disposed of by will to his two sons from his first marriage. The appellant contends that the variation is inadequate to fulfill the testator's legal and moral duties to her under the Wills Variation Act, R.S.B.C. 1996, c. 490. The reasons for judgment of the trial judge are indexed as 2006 BCSC 1839.

Background Facts

- [2] The testator died in 2003 at age 63. He was survived by the appellant, then age 56, and his two sons, the respondents Nicholas Saugestad and Stephen Saugestad, then ages 30 and 29. The testator was a native of Norway and lived in Japan from 1968 to 1990, employed by a subsidiary of Tokai Shipping Ltd. He married his first wife, Toshiowati ("Joy") Umezu, in 1970. She died of breast cancer in 1989. Tokai transferred the testator to Vancouver in 1990. He was paid a retirement allowance at that time. The testator continued to work for Tokai in Vancouver as a ship broker at a salary of \$10,000 per month until 2001 when Tokai went into receivership and he retired.

- [3] The testator met the appellant in 1990 when she was separated from her first husband and was working as a realtor. She has a grade 12 education and was licensed as a real estate salesperson until 2002. She has no children. Following her divorce, the appellant and the testator lived together for about a year and then were married on 5 March 1992. After the marriage, the appellant worked as a realtor until 1997 when she retired with the testator's encouragement; her retirement permitted them to travel extensively together at his expense, paid partly out of his capital assets. The testator told her he had enough money to support them in their retirement. The appellant was in good health except for a heart related problem that resulted in minor surgery in 1993 and 2003.
- [4] Both the respondents are single with no dependents and no significant independent assets. They were born in Japan and sent to boarding school in Hawaii in their early teens at their father's expense. They both have Bachelor of Arts degrees resulting from university studies financed by the testator. Stephen has his own web design business with anticipated earnings of \$35,000 per year. He was previously employed as a web developer, earning approximately \$21,000 per year. Nicholas is employed as a sales representative for a shipping company, earning \$60,000 per year.
- [5] On the testator's death, the appellant inherited the matrimonial home, a condominium on Ostler Street in North Vancouver ("the Ostler Street Condo"), as surviving joint tenant. She receives the testator's Japanese pension of approximately \$1,350 per month (declining slightly over time) and a CPP survivor's benefit of \$270.13 per month. Together with motor vehicles, furniture and artwork, she is the beneficiary of the testator's RRSPs totalling \$52,633 and approximately \$28,000 in various bank accounts. Specific bequests of cars, antiques, and art pieces were made to the respondents in the will. The residue of the estate was to be shared equally between the sons.
- [6] A clause in the testator's will dated 31 March 1998 explained why he had made no provision for the appellant in his will:

I LOVE MY WIFE, JOAN IRENE SAUGESTAD, but I have not made her the beneficiary of my Will, as I have provided for her with other means so she does not require a bequest from me. I have provided for her as follows:

- a. She is a joint tenant of our home located at 401-1500 Ostler Court, North Vancouver, although I provided all of the purchase funds as well as funds for upgrading and furnishing;
- b. She is the named recipient of my Japanese pension.

The appellant was aware that the will made no provision for her and she in turn made no provision for him in her will.

- [7] The appellant brought to the marriage a property settlement of \$145,000 from her first marriage, a house later sold for \$76,000, some furniture, a car, and some savings. The trial judge calculated her total assets entering the marriage at approximately \$225,000 compared to her assets of approximately \$950,000 on the testator's death.

The Assets in Dispute

- [8] The testator's assets involved in the appeal primarily fall within three categories:

1. real property;
2. shares in a private investment holding company, Nistera Ltd. ("Nistera"),
3. the testator's inheritance from his mother, Hjordis Saugestad (the "Hjordis Inheritance").

All monetary values that follow are expressed in Canadian dollars.

