

CANADA / JUDGMENT

Simmons v. McDougall Estate

2024 BCSC 1221

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1221 Simmons v. McDougall Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Simmons v. McDougall Estate,

2024 BCSC 1221

Date: 20240708

Docket: S225051

Registry: Vancouver

Between:

Johanna Lucienne Simmons and Jennifer Ann McDougall

Plaintiffs

And

Donald Geoffrey McDougall, as the Executor of the Will and Trustee of the

Estate of Armida Spada McDougall, Deceased, and Donald Geoffrey McDougall

Defendants

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

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Counsel for the Defendants:

J.D. Whyte

Place and Dates of Trial:

Vancouver, B.C.

May 27-31, June 3-4

and 6-7, 2024

Place and Date of Judgment:

Vancouver, B.C.

July 8, 2024

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I. Introduction

[1] The late Armida Spada McDougall ("Armida") died on January 26, 2022, leaving a will dated August 21, 2018 (the "Will").

[2] Armida is survived by her three children. Two of them, the plaintiffs Johanna Lucienne Simmons ("Johanna") and Jennifer Ann McDougall ("Jennifer"), have brought this action seeking an order under s. 60 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA], to vary the terms of the Will in their favour.

- [3] Armida's estate contains assets valued at approximately \$2 million, sourced primarily from three condominiums in downtown Vancouver. The Will gives Johanna and Jennifer a bequest of \$200,000 each, and smaller cash gifts to two close friends, but otherwise leaves the remainder of the estate to her other child, the defendant Donald Geoffrey McDougall ("Geoffrey"), who is also appointed as executor.
- [4] Johanna and Jennifer contend that the Will should be varied because it does not make sufficient provision for them. Instead, they say, the court should order that the estate be distributed to each of the three children in equal measure.
- [5] Geoffrey opposes the action in his personal capacity as the residual beneficiary under the Will. He says that the court should give effect to Armida's testamentary wishes as reflected in the Will. Those wishes are, he says, adequately explained in a letter to her children that she signed before a lawyer at an unknown time prior to her death (the "Letter"). The Letter listed her various reasons for leaving what she described as the "bulk" of her estate to Geoffrey.
- [6] For the reasons that follow, I have concluded that the action should be allowed in part.

II. Evidence and Findings of Fact

A. Armida and her Family

- [7] Armida was born in Montreal on February 23, 1936.
- [8] After graduating from secondary school in Montreal, she worked for a magazine and then a bank. When her first marriage ended, she went back to school and obtained a teaching certificate from McGill University. With that qualification in hand, she worked as a teacher for 32 years, both in Quebec and later in British Columbia after her move to this province in 1976. She retired from teaching in 1994 and decided to pursue a second career in real estate. When the children were younger, she also ran a delicatessen with an associated catering business. In her later years, she came to own three condominiums in the Wall Centre in downtown Vancouver. The most valuable of these was her principal residence. The other two were rented out to generate income.
- [9] She died from pneumonia, associated with COVID-19, less than a month before what would have been her 86th birthday.
- [10] She had, by all accounts, a "larger-than-life" personality. Those who knew her well describe her as warm, loving, generous and devoted to her family, particularly her five grandchildren. She was graced with a sharp wit and a vibrant sense of humour. She loved to cook, particularly for family.
- [11] Nevertheless, her life was not always an easy one. When she was young, her father physically abused her mother and their five children, including Armida herself. Later, she was also physically abused by her second husband, whom she and others described as an alcoholic.

- [12] Perhaps as a result of those experiences, she could be combative, quick-tempered, spiteful and vindictive. She harboured numerous grudges over the course of her long life. Close friends and family members could be shunned, sometimes for years at a time, sometimes over seemingly trivial provocations.
- [13] She had a rocky relationship with at least two of her siblings. I heard testimony from one of them, her sister Alda Nuss ("Alda"), as well as their brother-in-law, Harry Hocqard, who was married to Armida's late sister, Mary Ann. Armida did not speak to those sisters for decades as a result of a dispute that arose when Armida and her other sister, Lydia, brought their elderly mother from Ontario to British Columbia without the knowledge or approval of their other siblings.
- [14] Armida was married twice. She married her first husband, Jean-Charles de Maisonneuve, in Montreal in 1956. The marriage lasted only a few years. Before they separated, they had one child, Johanna, in 1957.
- [15] In 1970, she married her second husband, Don McDougall ("Don"). They had two children, Geoffrey, in 1970 and Jennifer, in 1973. They relocated to British Columbia together in 1976 but separated in 1986.
- [16] In 1981, Johanna married Thomas Simmons ("Thom"). They remained married until Thom's death in 2019. In 1994 and 1995, respectively, they adopted two baby girls, Anna and Katie.
- [17] Jennifer has been married twice. In 2010, she met her first husband, Raymond Evenson ("Ray"), with whom she had a daughter, Jessica, in 2012. They separated in 2016 and later divorced. Jennifer married her second husband, Darren Layton, in 2019.
- [18] In 2005, Geoffrey married Isela McDougall. They have two sons, Dylan, born in 2009, and Brandon, born in 2011.

