

CANADA / JUDGMENT

Scurek v. Scurek

2020 BCSC 450

COURT

Supreme Court of British Columbia

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2020 BCSC 450 Scurek v. Scurek

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Scurek v. Scurek,

2020 BCSC 450

Date: 20200327

Docket: S175062

Registry: Vancouver

Between:

Lydia Adrienne Scurek

Plaintiff

And

Peter Alexander Josef Scurek as Executor of the Will of

Joseph Scurek aka Józef Scurek, Deceased, and in his personal capacity,

James Joseph Donald and John William Donald

Defendants

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

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The Defendant, John William Donald, appearing in person:

J.W. Donald

The Defendant, James Joseph Donald, appearing in person:

J.J. Donald

Place and Dates of Trial:

New Westminster, B.C.

February 3, 5, 6-7, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 27, 2020

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I. Introduction

- [1] This case raises the question of whether a testator can discharge his moral obligation to his adult daughter by benefiting her sons at her expense. I decide that he cannot, in the circumstances of this case, at least.
- [2] The plaintiff, Lydia Scurek ("Lydia") seeks to vary the last will of her father, Joseph Scurek ("Joseph") made March 8, 2013 (the "Will").
- [3] Joseph died February 9, 2017 at Surrey, BC. He was 85 years of age when he died. He was predeceased by his wife, Stanislava Scurek ("Slavi") who died March 5, 2013. She was 76 years of age when she died. Slavi's estate passed to Joseph up on her death. The Will was made three days after Slavi died.
- [4] Joseph and Slavi had two children: Peter Scurek ("Peter") born in 1959, (currently aged 60) and the plaintiff, Lydia, born in 1962 (currently aged 58).
- [5] Lydia has two children from her former marriage to John Donald, Senior ("John Sr."): John W. Donald ("John Jr."), born in 1981, currently age 39; and James J. Donald ("James"), born in 1984, currently age 35.
- [6] The plaintiff's brother, Peter, and her sons, John Jr. and James, are the defendants.
- [7] As of Joseph's date of death, February 9, 2017, the estate value was \$1,926,833.08. The current value of the estate is \$1,626,125.36.
- [8] The Will provides for division of the residue of the estate as follows: 50% to Peter; and 50% divided into three equal shares, one for each of Lydia, John Jr., and James. Therefore, Lydia and her sons would receive 1/6, each.
- [9] Lydia has no significant assets, is disabled, and unemployable.

[10] Peter is also unable to work due to disability.

II. Positions of the Parties

[11] Lydia argues that she is 58 years of age, disabled, and essentially destitute. She has no assets and minimal income. She has a grade nine education, and no marketable skills. Her work history consists primarily of minimum-wage occupations that did no more than meet her day-to-day expenses. There is no prospect her situation will improve except through what she will receive from Joseph's estate.

[12] Lydia's position is that Peter is financially comfortable and secure. She notes that he owns real estate and investments with a value of \$3,312,666, not including money and property that Peter received from Joseph passing outside of the estate worth \$959,188.

[13] She proposes that Peter's share of the estate should be reduced from one-half to 1/6 and that her share of the estate should be increased to one-half. She proposes that the shares of her sons John Jr. and James remain 1/6 each, in accordance with the Will. In effect, then, the proportions of the estate that she and Peter would receive are reversed from that set out in the Will.

[14] As noted, the value of the estate as at January 16, 2020 is \$1,626,125.36. A one-sixth share is therefore valued at \$271,020.

[15] Lydia contends that taking into account the property passing to Peter outside the estate, after the variation she proposes, Peter would still receive a much larger benefit than she does:

Peter 1/6 (\$271,020 + \$959,188) \$1,230,208

Lydia 3/6 \$813,060

John Jr 1/6 \$271,020

James 1/6 \$271,020

[16] Peter's position is that the Will should not be varied. He argues that the Will reflects a notional equal (50% each) distribution to Joseph's son and daughter, but reflects a concern that if 50% of the estate were given to Lydia, it would be wasted due to her inability to manage money, given her past history, thus leaving Joseph's grandsons with no benefit.

[17] He says, in the alternative, if there is to be a variation of the Will, any increase in Lydia's share should be at the expense of the shares of John Jr. and James.

[18] The position of John Jr. and James is that their shares of the estate should not be disturbed.

III. Background

- [19] Joseph and Slavi immigrated to Canada in 1960 or 1961. They were Slovenian. Peter was born in Austria in 1959. Initially the family resided in Manitoba, where Lydia was born in 1962. The family moved to Vancouver in approximately 1964.
- [20] Joseph was a glazier. When Peter and Lydia were children, Slavi worked at various jobs, such as at a delicatessen on Davie Street; at the meat department of a Safeway store, at Jones Tent and Awning; as a receptionist at Hagen's Travel; and for a Slovenian language radio program.
- [21] In approximately 1978, Joseph and Slavi began a glass business, Skyline Glass Limited ("Skyline Glass"). Skyline Glass was incorporated November 7, 1978. The directors and officers were Joseph and Slavi. Slavi did the bookkeeping and administration. Peter worked in the business with Joseph for many years.
- [22] Skyline Glass purchased a warehouse in Richmond in 1980, from which it operated from that time. It sold the warehouse December 8, 2006, which probably relates to when Skyline Glass ceased doing business. Its final corporate annual report was filed November 7, 2009.
- [23] By all accounts, Slavi was the decision-maker in the family. She ran the household, and made the financial decisions, including investment decisions. Peter emphasized that Slavi was a very organized and intelligent person.
- [24] Lydia testified that as a child and teenager she had a difficult relationship with her mother. Slavi was a strict disciplinarian towards her, and punished her harshly if she failed to obey her. She gave several examples, which I need not relate.
- [25] Lydia felt that Slavi treated her unfairly as compared to Peter, who was four years older than she was. She testified that her mother treated Peter "a lot nicer". Peter was able to "run wild" and to carry on "being a boy" and having fun. Lydia felt that she had to do most of the household chores, such as laundry, household cleaning and yard work, while Peter refused to do the chores he was told to do. Peter disagrees, and maintains that he also carried out his share of chores. He does not deny having been allowed ample personal freedom.
- [26] Lydia testified that she "ran away" from home at age 16, after an incident with her mother. Lydia wanted to go to a party, and stay out late. Slavi demanded that she return home by 10 p.m. Lydia did not agree and said she was going to the party anyway. Slavi said, "Don't come back." When Lydia returned her belongings were strewn outside on the yard. Lydia went to live with friends. She dropped out of school and never returned to school. She was in Grade ten. She never graduated from high school.
- [27] After about a year, Lydia and Slavi reconciled. As Lydia put it, Slavi found her and asked her to return home. Lydia returned home, albeit for a relatively brief period of time. After about a year, she met John Sr., and they decided to begin living together. They moved to a rented apartment in Burnaby.