1. Real Property

- [9] The testator had interests in four condominiums at the date of his death. The matrimonial residence, the Ostler Court Condo, was purchased by the testator in 1993. He transferred title into joint tenancy with the appellant and title passed to the appellant by right of survivorship. This property was valued at \$381,000 at the date of death.
- [10] The testator was the sole owner of a condominium in Boca Raton, Florida, ("the Boca Raton Condo") purchased during his first marriage in 1981 for \$128,000. Title passed as part of the residue of the estate to the respondents under the will. It was later sold for net proceeds of \$285,204, less expenses. The trial judge valued it at \$255,715 at the date of death.
- [11] In 1994, the testator and the appellant purchased a rental condominium in Whistler as tenants in common. They each contributed approximately one-half of the net purchase price. This condominium was sold in 1997 and a portion of the proceeds was applied to the purchase of a second Whistler condominium ("the Blackcomb Condo") with the testator and the appellant again as tenants in common contributing equally to the cash portion of the purchase price. This condominium was valued at \$750,000 less a mortgage of \$92,956 at the date of death.
- [12] In April 1995, the testator and the appellant purchased a rental condominium known as the Electra ("the Electra Condo") on Nelson Street in Vancouver as tenants in common with equal contributions to the cash portion of the purchase price. The trial judge valued the Electra Condo at the date of death at \$170,000 subject to a mortgage of \$62,385.
- [13] The will gave the testator's one-half interest in the Blackcomb Condo and the Electra Condo to the respondents by virtue of their inclusion in the residue of the estate.

2. Nistera

[14] In 1990 the testator moved approximately \$400,000 of his retirement allowance from his employer in Japan to accounts in Norway from accounts in Singapore and Tokyo. The testator's mother, Hjordis Saugestad, managed the funds in the Norwegian accounts until 1993 when the funds were transferred to accounts in the testator's name. In 1997 the testator incorporated a private investment holding company in Gibraltar, Nistera, which he controlled. The shares were held by Danish bank nominees for the testator and the respondents as joint tenants. In 1997 the testator transferred \$415,000 to Nistera from his accounts in Norwegian banks and in 2000 he likewise transferred another \$720,457. The testator took monies from the Nistera accounts from time to time for family expenses and there may be tax implications related to Nistera that the estate will have to deal with in due course. At the testator's death, Nistera held deposits valued at \$1,014,758.12. There is no evidence that any of the funds held in the Norwegian accounts or in Nistera originated in Canada. Beneficial ownership in the Nistera shares passed to the respondents by right of survivorship.

3. The Hjordis Inheritance

[15] The testator's mother, Hjordis Saugestad, died on 6 November 2002 leaving 50 percent of her estate nominally to the testator and 50 percent to two grandsons who were sons of the testator's brother. \$356,655 was received by the testator from the estate before his death. One-half of that amount was transferred to Norwegian accounts for the two grandsons in accordance with the terms of Hjordis' will and is not in issue. The remaining half was transferred by the testator to his bank account in North Vancouver. Approximately \$53,000 of that amount was withdrawn and the remaining balance of \$125,365 was nominally an asset of the estate that passed to the respondents as residue under the will.

[16] After the testator's death, the estate received a further \$374,085 from Hjordis' estate which passed to the respondents as residue under the will.

The Decision of the Trial Judge

[17] The trial judge noted that the authority of a court to vary a will to meet the legal and moral obligations of the testator to provide for the proper maintenance and support of the testator's spouse, children, or both, is founded in s. 2 of the Wills Variation Act. Section 2 provides:

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.

The trial judge followed a two-stage approach endorsed by *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, and applied in subsequent cases, to analyse the testator's obligations to the appellant and determine whether "adequate, just and equitable" provision had been made. The first stage

addresses the notional obligations of the testator under a Family Relations Act analysis and whether these obligations have been met. The second stage considers the moral obligations of the testator and determines whether these moral claims against the estate have been, or can be, met.