B. Armida's Relationship with Johanna

- [19] Johanna was four years old when Armida separated from her father. She remembers having little parenting time with her father thereafter because Armida would not permit it. Instead, Johanna says, they moved frequently because Armida wanted to make it difficult for Johanna's father to find them.
- [20] Johanna says that life in the home became more difficult for her after Armida married Don. She remembers Don being physically abusive to both Armida and her. Johanna was Armida's only child until Geoffrey's birth in 1970, when Johanna was 13. Johanna moved out of Armida's home in 1981, at age 24, when she married Thom.

- [21] About a decade later, Johanna and Thom were able to purchase their own house in Coquitlam. It had an unfinished basement. Johanna says that they purchased that home with a view to helping Armida, who was struggling financially raising two teenagers. Armida had separated from Don in 1986. Jennifer later moved out in circumstances that I will describe in greater detail below. In 1991, Armida and Geoffrey moved into Johanna and Thom's basement. Armida spent about \$40,000 refurbishing it for that purpose.
- [22] In 1994 and 1995, Johanna and Thom adopted Anna and Katie. The following year, they purchased another house, this time in North Vancouver. It too had a basement suite that Armida decided to make her home. This time, however, she moved in alone, because Geoffrey had moved out in 1992 to rent a house with friends closer to the vocational school he was attending.
- [23] Armida became very fond of Anna and Katie, her first grandchildren. She was deeply involved in their lives, so much so that Johanna became increasingly uncomfortable. According to Johanna, Armida refused to accept any boundaries. She would frequently appear in their upstairs bedrooms unannounced. At times, she would interfere with Johanna and Thom's parenting and undermine their authority. She would accede to the children's requests for sweets when their parents had refused them. On one occasion, Armida took Anna to the doctor without telling the parents.
- [24] With tensions rising in the home, Armida moved out in October 1997. Armida's view was that she had been forced to leave. Johanna and Thom agreed to repay Armida the \$40,000 she had spent on refurbishing the basement when they sold the house later that year.
- [25] Once they were living apart, Johanna tried to set limits on the time that Armida spent with Anna and Katie. Armida continued to turn up at their new home two or three times every week, often unannounced. Johanna asked Armida not to arrive without arranging the visit in advance. Armida was unhappy with that request.
- [26] The relationship deteriorated further as a result of an incident that occurred in April or May 1998, when Armida turned up at Anna and Katie's pre-school to pick them up. Johanna had instructed the pre-school staff not to release the girls into Armida's care without Johanna's permission. Armida refused to leave. The incident ended only after Johanna called the police.
- [27] About a month later, in June 1998, another incident occurred at the girls' graduation from pre-school. Johanna had invited Armida to that event. According to Johanna, Armida threw her arms around Anna and began crying and making a scene. Armida became angry when Johanna told her to stop that behaviour.
- [28] On October 30, 1998, Armida commenced a lawsuit against Johanna and Thom under the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA], seeking greater access to Anna and Katie. The parties met in March 1999 with their respective lawyers to discuss a possible resolution. During the meeting, Armida made a comment to Joanna about her "halo fitting too tight".

Johanna had a panic attack and later had to be hospitalised for what turned into a major depressive episode. On the advice of her doctor, she ceased having contact with Armida. The ensuing period of almost complete estrangement was to last for about a decade and a half.