- [28] When Lydia became pregnant, Slavi insisted that Lydia and John Sr. get married, as Slavi did not want the child to be born out of wedlock. Lydia was married in January 1980, when she was just shy of her 19th birthday. John Jr. was born two days later. James was born three years later, in 1984.
- [29] Lydia testified that she had a very good relationship with her father when she was young, and later. He was not a disciplinarian.
- [30] Lydia and Peter had a poor relationship when they were young. It has remained poor.
- [31] Peter completed high school, but with low grades. Before completing high school, he worked at a McDonald's restaurant. As young man, he worked at a variety of other jobs such as at a bank, in construction, custom cabinetry, and gardening, before he began working for Skyline Glass.
- [32] Peter was injured in a succession of motor vehicle accidents as a young man. The first accident occurred on Canada Way, in Burnaby, when he was 16 years of age. Later he was involved in a head-on collision on Highway 99 while returning from Whistler. He was also involved in a motorcycle accident which resulted in a serious brain injury. After being hospitalized for approximately two weeks, he spent approximately six months at the GF Strong Rehabilitation Centre.
- [33] The accidents, particularly the motorcycle accident, resulted in permanent cognitive difficulties. His description of these accidents and of his injuries was difficult to follow. However, the details are not important.
- [34] More recently Peter has been injured in other motor vehicle accidents, occurring in July 2012 and February 2014.
- [35] After the motorcycle accident, Peter began working with Joseph and Slavi at Skyline Glass. He worked with them and Skyline Glass for approximately 28 years, until the business shut down. Following that, he worked as a custodian for the New Westminster School District for several years, until his most recent motor vehicle accidents. He no longer works. He receives a Canada Pension Plan ("CPP") disability pension.
- [36] At trial, his cognitive impairment was quite apparent. He has a great deal of difficulty with memory and concentration. His evidence was often incoherent. I doubt that he is capable of fabrication, but it is clear that, if not corroborated, his evidence must be treated with a great deal of caution.
- [37] Peter has no children. He met Tania Babic ("Tania") in 2000, and they were married in 2009. Tania works as a practical nurse at a residential care facility in Richmond.
- [38] Slavi favoured owning and investing in real estate.

- [39] Joseph and Slavi bought an old house on Commercial Drive in Vancouver, intended as some kind of family or joint investment. According to Peter, he, his parents, and Lydia and John Sr. all put in \$2,000 towards the purchase. No documents verify this. Lydia agrees that she and John Sr. resided there for a period of time. In any event, that investment did not work out, and the property was sold. In January 1984, Joseph and Slavi purchased a residence at 18262 15th Avenue, Burnaby. This too was intended as a kind of family joint venture, although the title was held by Joseph and Slavi. Peter and Lydia agree that this purchase was intended to benefit them, somehow. According to Lydia, she and Peter did not pay anything towards this purchase. There are no records.
- [40] Lydia and her family moved into the 15th Avenue residence. James was born a few weeks after the purchase.
- [41] Lydia and Peter agree that Lydia and John Sr. were expected to pay monthly rent to Slavi, and that Slavi told them to leave when they were unable to pay the rent. According to Lydia, John Sr. had an indifferent attachment to working, and earning a living. After residing in the 15th Avenue home for less than a year, Lydia and her family moved to rented accommodation in Burnaby, where they stayed for several years.
- [42] On January 26, 1985, Joseph and Slavi transferred the 15th Avenue property to Peter. The stated consideration on the transfer document is \$1. The market value was declared at \$100,000. By then, Peter was working for Skyline Glass. On his examination for discovery Peter testified that Slavi gave him a gift of \$10,000 to purchase the property. Peter says he paid Slavi, and that Slavi paid Lydia and John Sr. for their interest in the property. Lydia denies that Peter paid her anything for her interest in the property. On the evidence as a whole, I find that Peter received the property as a gift from Joseph and Slavi. Peter began residing there. After the transfer he paid the expenses for the property, including paying the mortgage of \$63,000.
- [43] Peter and Tania now own the property jointly. Peter transferred a one-half interest in the property to Tania in June, 2014, as a gift.
- [44] In 1991, Joseph and Slavi purchased a property on 14A Avenue in south Surrey. It is not clear on the evidence if they ever resided there. Peter described it as a heritage house, that needed work. It appears to have been held as an investment for many years. After Slavi's death the 14A Avenue property was transferred to Joseph by right of survivorship on September 9, 2014. It was sold by John Jr. and James as Co-Committees of Joseph's estate on September 12, 2014, for \$745,000.
- [45] In 1992, Joseph and Slavi purchased a home on 20th Avenue in south Surrey, where they resided together for many years. The 20th Avenue residence remains an estate asset. Its B.C. Assessment value in 2017 was \$1,137,000. An appraisal as at July 29, 2019 gives an estimate of value of \$1,025,000.