The Family Relations Entitlement Claims

- [18] In the case at hand, the trial judge correctly employed a hypothetical calculation and division of family assets between the testator and the appellant in the first stage of the analysis, assuming that the parties had separated and that the assets were divided between them immediately before the date of the testator's death pursuant to the Family Relations Act, R.S.B.C. 1996, c. 128 (the "FRA"). The appellant contends, however, that the trial judge erred in her treatment of the Boca Raton Condo, Nistera, and the Hjordis Inheritance.
- [19] The trial judge accepted that the Boca Raton Condo and Nistera would be considered family assets for the purpose of division under Part 5 of the FRA, but she found that the presumptive equal division of those assets under s. 56(2) would be unfair having regard to the factors listed in s. 65(1). She concluded that those assets should be notionally divided 80/20 in favour of the testator. She decided that no part of the Hjordis Inheritance was a family asset, but if she was in error and the portion received by the testator's estate after his death was a family asset, it should also be notionally divided 80/20. The Ostler Street Condo, the Blackcomb Condo and the Electra Condo were family assets that should notionally be divided equally. On this notional division the trial judge concluded that the appellant was left with approximately \$50,000 more in assets on the testator's death than she would have obtained on a division of family assets under the FRA.
- [20] The appellant submits that the trial judge's analysis contains several errors.
1. The Allegations of Bad Faith
- [21] In this Court the appellant contended for the first time that the testator arranged the joint tenancy of the shares in Nistera with his sons as part of a secret scheme to defeat the appellant's claims to the Nistera assets under s. 66(3) of the FRA and the Wills Variation Act. The appellant argues that the testator's declaration of trust in favour of the respondents for the first part of the Hjordis Inheritance also was made with intent to disguise the family asset status of those funds and defeat the appellant's claims.
- [22] The facts found by the trial judge implicitly reject any bad faith on the part of the testator or the respondents. The testator recognized the moral claims of both the appellant and his sons and he arranged his affairs to balance those claims. The trial judge concluded (at para. 135):
- [...] the testator's clear intention was that his children should benefit from his estate. That is why he arranged his affairs as he did, and why he provided for the plaintiff in other ways to ensure she would be adequately looked after for the remainder of her lifetime. He paid for the entirety of the Ostler Court Condo, which she receives by the right of survivorship. He was aware that she

had significant assets, in the form of RRSPs and the couple's investment properties, which would ensure she was provided for. He clearly wanted to provide for his sons, who themselves are only just starting out on their career paths and have no assets or real estate, and have not received the benefit of their mother's estate. In these circumstances, the moral claim of the sons is stronger than the moral claim of the plaintiff, and I have taken that into account in reaching my decision.

[23] The testator recognized the claims of the appellant in the arrangement of his affairs. He explained in his will that the appellant was excluded because he had provided for her by other means "so she does not require a bequest from me". He left her the matrimonial residence and his pension outside the will. Together they had arranged to hold their real estate investments, to which they both contributed financially, as tenants in common. Neither the pleadings nor the facts found by the trial judge can support an inference that the testator dealt with any of his assets in a manner intended to defeat legitimate claims of the appellant. There is no basis for us to question the legitimacy of the testator's motivation in arranging his affairs as he did. I would reject this ground of appeal.

2. The Status of the Hjordis Inheritance

[24] The appellant submits that the trial judge erred in finding the first part of the Hjordis Inheritance to be held in trust by the testator for the respondents and therefore not beneficially an asset of the estate. She also submits that the second part, received after the testator's death, was a family asset subject to equal division under the FRA.

[25] The trial judge has concluded that the first part of the Hjordis Inheritance was impressed with a trust in favour of the respondents in accordance with the intent of the testator's mother. On that finding, the testator had no beneficial interest in that portion of the inheritance and it could not be attributed to him as a family asset.

[26] The appellant contends that the evidence did not support the finding of a trust and that an email from the testator to his solicitor referencing the trust is insufficient in law to create a trust. In my view, this submission misapprehends the nature of the trust. The trust arises from the intention of the testator's mother to benefit the respondents and not the testator; no beneficial interest passed to the testator. His email to his solicitor is simply an acknowledgement of the existing trust: it did not create it. The transfer by the testator of one-half of the first distribution from the Hjordis estate to his two nephews (the grandsons of Hjordis) is circumstantial confirmation of the acknowledgement in the testator's email that he was not the intended beneficiary of that distribution. The trust is properly characterized as a secret trust, in the sense that no reference is made to it explicitly in Hjordis' testamentary documents but it is enforceable outside her will.

[27] The trial judge noted that the testator withdrew approximately \$53,000 of the Hjordis Inheritance funds from his bank account and used a portion to pay living, travel, and entertainment expenses of the testator and the appellant. Approximately \$40,000 was used for the respondents' benefit to pay certain of their school related loans. It is agreed by the parties that the trial judge incorrectly found the appellant and testator's amount to be \$8,000

rather than \$13,000 but the discrepancy in the amount does not affect the judge's finding that the funds were impressed with a trust. On her finding, it was neither an asset of the estate nor a notional family asset.