- [29] In the course of the litigation, the parties agreed to have a report prepared by Dr. Michael Elterman, a clinical and forensic psychologist, pursuant to s. 15 of the FRA. The resulting report, dated May 26, 2000, recommended that Armida receive access to the grandchildren on alternate weekends for four hours at a time. The parties appear to have accepted that recommendation, thereby ending the litigation. The action never went to trial.
- [30] During the period of estrangement, Johanna made two attempts, at two different times, to reconcile. First, she wrote Armida a letter on September 9, 1999, proposing that they meet to discuss their differences rather than go to court. Armida responded positively by letter on September 13, 1999. They met three days later. The meeting was unsuccessful.
- [31] The next attempt came nearly seven years later. In early 2006, Armida apparently wrote another letter to Johanna (which has not survived), this time to express concern for Anna's welfare and to accuse Johanna of hurting Anna, even though she professed to love her. Johanna responded by email on February 9, 2006. In the resulting email exchange, which was in evidence before me, Johanna expressed her own hurt at the suggestion that she only "professed" to love Anna. Nevertheless, she told Armida that the girls were free to see Armida whenever they wished. She added that she was willing to go for counseling with Armida in order to "work towards some kind of reconciliation between us and perhaps this way pave the way for our kids to have a relationship with you."
- [32] Armida's response, sent the following day, stated as follows:

If my email sounded a little harsh, Im sorry. I WILL NOT be hurt again. I went through years of hell, of blaming myself, of taking it out on Geoff and Jenn and going through periods of unbelievable loneliness I will not be dragged into this morass again. My life is good at the moment and I really dont need to be speaking to anyone. As they say....been there, done that.

If you want to understand how I feel, because right now this is all about me for a change, perhaps you should speak to Dr. Woods. He can perhaps shed some light on it for you.

Mom

- [33] Although the rift between Johanna and Armida was to continue for many years after that, Johanna allowed the girls to have at least some contact with Armida. For example, she arranged for Jennifer to take them to Geoffrey's wedding to Isela in 2005.

- [34] As Anna entered her teen years, her mental health deteriorated. Johanna and Thom had difficulty coping with the situation. On one occasion in 2008, when Anna was 14, she became violent and the police were called. After that, Anna moved in with Armida and Jennifer and remained in their care for about a year. Anna returned home in 2009 but her behavioural problems continued.
- [35] Exasperated, Johanna and Thom sent Anna to a treatment facility in Kelowna. Upon her arrival there, Anna called Jennifer and Armida, pleading for help. They travelled to Kelowna to pick her up and brought her back to their home. Following that incident, Armida reported Johanna to the child protection authorities, alleging child abuse. She also sought to obtain guardianship of both Anna and Katie, ultimately without success. When Anna learned of this, she ran away from Armida's home and stayed with neighbours, before eventually returning home to Johanna and Thom.
- [36] On December 2, 2010, while or soon after those events were taking place, Armida decided to transfer title to her principal residence, which until then had been held in her name alone, to herself, Geoffrey and Jennifer, to the exclusion of Johanna. The transfer was later reversed in 2016, after they reconciled.
- [37] The estrangement between Johanna and Armida finally ended in 2014, when Geoffrey contacted Johanna to let her know that Armida had been diagnosed with cancer. Their relationship gradually improved after that. In 2019, after Thom's death, they grew closer than they had ever been before. They went travelling together to Yellowknife to see the northern lights. Johanna also invited Armida to her recreational property on the Sunshine Coast.
- [38] They generally remained on good terms for the rest of Armida's life.

C. Armida's Relationship with Jennifer

- [39] Jennifer was 13 when her parents separated. She recalls having an "off and on" relationship with her mother until then, but afterwards their relationship became strained and remained so for several years. I heard different accounts as to why. According to Jennifer, Armida did not approve of Jennifer's efforts to maintain a relationship with Don after the separation. By Geoffrey's account, Jennifer was a rebellious teenager with a tendency to skip school and break curfews. She often preferred to stay with Don, he recalls, because Don was less of a disciplinarian than Armida.
- [40] Jennifer permanently left the home as a result of an incident that occurred in 1989, when she was 16. On that occasion, she says, as she was returning home, she overheard Geoffrey telling Armida that if Jennifer was making her life miserable then she should ask her to leave. At this point, Jennifer says, she intervened and announced that if she was making Armida's life miserable then she would leave of her own accord. She then went to her car, intending to drive away. Geoffrey reached into the driver's side window, took her key chain and removed the house keys, telling her that if she leaves now, she should not come back.