- [46] Lydia purchased a residential property in Abbotsford in the early 1990s. She paid \$79,000 for the property. Slavi helped her with the down payment. She lent Lydia \$10,000 on a promissory note. Lydia and her family remained there for about four years. She made a good profit on the property, which she sold for \$300,000. She repaid the promissory note to her mother. Lydia and her family then moved to Armstrong. Lydia purchased a farm property on Hales Road, Armstrong, on September 28, 1992, for \$164,000, using the proceeds of sale of the Abbotsford property, and borrowing \$47,500 on a mortgage.
- [47] Lydia and John Sr. separated around the time that Lydia bought the Armstrong property. A few years later, Lydia and John Sr. were divorced. The Hales Road property was sold by court order, in 1997, for \$215,000. Lydia was required to pay John Sr. \$65,000.
- [48] At about the same time, (1997) John Jr. and James went to live with their father, in the Lower Mainland.
- [49] Lydia worked steadily at various jobs, from at least the time of her separation from John Sr. When she first moved to Armstrong in 1992, she operated the farm. She also worked in various jobs such as sawmill worker, restaurant and pub server, and as a housekeeper for a hotel. These were minimum wage jobs.
- [50] In May 1997, Lydia purchased another residence, at 2500 Colony Road, Armstrong, for \$110,000. She moved to the Lower Mainland in approximately 2000. She rented the Colony Road property to tenants. She had problems with the tenants. She sold the property in 2003 for \$106,000; thus, at a small loss. She received net proceeds of \$30,000 on the sale. She has not owned real estate since then. The \$30,000 was used for living expenses.
- [51] Joseph and Slavi helped Lydia financially after the separation from John Sr. In 1995 they took an assignment of the mortgage on the Hales Road property from the original mortgagor, and they lent Lydia money secured by a mortgage on the Colony Road property. They provided Lydia with favourable terms for payment. Their secured loans were repaid when the properties were sold.
- [52] In approximately 2000 Lydia began a relationship with Rick Wiltse, which lasted until about 2008 or 2009. Lydia states that Mr. Wiltse drank too much, there was too much partying, and she had to leave. Mr. Wiltse died in approximately 2015, several years after the relationship ended.
- [53] At some point in time, Slavi inherited some money from her parents. She gave \$60,000 to Peter. Slavi told Lydia that she had given the \$60,000 to Peter, and that she would give \$20,000 to each of Lydia and her sons. Slavi told Lydia that she would hold the \$20,000 for her until Lydia was 60 years of age.

- [54] John Jr. and James received \$20,000 each in approximately 2007. Slavi treated them differently, however. John received an outright gift of \$20,000. In the case of James, Slavi provided \$20,000 as matching funds, to savings made by James and his wife, to buy a property. James was not told that the money came from an inheritance.
- [55] Slavi's differing treatment of Peter, Lydia, John Jr. and James provides an indication of her careful approach to financial matters generally, and in particular in relation to her family members.
- [56] In 2007 Slavi paid two of Lydia's bills totalling \$1,300, at Lydia's request. A note written by Slavi at the time states that \$900 was to pay off Lydia's Visa account and \$400 was for Lydia's motorcycle payment. The note indicates that the \$1,300 would be transferred out of Lydia's term deposits, stated to be in the total amount of about \$27,000 at the time. There is no evidence about the term deposits apart from the note. Whether they could be related to the inheritance fund is not known. The source of the funds in the term deposits is unknown. Lydia was unaware of the term deposits. She never received the capital of the inheritance that Slavi told her she was holding for her.
- [57] After Lydia returned to the Lower Mainland, she worked as a road flagger, full time, 40 hours per week, for ten years, on and off. As a flagger she earned \$16 per hour. For two years she worked for Fraser Wharves, detailing and moving motor vehicles that were being imported and shipped by rail. She was paid \$26 per hour. It was full time work. She testified that this was the best job she ever had. Unfortunately, she was laid off. After that she took odd jobs, such as cleaning offices, part time, for minimum wage and working at a gas bar.
- [58] After Lydia's relationship with Mr. Wiltse ended, she formed a relationship with another man, which lasted about a year.
- [59] Lydia was having her own problems with alcohol abuse. For a few months in 2011 or 2012 she lived with her parents in south Surrey. She was working, but drinking excessively. Slavi had already been ill for some time. Slavi was unable to tolerate Lydia's behaviour and demanded that she leave. When Lydia returned home from her work at a gas bar, she found that the locks had been changed. Lydia lived in her car for a time, and then went into a residential alcohol rehabilitation facility for a month.
- [60] Lydia worked until February 2015. She was involved in an accident and broke her leg. She was laid off from work. She also has a back injury. She was approved for a CPP disability pension. Currently, she receives a CPP disability pension of \$706 per month, and GST rebates. She relies on a female friend for financial support. She estimates that this friend has given her more than \$10,000 over the years.
- [61] Joseph became ill and was hospitalized in approximately September of 2013. John Jr. and James were appointed co-committees of his person and estate on April 14, 2014. After being discharged from the hospital, Joseph resided in long term care homes until he died February 9, 2017.