- [28] The appellant contends that the trust of the first part of the Hjordis Inheritance in favour of the respondents is inconsistent with the decision in *MacDonald v. MacDonald*, 2002 BCSC 1453, 33 R.F.L. (5th) 119, at paras. 80-81, which rejected the attempted characterization of an employment bonus earned before separation, but partly paid after separation, as two separate assets for family asset purposes. In my view, that decision is not on point. The bonus in *MacDonald* was a single asset. Here the trust excluded any beneficial interest of the testator in that portion of the inheritance and it could not be characterized as his family asset. There was no trust involved in the second distribution, received after the testator's death in the amount of \$374,085, and it became part of his beneficial estate. The trial judge correctly recognized that difference. In my view, the trial judge made no reviewable errors in her treatment of the Hjordis Inheritance trust.
- [29] The remaining Hjordis Inheritance issue is whether the portion received after the testator's death was a notional family asset. After an extensive review of family law authorities, the trial judge decided that it was not. The testator had discussed with the appellant using those funds in the future, including for the purchase of a new car, diamond earrings for the plaintiff, and a six-month world cruise. The trial judge concluded that those discussions did not amount to reliance on those funds for their future financial security. Such reliance was required to characterize a future inheritance as a family asset. Here the couple had sufficient other assets for their financial security in their retirement, and they were contemplating drawing on the Hjordis Inheritance for luxury expenditures.
- [30] The appellant submits that the availability of other assets to support her is not relevant to the determination of the status of the Hjordis Inheritance. The test to be applied under the Wills Variation Act is whether the will has made "adequate, just and equitable" provision for the appellant. The family asset determination is a notional one, in atypical circumstances. Usually a division of family assets under the FRA occurs between a separating couple in mid-life where the interests of the parties themselves, plus any dependent children, are the dominant considerations. In the wills variation context, the determination is made at the end of life of one of the parties. The trial judge was alert to this distinction, quoting para. 32 of *Tataryn*. Here, the issues involve intergenerational equity between a surviving spouse, at or near retirement with no children of her own, and adult children from the deceased spouse's first marriage. The trial judge found that other assets were sufficient to provide adequately for the appellant's financial security. As to the respondents, the trial judge observed that they "are only just starting out on their career paths and have no assets or real estate, and have not received the benefit of their mother's estate". The trial judge concluded that their financial circumstances were more deserving of moral claims on the estate than the appellant's wish to continue a generous lifestyle and purchase luxury items. In my view, the trial judge framed the issue correctly and I agree with her conclusion. Simply because

the appellant and the testator had indulged in an expensive lifestyle that encroached on capital assets does not legally obligate the estate to sustain that indulgence where the appellant is otherwise financially secure.

3. The 80/20 Notional Division of the Boca Raton Condo and Nistera

[31] The appellant also submits that the trial judge overlooked or underweighed the appellant's contributions to the testator's assets. She contends that in particular she made substantial contributions to the Boca Raton, Blackcomb and Electra Condos. The trial judge noted that the appellant and the testator had made approximately equal contributions to the Electra Condo and to the Blackcomb Condo and its predecessor in Whistler. The return on these investments was largely in the form of capital appreciation and, as the couple held the properties as tenants in common, the appellant received half of those gains. The Boca Raton Condo was acquired by the testator entirely from funds accumulated during his first marriage. The appellant supervised some renovations to make it suitable for the family's use after it had been previously rented, but the cost of the renovations was paid from the testator's funds and the appellant subsequently benefited from its use with the testator. In my view, there are no grounds for concluding that the trial judge's 80/20 reapportionment of the Boca Raton Condo overlooked or failed to adequately account for any contribution of the appellant to the value of that asset and I would not give effect to the appellant's submission.