- [41] She did not come back. Instead, she stayed with various friends for several months and eventually moved into an apartment near her school that Don had rented for her. She completed high school while residing there.
- [42] During this period, Armida tried to maintain contact with Jennifer. She tried calling Jennifer regularly and even contacted her school counselor in an effort to stay in touch. Nevertheless, they did not speak for about two and a half years.
- [43] Their relationship began to improve again in 1991. Over the next few years, they grew close once more. Jennifer bought a condominium in the same building where Armida resided and they saw one another regularly. For about two years, they worked together as realtors. They travelled together to Italy, France, Montreal and New York. When Armida was diagnosed with cancer and began treatment in 2014, Jennifer visited her regularly and brought her meals because Armida did not like the hospital food.
- [44] The relationship began to sour again in 2016, after Jennifer separated from Ray. Jennifer was dismayed and hurt that Armida and Geoffrey continued to be in contact with Ray, even growing closer to him than they were during the marriage. It appears that, during his parenting time, Ray would take Jessica to see Armida and they would discuss Jennifer's behaviour, despite Jennifer's repeated requests that Armida not do so.
- [45] Armida and Geoffrey supported Ray's position in the divorce action. Geoffrey provided Ray with an affidavit in support of Ray's court application seeking more parenting time. By 2018, exasperated by their refusal to comply with her requests to stay out of it, Jennifer drastically reduced her contact with both Armida and Geoffrey.
- [46] The reasons for the more recent breakdown in the relationship between Jennifer and Armida can be discerned from an exchange of text messages between them in October 2016. In that exchange, Armida, having reconciled with Johanna, asked that Jennifer sign the papers to transfer title to Armida's principal residence back into Armida's name alone, as discussed above. In the course of their discussion about that, Jennifer reiterated her complaint that Armida continued to be in contact with Ray, despite Jennifer's stated wishes. To underscore her point, Jennifer forwarded to Armida a text message she had recently received from Ray in an effort to show Armida how Ray was using the information he was receiving from Armida against Jennifer in the divorce litigation. Armida was unrepentant. She responded as follows:

If you shut your mouth a little and STOP BEING THE VICTIM things would go better for you. And if we're all against you as he says can we ALL be wrong. Think about that a little if it were true as he says. STOP ANTAGONIZING him. Grow up and act like a woman. Your 43 and not a child GROW UP!!!!

- [47] To this, Jennifer responded as follows:

Thanks for your support mom.

Cancel tues. I will go in and sign whatever you need. I don't expect a dime from you anyways. Nor should Jess. Geoff and boys will be the only ones on your list. I don't even buy the whole story that the lawyer said to put the house in our name oh now let's take it out. I don't give a shit. I know what you think of me and Jess compared to Geoff and the boys. Always been that way. Send me the details and I will go sign. I don't wanna talk about this anymore.

[48] Despite the rift that arose between them, they did not cut off all contact. They continued to be in touch with one another sporadically in the last few years of Armida's life. When Armida required knee replacement surgery in 2018, Jennifer was able to arrange a shorter wait time for the surgery. She also drove Armida to the hospital on the day it took place.

[49] After Jennifer met her second husband in 2016, she wanted to avoid exposing him to what she viewed as her family's "craziness". She had not seen Armida for many months when, in January 2022, she went to see her in the hospital in a comatose state, shortly before her death.

D. Armida's Relationship with Geoffrey

[50] Geoffrey left Armida's basement suite in Johanna's house in 1992, when he was 22. He remained close to Armida thereafter, at least until their relationship deteriorated in the last two years of Armida's life. Until that occurred, they were in touch almost daily, as evidenced by numerous phone records, text messages and emails that were placed in evidence before me. They grew even closer after the birth of Geoffrey's sons.

[51] Geoffrey generally placed himself on Armida's side of the fault lines that divided the family. I have already described Geoffrey's role in the events that led Jennifer to move out of Armida's home in 1989 and the rift that arose following Jennifer's separation from Ray in 2016. In addition, Geoffrey unequivocally took Armida's side in the dispute between Armida and Johanna over Armida's access to Anna and Katie. On the occasion of his 28th birthday in July 1998, Johanna sent Geoffrey a birthday present but Geoffrey returned it, telling her in the accompanying letter that he was unable to accept it because he found it "hard to accept gifts from people who feel they must hurt others close to them". He added that:

[t]his misguided pursuit for self-empowerment has gone completely out of control. I don't have time in my life for people who are so self-absorbed.

Call me when you put your life back into perspective.

[52] As a result, they too remained estranged for many years.

[53] Unlike Johanna and Thom, Geoffrey and Isela did little to resist Armida's inclination to enmesh herself in their own and the boys' lives. They had no difficulty with Armida turning up at their home unannounced, whenever she wished. They had dinners together at least once a week. Armida frequently picked the boys up from school. She took them to the theatre, concerts, museums and art galleries. She went to their sporting events. They celebrated holidays together. When they went away on vacation, Armida often travelled with

them as part of the family.