- [62] Lydia began residing in the 20th Avenue family residence with the permission of the committees, her sons, in December 2014. She paid rent of \$700 per month until March 2017, but has not paid rent since then.
- [63] Joseph, Slavi and Peter invested together as partners in various properties. The investments were completely managed by Slavi. Peter had no responsibility for this. There are no complete records of the investments, and Peter's description of the investments was scattered and disjointed. There are some records, however. Peter testified that at one point they owned a warehouse in Surrey. That was sold, and the proceeds were rolled over to the purchase of a property on Oxenham Avenue in White Rock. The records show this was purchased for \$275,000, in 2002. They owned the property as joint tenants. Its appraised value was \$1,100,000 as of the date of Joseph's death. On Joseph's death, Peter became the sole owner of this property, via survivorship as a joint tenant.
- [64] Peter had a personal real estate investment as well. In 1993 Peter purchased a property at 828 Stevens Street, White Rock, for \$184,000. He sold the property for \$810,000 in January 2019. Slavi managed this investment on his behalf.
- [65] As designated beneficiary, Peter received the proceeds of a CI Investment account that Joseph owned and which had a balance of \$225,885 as of the date of Joseph's death. Therefore, this account passed to Peter outside the estate.
- [66] As noted, the value of Joseph's estate at the date of his death was \$1,926,833.08. The estate assets were as follows:

Description

Amount

12952 - 20th Avenue, Surrey ("20th Avenue Property") - Joseph and Slavi's residence

\$1,137,000.00

HP4 - 1400 Alta Lake Road, Whistler ("Whistler Property") - rental property

\$224,300.00

Coast Capital Accounts

\$413,607.16

Bank of Montreal Accounts

\$100,743.56

Worldsource Investment account

\$15,514.73

Miscellaneous (CPP OAS)

\$4,005.45

Estate jewelry and personal items

\$31,982.20

Total

\$1,927,153.10

[67] There is a minor discrepancy of \$320.02 between the total of the above-noted items and the value of the estate at death of \$1,926,833.08.

IV. Legal Principles

[68] Section 60 of Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA] provides as follows:

Maintenance from estate

60 Despite any law or enactment to the contrary, if a will-maker dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the will-maker's spouse or children, the court may, in a proceeding 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 will-maker's estate for the spouse or children.

[69] The leading authority in British Columbia on wills variation is the decision of the Supreme Court of Canada in *Tataryn v. Tataryn Estate*, [1994] 2. S.C.R. 807 [Tataryn].

[70] In *Tataryn*, the court was dealing with the predecessor legislation to s. 60 of WESA, the Wills Variation Act, R.S.B.C. 1979, c. 435, s. 2(1).

[71] Some relevant portions of *Tataryn* are as follows:

12 The language of the Wills Variation Act is very broad. The court must determine whether the testator has made "adequate provision" for his spouse and children. If it concludes he or she has not, the court "may, in its discretion, ... order ... the provision that it thinks adequate, just and equitable in the circumstances".

13 I do not interpret the section as imposing two different tests. The court must ask itself whether the will makes adequate provision and if not, order what is adequate, just and equitable. These are two sides of the same coin.

15 Whatever the answers to the specific questions, this much seems clear. The language of the Act confers a broad discretion on the court. The generosity of the language suggests that the legislature was attempting to craft a formula which would permit the courts to make orders which are just in the specific circumstances and in light of contemporary standards. This, combined with the rule that a statute is always speaking (*Interpretation Act*, R.S.B.C. 1979, c. 206, s. 7), means that the Act must be read in light of modern values and expectations. What was thought to be adequate, just and equitable in the 1920s may be quite different from what is

considered adequate, just and equitable in the 1990s. This narrows the inquiry. Courts are not necessarily bound by the views and awards made in earlier times. The search is for contemporary justice.

16 The two interests protected by the Act are apparent. The main aim of the Act is adequate, just and equitable provision for the spouses and children of testators.

17 The other interest protected by the Act is testamentary autonomy. The Act did not remove the right of the legal owner of property to dispose of it upon death. Rather, it limited that right.

24 First, I cannot agree that the wording of the Act suggests a strict needs-based test. As noted above, the wording is broad and capable of embracing changing conceptions of what is "adequate, just and equitable". The Act does not mention need. Moreover, if need were the touchstone, the failure to exclude independent adult children from its ambit presents difficulty. Nor, as will be discussed in greater detail below, do the words of the statute suggest a test devoid of judicial discretion, as witnessed by the express references to "discretion" and what is "adequate, just and equitable in the circumstances" (emphasis added).

25 Nor can I agree that the history of the Act suggests that the only reason for its passage was to prevent persons becoming a charge on the state. While the Act certainly was intended to serve this minimum function, there is nothing to suggest that the women's groups who lobbied for it or the legislators who adopted it intended that it be confined to cases of need.

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

30. The legal obligation of a testator may also extend to dependent children. And in some cases, the principles of unjust enrichment may indicate a legal duty toward a grown, independent child by reason of the child's contribution to the estate. The legal obligations which society imposes on a testator during his lifetime are an important indication of the content of the legal obligation to provide "adequate, just and equitable" maintenance and support which is enforced after death.

31 For further guidance in determining what is "adequate, just and equitable", the court should next turn to the testator's moral duties toward spouse and children. [] Similarly, most people would agree that an adult dependent child is entitled to such consideration as the size of the estate and the testator's other obligations may allow. While the moral claim of independent adult children may be more tenuous, a large body of case law exists suggesting that, if the size of the

estate permits and in the absence of circumstances which negate the existence of such an obligation, some provision for such children should be made [citations omitted.]

32 How are conflicting claims to be balanced against each other? Where the estate permits, all should be met. Where priorities must be considered, it seems to me that claims which would have been recognized during the testator's life -- i.e., claims based upon not only moral obligation but legal obligations -- should generally take precedence over moral claims. As between moral claims, some may be stronger than others. It falls to the court to weigh the strength of each claim and assign to each its proper priority. In doing this, one should take into account the important changes consequent upon the death of the testator. There is no longer any need to provide for the deceased and reasonable expectations following upon death may not be the same as in the event of a separation during lifetime. A will may provide a framework for the protection of the beneficiaries and future generations and the carrying out of legitimate social purposes. Any moral duty should be assessed in the light of the deceased's legitimate concerns which, where the assets of the estate permit, may go beyond providing for the surviving spouse and children.