[32] The trial judge also notionally apportioned Nistera 80/20 in favour of the testator. She summarized her conclusion at para. 107 of her reasons:

In the case at bar, the marriage was of moderate duration, and the funds held by Nistera Ltd. were brought into the marriage by the Deceased. Some unknown portion of these funds may have been inherited by the Deceased on the death of his first wife, and her contributions to raising the Deceased's children no doubt contributed to his income and earning capacity. Although the plaintiff would have a need to remain economically independent, she would have significant other assets that would enable her to provide for herself, as well as half of the Deceased's pension. As the Deceased was retired, both spouses would have a need for additional income to support their lifestyles, which would have to be produced by their existing assets. The couple was already encroaching on the Deceased's capital in order to sustain their expensive lifestyle. Additionally, the plaintiff did not contribute to the acquisition or preservation of the funds held by Nistera Ltd., and in fact contributed to their expenditure by virtue of the lifestyle she shared with the Deceased. Thus, an equal division would be unfair in these circumstances, and I would have reapportioned the fund 80% in the Deceased's favour.

I am satisfied that the facts on which this apportionment is based are supported by the evidence and there are no grounds to disturb the findings that the appellant did not make any contribution to the Nistera assets and had only benefited from encroachment on those assets with the testator "to sustain their expensive lifestyle" in their retirement. I would not disturb the trial judge's notional apportionment of Nistera.

The Moral Entitlement Claims

[33] The trial judge summarized the relationship between the testator and the appellant in these terms (at para. 123):

[...] this is a second marriage of moderate length; the testator has children from a previous marriage and much of his estate was accumulated during that first marriage; each party has their own assets and is largely financially independent; and the testator made clear his intention that he wanted his estate to benefit his children, and not the plaintiff's heirs. Society's reasonable expectations of what a judicious husband and father would do in such circumstances may vary much more widely than they might in the case of a life-long marriage in which neither party entered the relationship with significant assets, as was the case in *Tataryn*.

The trial judge noted that the appellant was leaving an 11 year marriage with over \$900,000 compared to her assets of approximately \$225,000 when she entered it. The judge acknowledged that the appellant's real estate acumen had contributed to the value of the real estate investments but she concluded that the testator's capital contributions and payment of all the couple's living expenses had left the appellant with financial gains that she could never have achieved had she continued working as a realtor and paying her own expenses. The gains offset any disadvantage to the appellant in giving up her career. Both spouses retired and the trial judge concluded that they enjoyed each other's company in an expensive lifestyle paid for by the testator.

[34] The trial judge concluded that the respondents had a strong competing moral entitlement to the testator's estate based in part on the contributions of the testator's first wife to his estate. The trial judge summarized those contributions as childcare and household management as well as benefiting him with her estate. She presumed that the first wife would have wanted her efforts to benefit her sons rather than the testator's new wife.

[35] The appellant contends that there was no evidence to support the trial judge's finding that the testator's first wife made a contribution to his assets, and in particular to the funds held in *Nistera*. The trial judge found that "some unknown portion" of the *Nistera* funds may have been inherited by the testator from his first wife and her contributions in raising the children, as their primary care-giver, "no doubt contributed to [the testator's] income and earning capacity". The testator was married to his first wife for 19 years and the respondents were 17 and 15 when their mother died. The evidence clearly established that the testator was the beneficiary of his first wife's estate and its size was unknown. According to the evidence of *Nicholas Saugestad*, his mother had her own import-export business in Japan. She guaranteed the mortgages on the *Boca Raton Condo*. I am satisfied that there was evidence to support the facts found by the trial judge as to the first wife's contribution and there are no grounds to disturb that finding in this Court.

[36] The trial judge also concluded that the testator's support for his sons during his lifetime created a legitimate expectation that they would receive *Nistera* and the bulk of the estate. The testator had paid for the respondents' education expenses and a comfortable upbringing in a large home in Japan. The testator paid for their travel expenses and they had

use of the condos in Whistler and Boca Raton. The testator's relationship with his sons, and for that matter with the appellant, was sometimes difficult but he recognized his moral responsibilities to both the respondents and the appellant in the disposition of his assets. He arranged his affairs to fulfill his intention to leave the Ostler Court Condo directly to the appellant outside the will.