33 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. In the absence of other evidence a will should be seen as reflecting the means chosen by the testator to meet his legitimate concerns and provide for an ordered administration and distribution of his estate in the best interests of the persons and institutions closest to him. It is the exercise by the testator of his freedom to dispose of his property and is to be interfered with not lightly but only in so far as the statute requires.

[72] In *Kelly v. Baker* (1996), 82 B.C.A.C. 150 [Kelly], Finch J.A. (as he then was) summed up the duties of the trial judge under the statute at para. 58:

[58] In deciding a claim under s.2(1) of the Act, the task of the court is to decide whether, at the date of the testator's death, her will was consistent with the discharge by a good parent of her duties to her family [citations omitted]. The law does not require that the reason expressed by the testator in her will, or elsewhere, for disinheriting the appellant be justifiable. It is sufficient if there were valid and rational reasons at the time of her death - valid in the sense of being based on fact; rational in the sense that there is a logical connection between the reasons and the act of disinheritance.

[73] Paragraph 58 of *Kelly* was more recently cited with approval by the Court of Appeal in *Doucette v. McInnes*, 2009 BCCA 393, at para. 70.

[74] In the first stage, the court should consider the circumstances existing and reasonably foreseeable as of the date of death of the testator, that being the last chance that the testator had to make a proper will. If the court decides the testator has not made adequate provision for the proper maintenance and support of a spouse or child, then, in the second stage, the court determines the provision that the court thinks adequate, just and equitable in the circumstances. In the second stage the court may take into account not only the circumstances existing and reasonably foreseeable at the date of the testator's death, but

also any substantial change in circumstances of a person who may be entitled to make a claim or indeed a beneficiary that may have occurred between the date of death and the trial: *Eckford v. Van Der Woude*, 2014 BCCA 261, at paras. 50-51.

[75] A useful list of considerations that may relate to the existence and strength of a testator's moral duty to independent children is set out in the decision of Ballance J. in *Dunsdon v. Dunsdon*, 2012 BCSC 1274 [Dunsdon], paras. 134 to 135:

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

- relationship between the testator and claimant, including abandonment, neglect and estrangement by one or the other;
- size of the estate;
- contributions by the claimant;
- reasonably held expectations of the claimant;
- standard of living of the testator and claimant;
- gifts and benefits made by the testator outside the will;
- testator's reasons for disinheriting;
- financial need and other personal circumstances, including disability, of the claimant;
- misconduct or poor character of the claimant;
- competing claimants and other beneficiaries:

[citations omitted.]

[135] These considerations tend to overlap and are not approached in isolation as independent, air-tight categories.

[76] Ballance J. added the following:

[136] The law imposes no requirement that children be treated equally by a testator: *Re Lukie et al. and Helgason et al.*, 72 D.L.R. (3d) 395, [1976] B.C.J. No. 1393 (C.A.); *Price v. Lypchuk Estate* (1987), 37 D.L.R. (4th) 6, [1987] 4 W.W.R. 128 (B.C.C.A.). Therefore, the mere fact that an independent child has not been given the same provision under a will as the testator's other children will not necessarily establish a moral claim. In a variety of situations, the courts have accepted an unequal distribution of an estate as being fair and adequate. Tataryn itself is an example of an unequal distribution even after the court varied the terms of the will.

V. Circumstances of the Parties

A. Lydia

- [77] Lydia receives CPP disability income of about \$8,600 per year, and non-taxable GST rebates of \$1,844 per year. She has no assets apart from an older Harley-Davidson motorcycle that needs repair.
- [78] When the 20th Avenue house is sold, following the trial of this action, Lydia will have to find somewhere to live.
- [79] Lydia's circumstances are not materially different now than they were when Joseph died.
- [80] When Joseph died on February 9, 2017 it was foreseeable that Lydia's circumstances would probably not change in the future.

B. Peter

- [81] Since Joseph's death, Peter's circumstances have improved in that he received the property passing to him outside the estate. In other respects his circumstances have not materially changed.
- [82] Peter and Tania reside in a condominium in Richmond. Peter purchased this condominium in 2005. Peter transferred a one-half interest in the property to Tania 2014. It has an assessed value of \$435,000.
- [83] Peter and Tania own the 15th Avenue, Burnaby, property that he acquired in 1985 from his parents. The BC assessment value of this property is \$1,311,000.
- [84] Peter has financial investments of over \$1,200,000. This includes the net sale proceeds from the Stevens Street, White Rock, property that he sold for \$810,000 in January 2019. He also received ICBC settlement proceeds from his two more recent motor vehicle accidents of \$215,000. He has \$300,000 in other savings.
- [85] Including the value of the property that passed to Peter outside the estate, he has assets of over \$4 million.
- [86] Like Lydia, Peter receives CPP disability benefits, and is not employable. He is not in good health. In addition to his cognitive problems, he has a back injury, diabetes, and other health problems. He needs help with his affairs and his physical person. Fortunately, as Peter recognizes, Tania looks after him.
- [87] Financially, Peter is secure. He receives rental income from the 15th Avenue property. His annual income is approximately \$65,000. Tania earns, net of deductions, \$3,500 per month, as a licensed practical nurse.

C. John Jr. and James

- [88] John Jr. is married, but separated, and has a new common-law spouse. He is 39 years of age. He is employed as a maintenance engineer with Langley Memorial Hospital. He is studying towards a Bachelor of Science degree.
- [89] James is married and has two children, both boys, aged three and one. James is employed with the city of Burnaby as a foreman in sewer maintenance and construction. He did not graduate from high school. He has worked since the age of 17. He has taken seminars and courses. His goal is to become a building inspector for the City of Burnaby.
- [90] There is no evidence about the financial circumstances of John and James. However I think it can be safely inferred that they are neither affluent nor impoverished, and I have no doubt that money would be welcome and could be put to good use by them.

VI. Discussion and Analysis

A. Discussion

- [91] Some parts of Peter's evidence appear to be reliable, such as his description of his parents, and of his relationship with them. Due to his cognitive difficulties, Peter's testimony regarding specifics is highly unreliable, as he was quick to concede.
- [92] Lydia was a credible witness generally, in that she was doing her best to tell the truth. However her recall of specific details is not very reliable.
- [93] However, Peter and Lydia's credibility and reliability are not central to this case.
- [94] It is convenient to organize the discussion using the list of considerations noted by Ballance J. in Dunsdon. I recognize that, as Ballance J. noted, the considerations tend to overlap, and are not approached in isolation.
- [95] I observe also that the Dunsdon considerations specifically reference the testator's moral duty to independent children. Although Lydia had been an independent adult for many years previously, it is questionable whether she could properly be considered "independent" based upon her circumstances at the time the Will was made, and when Joseph died, and even more so, presently. Nevertheless, I will focus on the law and principles that apply to independent adult children. Ultimately, every case is different and must be decided on its own facts, in any event.
1. Relationship between the Testator and Claimant, including abandonment, neglect and estrangement by one or the other
- [96] In general, Lydia maintained a positive relationship with both of her parents throughout their lives.

- [97] Clearly, Lydia's relationship with her mother was sometimes difficult. Her relationship with her father did not have the same problems. It appears Slavi laid down rules, expected them to be followed, and believed that there should be consequences when the rules were not followed. Lydia was not always capable of following Slavi's rules, or did not want to do so.
- [98] This was vividly demonstrated when Slavi ejected Lydia from the home at 16, after Lydia defied Slavi by staying out late at a party. Also, later, in 1985 when Slavi required Lydia, her husband and two young children to leave the 15th Avenue property when they failed to pay the rent. Lydia was removed from the family joint venture relating to that property. Peter acquired the property, instead. Peter participated in subsequent joint investments, but Lydia did not.
- [99] However, except perhaps for relatively brief periods of time, Lydia was never estranged from her parents. The exceptions included when Lydia ran away at age 16, and when she was in alcohol rehabilitation.
- [100] For a number of years Lydia was living in Armstrong, somewhat distant from the Lower Mainland, and she was working. Her sons had a close relationship with their grandparents throughout. While they still lived with Lydia in Armstrong in the 1990's, she would send them to the Lower Mainland on a bus to be with the grandparents for visits. Lydia continued to regularly attend family functions and celebrations, but she was not always able to attend.
- [101] The financial dealings between Lydia and her parents provide some insight into their relationship.
- [102] When Lydia asked for their help, Joseph and Slavi provided financial support to Lydia in relation to the two properties Lydia owned in Armstrong. Joseph and Slavi remained concerned about her welfare and were prepared to assist her, but with security for their interest.
- [103] Slavi did not approve of Mr. Wiltse, who, as Lydia described him, was a long-haired, tattooed, motorcycle biker type of person. On the other hand, Joseph liked Mr. Wiltse. Lydia's relationship with her parents continued during this time.
- [104] While she was with Mr. Wiltse, Lydia continued to work steadily but could do no better than simply paying the bills and making a living. There is no evidence that Lydia and Mr. Wiltse built up any assets.
- [105] The \$1,300 Slavi paid Lydia for her bills in 2007 show that Slavi continued to be prepared to assist Lydia, but within limits, and cautiously. This was consistent with the previous pattern of careful, documented assistance that Slavi gave to Lydia over the years. She lent Lydia \$10,000 to buy the Abbotsford property, but got a promissory note, which was repaid. Joseph and Slavi held mortgages on the two Armstrong properties.

- [106] As noted, Lydia lived with her parents in 2011 or 2012 for a few months, but was evicted, most likely as a result of her problems with alcohol.
- [107] This episode could be considered "tough love" on Slavi's part, as Lydia's counsel argues. Lydia went into rehab.
- [108] After Slavi died March 5, 2013, Lydia maintained a good relationship with Joseph until his death February 9, 2017. She visited him in the White Rock Hospital and then in the long term care homes in which he resided. Joseph was happy to see Lydia when she visited him in the hospital. She visited him often in the care homes, especially towards the end of his life. By then she was residing in his home on 20th Avenue. On several occasions she brought him from the care home to his own residence, which he enjoyed immensely.
- [109] In summary, as I have said, in general Lydia maintained a positive relationship with both of her parents throughout their lives, and in particular, with the testator, Joseph.
2. Size of the estate, and contributions by the claimant
- [110] These two considerations may be considered together.
- [111] The size of the estate is not small but still could be considered modest. It is not so large that the testator could be very generous to all of the intended beneficiaries at the same time.
- [112] Lydia did not contribute to the estate. On the other hand, it appears that she was not a substantial financial burden to her parents, given their means.
- [113] Lydia never received the portion of her grandparent's estate that Slavi told Lydia she would receive. It is possible therefore that these funds form part of the estate assets.
3. Reasonably held expectations of the claimant
- [114] Lydia did not have specific discussions with her parents or with Joseph, as to their intentions about their estates or about Joseph's estate. Lydia states that when her father was in a residential care home, thus, after he had already made the Will, he told her that the estate would be divided equally as between herself and Peter. This remained her understanding. This would have been a reasonably held expectation on Lydia's behalf. This did not occur.
4. Standard of living of the testator and claimant
- [115] Joseph and Slavi were hard-working people who were careful with their money, and made careful investments, often in partnership with Peter. They invested their money primarily in real estate, and managed to accumulate a fair-sized estate.
- [116] Lydia barely managed to get by, for the most part, and needed financial help at times. At times she had some real estate equity but not after 2003.
5. Gifts and benefits made by the testator outside the Will

- [117] As previously noted, Slavi and Joseph provided Lydia with some financial assistance from time to time during Lydia's life. There were no substantial gifts.
- [118] Peter had received a gift of \$60,000 from Slavi, from her inheritance. Lydia did not receive an equivalent gift. Slavi seems to have held some monies on her behalf. Lydia received some monies when she was in need, but did not receive the \$20,000 that Slavi told her about.
- [119] Peter received \$959,188 outside of the Will. He also benefitted very substantially from his relationship with his parents during their lifetimes, as I will discuss in more detail.