- [37] The testator has provided the appellant with sufficient assets that, together with assets she brought into the marriage, provide her with a comfortable, financially secure lifestyle. He left her the Ostler Court Condo and his RRSPs and pension. She retained half-interests in the Blackcomb Condo and the Electra Condo that were both appreciating in value. She has no immediate family with potential moral claims on her estate and expectations of an inheritance.
- [38] The assets allocated to the respondents are substantial but hardly excessive considering the cost of residential accommodation in Vancouver and their reasonable expectation that their father use his estate to enhance the modest lifestyle available from their employment income and provide them with some financial security. In part, their moral claims arise out of the unquantified benefits received by the testator from his first wife during their marriage and his receipt of her estate. I agree with the trial judge's presumption that she could reasonably expect those benefits to eventually devolve to her sons.
- [39] The trial judge recognized that the testamentary autonomy of the testator was a factor to be taken into account when assessing the appellant's claims. Madam Justice McLachlin observed in *Tataryn*, at para. 33, that in many cases a testator has available a range of options for dividing assets that is adequate, just and equitable. An option chosen by a testator within the range should not be disturbed. This is not a case where adult children are advancing claims against the provisions of a will on grounds that they have moral claims which the testator has failed to meet. The respondents are defending the testator's division of his assets. The issue is not between the moral claims of the appellant and the respondents, each standing independently of the will. It is whether the testator's arrangement of his affairs is within the range of testamentary autonomy entitled to deference. The moral claims of the respondents reinforce deference to his arrangements. The trial judge rightly recognized that testamentary autonomy and the respondents' moral claims coincided to support the terms of the will.
- [40] The testator arranged his affairs in a manner that provided reasonable financial security for the appellant and otherwise chose to benefit his sons. The appellant's case is essentially that she needs a larger share of the assets to be able to continue the generous lifestyle that she enjoyed with the testator in retirement, without encroaching on her capital. In my view, the trial judge was right not to override the testator and assign that objective a moral priority. The respondents' inheritance will not support an expensive lifestyle but with prudent investment it will supplement their modest employment income and allow them the means to maintain a comfortable standard of living consistent with the support provided by the testator before his death. Their moral claims rank ahead of the appellant's in the

circumstances.

The Trial Judge's Variation of the Will

- [41] The trial judge concluded that the absence of any provision for the appellant in the will caused the testator to fail in his obligations to her. She ordered that the will be varied to provide the appellant with a bequest equal to the net amount she had taken from the estate after the testator's death and a life interest in the testator's one-half interest in the Electra Condo; the estate was ordered to pay out one-half of the Electra mortgage. The trial judge considered ordering the alternative of an absolute interest in the Electra Condo, rather than a life interest, but after reviewing several cases, including *Tataryn*, she concluded that an absolute interest was not required because the appellant's financial independence was assured by her other assets including the matrimonial home, and the value of the life estate was sufficient to meet the testator's obligations to her. There is no cross appeal from the trial judge's variation.
- [42] *Tataryn* directs (at para. 11) that, apart from oral testimony, an appellate court is in the same position as the trial judge in applying the Wills Variation Act and deference to the findings of the trial judge is not required. The Electra Condo is an investment rather than a property personally used by the appellant or the respondents. It is managed by the appellant. It may be sold at any time depending on the inclination of the vendors in the light of market conditions. Allocating sale proceeds between the life interest and the reversion adds an additional complication to a sale. A life estate is usually more appropriate for a matrimonial home or other asset personally used by the grantee. Here the appellant already has a one-half interest in the Electra Condo. In my view, it is preferable to vary the will to give her the testator's one-half interest absolutely instead of a life estate and I would allow the appeal to that extent. It follows that the appellant will assume the entirety of the mortgage remaining on the Electra Condo and the estate will be relieved of any obligations with respect to that mortgage.

Conclusion

- [43] In the result I agree with the limited variation in the will made by the trial judge, except in respect of the Electra Condo. I would amend the trial judge's order to give the appellant the testator's one-half interest outright, subject to her assumption of the entire remaining mortgage. In all other respects I would affirm the trial judge's order.
- [44] As the appellant has had limited success on this appeal, she should have the costs of the appeal on a party and party basis at scale 1.

"The Honourable Mr. Justice Mackenzie"

I AGREE:

"The Honourable Mr. Justice Hall"

I AGREE:

"The Honourable Mr. Justice Chiasson"

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