6. Testator's reasons for disinheriting

- [120] There is no evidence of any clearly expressed reason for Lydia's relatively small share of the estate. For example, nothing is said in the Will itself, and there are no written statements from Joseph or Slavi about this. There is no evidence from the solicitor. On the evidence overall, the reasons for providing Lydia with a relatively small share of the estate are essentially speculative.
- [121] Peter's evidence was that his parents intended to divide their estate equally between himself and his sister. His testimony seemed to be connected to the period of time when his mother was very ill, and he was having some discussions with his parents about estate matters. He added that his mother said that Peter should receive 50% because he had been so loyal, but that Lydia would have to share with her children. His evidence about these discussions was exceedingly vague, and largely incoherent. I put very little weight on this evidence.
- [122] Tania recalled discussions with Slavi and Joseph to the effect that the estate should be divided equally between Peter and Lydia, but they had concerns that Lydia always had financial issues, and she would spend the money. Although I consider Tania to be a good, fair witness generally, this testimony was also quite vague, and must be treated with caution. I must be mindful of Tania's interest in supporting Peter's position.
- [123] John Jr. testified that his grandparents told the grandsons that they had helped their children quite a bit, and that they would like to help the next generation. He testified that he did not pay too much attention to these comments.
- [124] Counsel for Peter submits that Slavi and Joseph were concerned that if 50% of the estate were given directly to Lydia, she would "waste" the money and nothing would be left for their grandsons. Therefore, in some notional sense, Lydia's "share" was divided into three shares, it is submitted. While it may be reasonable to so speculate, these submissions remain speculative in my view.

[125] The intention would have had to be Slavi's, and imputed to Joseph. She was the decision-maker. The Will was made very shortly after Slavi's death, and likely would have been in preparation before she died. I accept Peter's evidence that in the period following Slavi's death Joseph was mentally disconnected. These circumstances further complicate the search for the testator's intention.

7. Financial need and other personal circumstances, including disability of the claimant

[126] I have discussed this previously.

8. Misconduct or poor character of the claimant

[127] Under WESA s. 63 (b), the court may refuse to make an order in favour of a person whose character or conduct, in the court's opinion, disentitles the person to the benefit of an order.

[128] There is nothing that can be described as misconduct on the part of Lydia towards her parents. I expect that Slavi, in particular, was disappointed that her daughter failed to establish a stable and supportive bond with a husband that Slavi could approve of, and that Lydia failed to establish any financial security. Joseph and Slavi must certainly have been concerned about Lydia's excessive drinking and alcoholism, particularly in the period just prior to Slavi's death. Ultimately, Lydia went into rehab, and has managed to better control her alcohol dependency in the last few years. It is trite to say that alcoholism is a difficult disease to overcome.

[129] Only conduct affecting the testator is relevant: *Sammon v. Stabler*, 2000 BCSC 1048, at paras. 31, 35, 45.

[130] In *Re Radcliffe* (1977), 2 B.C.L.R. 220, McKay J. noted that the claimant, the testator's son, aged 49, was a person who clearly "had a difficult time in fighting the battle of life." He had worked in various places, usually for a limited period of time, but always at a bare subsistence income. He was unemployed, had no assets, and was in debt. The testator held his son in low regard. Nevertheless, the court decided that as a just father, the testator ought to have made some provision for him.

[131] Similarly, it may be said that Lydia has had a difficult time in fighting the battle of life, and may have been a disappointment to her mother, in particular, but these are not matters of misconduct or poor character within the meaning of the statute, or that ought to be significant in assessing the moral duty of the testator in this case.

9. Competing claimants and other beneficiaries

[132] This is the heart of the case. I will discuss this below.

B. Analysis

- [133] As noted in Tataryn, the legal obligation of a testator may also extend to dependent children: para. 28. Legal obligations should generally take precedence over moral claims. As between moral claims, some may be stronger than others, and it falls to the court to weigh the strength of each claim and assigned to each its proper priority: para. 32.
- [134] Lydia does not argue that Joseph had legal obligations towards her. The case turns on what the cases have traditionally referred to as the moral obligations of the testator.
- [135] In relation to moral obligations, in my view, the Will fails to properly recognize several important considerations.
- [136] The size of the estate permitted Joseph to make adequate provision for Lydia, while still benefiting Peter and Lydia's sons.
- [137] When the Will was made, and when Joseph died, Joseph ought to have recognized that Lydia was impecunious with little or no prospect of improving her financial situation. He ought to have recognized that a 1/6 share of the estate could not conceivably be sufficient to provide the substantial financial support that Lydia would need.
- [138] Joseph should have recognized that Peter was financially secure, and comfortable, even without an inheritance. Peter had substantial assets and had no need. In addition, Peter was married to Tania, a stable and supportive person, who had an independent income.
- [139] Joseph should have recognized that Peter would receive substantial property (nearly \$1 million) outside the estate. There is no evidence that this was considered. If, as Peter argues, the Will reflects a kind of notional equality between Lydia and Peter, then the property passing outside of the estate must have been ignored, or otherwise the shares would have been different.
- [140] Joseph should also have recognized that Peter had the benefit of a long and very supportive relationship with his parents, but Lydia's circumstances had been not nearly so fortunate.
- [141] Especially given his severe injuries, Peter had been fortunate in financial matters, primarily due to the assistance he received from his parents. Peter worked for many years in what was probably a form of protected employment with his parents. The business was successful. Peter received a share of income from the business. He was a partner with his parents in various real estate investments, which his mother managed on his behalf. His mother also managed Peter's own investments. Peter also happened to be frugal by nature. Under the circumstances, Peter was able to accumulate substantial assets.
- [142] Unlike Lydia, Peter had no financial pressures, and he had no competing financial burdens. He had a steady source of income. He remained unmarried until much later in life, and never had children. While commendable, Peter's loyalty to his parents must be seen in light of his relationship with them and his personal circumstances.

- [143] By contrast, Lydia had been unfortunate in financial matters. She was the more rebellious and independent child. Her rebelliousness may or may not have been justified. That no longer matters. Her personal relationships did not work out. John Sr. was not a good provider. The marriage broke down, and Lydia was required to sell the first Armstrong property in order to divide the family assets. Her relationship with Rick Wiltse also broke down, and did not assist her financially. Although Lydia was industrious and worked hard, she earned low wages at all times. She had two sons to take care of, at least until they went to live with their father. Lydia was unable to accumulate assets.
- [144] It is apparent that Joseph, and in effect Joseph and Slavi, wanted to benefit their grandsons. However, the grandsons have no moral claims under the statute. Joseph's moral duty to Lydia, "should be assessed in light of the deceased's legitimate concerns which, where the assets of the estate permit, may go beyond providing for the surviving spouse and children." Tataryn, at para. 32 [Emphasis added.]
- [145] The estate was not so large that Joseph could benefit the grandsons equally with Lydia, while at the same time providing generously for Peter.
- [146] Counsel for Peter argues that the Will reflects a sort of equality between Peter and Lydia, in that if the shares given to the two grandsons are thought of as falling within Lydia's share, then her share is equal to Peter's.
- [147] I do not agree with this characterization. As I stated at the outset of these reasons, in my view the testator cannot discharge his moral obligation to his child by benefitting her children at her expense. The plain fact is that under the Will Peter receives one-half of the estate, and Lydia one-sixth. The fact that one-third of the estate is allocated to Lydia's sons is of no material benefit to her. They are not obliged to support her, and they can be expected to prioritize their own needs.
- [148] As I have said, the related argument that the Will reflects a concern that Lydia would waste "her" share, leaving the grandsons with no benefit is essentially speculative. While it is possible that Slavi and Joseph were concerned that Lydia would not manage the inheritance wisely, the evidence that this factored into their thinking is weak.
- [149] However if Joseph's decision to limit Lydia's inheritance was indeed based upon a concern that she would "waste" the money, then that is unfair, and deserves little weight. As noted, she had always been a hard worker, who largely provided for herself. She has not been fortunate in financial matters. Perhaps she could have been a more careful manager of meagre resources, but there is no real evidence of profligate spending. At this stage of her life, she has every reason to manage her finances with great care. Joseph's primary moral duty was to his children.
- [150] What is plain is that the Will benefits Peter far more than Lydia, and benefits each grandson equally with Lydia. This may simply reflect the desire of the testator to benefit these persons in these proportions, and nothing more.

- [151] In my view, the Will does not make adequate provision for the proper maintenance and support of Lydia. Accordingly, I must decide, as the statute mandates, what is adequate, just and equitable in the circumstances of this case. As noted in *Tataryn*, the section does not impose two different tests. What is adequate provision and what is adequate, just and equitable are two sides of the same coin.
- [152] Lydia has a strong moral claim on the testator. At the time of Joseph's death she was (and she remains) in dire need of support, and could be expected to remain in need for the rest of her life. Despite her efforts, she had not been fortunate in life, financially. Peter was not in need at all. There was no sensible, rational justification for providing Lydia with such a small portion of the estate.
- [153] Nevertheless, the law requires that Joseph's testamentary autonomy be respected: "It is the exercise by the testator of his freedom to dispose of his property and is to be interfered with not lightly but only insofar as statute requires." *Tataryn*, para. 33. [emphasis added]
- [154] The grandsons were and are both independent, healthy young adults, gainfully occupied and capable of earning an income. They were provided with material assistance during Joseph's lifetime, in particular, the payments of \$20,000 each from Slavi.
- [155] To the extent possible, the testator's wishes should be respected and his wishes should be interfered with only insofar as the statute requires. The question, then, is how that should be accomplished in the circumstances of this case.
- [156] In my view, bearing in mind the benefits Peter received outside the estate, the appropriate allocation of the estate assets that recognizes, as far as possible, the testator's apparent wish to benefit Peter, as well as the grandsons, is to divide the estate as follows: Lydia 3/6, Peter 2/6, and John Jr. and James, 1/12 each.
- [157] Under this allocation, on current values, and leaving aside other expenses, Lydia receives \$813,060. John Jr. and James receive \$135,510 each. Peter receives \$542,040, which when added together with the \$959,188 he received outside the estate, totals \$1,501,228.

VII. Conclusions

- [158] I order that the Will be varied to provide for the allocations set out above.
- [159] No party made any submission as to costs. If the parties are unable to agree as to costs, they may make arrangements through the Supreme Court Scheduling manager to address costs either by way of written submissions or by way of written or oral submissions, provided arrangements are made within 60 days of the issuance of these reasons for judgment.

VIII. Comments on trial organization and presentation of evidence

- [160] The trial of this matter was conducted in an exemplary manner, for which I thank counsel and the parties.

[161] Counsel for the estate provided an estate summary together with supporting documents which was entered into evidence as an agreed statement of facts. Counsel provided the court with a document agreement, and a common book of documents which organized a significant volume of documents very clearly. Counsel for Lydia and Peter provided detailed chronologies of facts, with pinpoint references to the evidence, to the extent possible. Counsel provided helpful outlines of closing submissions, in writing, together with briefs of authorities, highlighted as to the most relevant passages. The trial was conducted very efficiently, over only four days, with appropriate civility throughout.

[162] This has made my deliberations and preparation of reasons for judgment much more efficient than is often the case.

"Verhoeven J."

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