- [54] Armida looked primarily to Geoffrey and Isela for advice, companionship and to help her with day-to-day problems, particularly as she got older. One of these was a suspected bank fraud that took many months to resolve. Another was a disagreement with city officials over the application of the vacancy tax to her investment properties.
- [55] From time to time, Geoffrey and Isela felt the need to set boundaries with Armida, but the resulting spats never led to lengthy periods of estrangement. Armida summed up her feelings for Geoffrey in an email to him on August 11, 2021. Geoffrey was embroiled at the time in a lawsuit against a former business partner. In seeking to assuage his concern about the financial consequences of resolving the dispute on the terms then on offer, she offered him the following assurances with respect to her estate:

Hope you're feeling better this morning. Not worth agonizing over a heartless souless person. You've got to believe in Karma Geoff. I do

Either way once I go there's lots for you. I would say close to \$2 m once all is said and done perhaps more

You've been a wonderful son. I may get angry at you now and again but I'm just a big bag of wind. And you know it too

If not for your love and support I probably would have gone long ago.

If \$200k is going to make such a difference in the pricks life let him have it I would probably call Tom [Geoffrey's lawyer] to see if those numbers are final

Have a good day Geoff. Your sons love you your wife loves you and you know how much I love and respect you

Mom

- [56] Nevertheless, the relationship between them soured as the COVID-19 pandemic progressed. With schools closed, Armida initially provided the boys with homeschooling. When this was no longer possible, Geoffrey and Isela opted to follow public health directives requiring families to remain isolated in their private bubbles. They understood Armida to be particularly vulnerable, given her illness. Nevertheless, Armida blamed them for her resulting loneliness and isolation. She grew increasingly angry and bitter. She began taking medication for depression for the first time in her life.
- [57] Her communications with Geoffrey and Isela became increasingly volatile and erratic. In January 2021, she wrote to thank them for a lovely dinner the day before, but one day later she sent an angry note complaining that they could no longer be trusted.

[58] In October 2021, Armida was having a FaceTime conversation with the boys when Isela responded to one of Armida's questions directed at Dylan. Armida became irate. She raised her voice and angrily rebuked Isela for that behaviour. Soon after that, she sent an angry email to Geoffrey and Isela, ostensibly to apologise for having raised her voice, but primarily to reiterate her complaint about Isela's behaviour.

[59] Geoffrey responded to that email as follows:

Can you please do me a favor, recognize what we do for you on a near daily basis and STOP for fuck sakes!!!!

Jesus Christ you can be a fucking pain in the ass. You do not know when to stop!!!!!!

if I see one more email like this directed towards my wife, it will be the single biggest mislabeled [sic] you have made in your 86 years.

Do not come over Monday, you are not welcome. I'll let you know when I change my mind.

[60] Another angry and intemperate exchange followed in the wake of a tense Christmas dinner on December 25, 2021. The following day, after consulting with Johanna, Armida sent an email to Geoffrey lamenting the "rift" that had come between them and pleading with him to fix it.

[61] On December 29, 2021, Armida sought Johanna's help in healing that rift, for which she blamed Isela. Her text to Johanna that day stated as follows:

Perhaps if you have the time and inclination you'll call [Geoffrey]? I'm sure you know what to say to him. I'm not in competition with his wife and she should not feel threatened by a 85 year old[.] Dr Woods told me some time back that she was playing that card.

And to leave Geoff's family alone and to concentrate on her dysfunctional family she has a brother who left his wife and is living in his mothers house with his girlfriend 15 yrs his senior who beats him. And she dares to look into my closets?

What an arrogant bitch!!!

[62] To this, Johanna replied as follows:

She is a bitch. She divides and conquers.

So your best defense and retaliation is to stick to her like shit, showing her she can't shake you and to be pleasant to her. She sets you up to react. She knows what buttons to push. She finds people's Achilles heel.

She did it to me once and I refused to bite.

[63] Later that same day, on December 29, 2021, Geoffrey and Johanna were exchanging text messages about Armida's behaviour. Geoffrey expressed the following opinion:

[Armida] has become the most obnoxious and rude person I know. She always had that side to her but it was usually directed at strangers. Lately it's been towards us. Can't deal with her right now

[64] Accordingly, on January 4, 2022, Geoffrey conveyed a similar message to Armida herself, telling her that he found her to be abusive and rude and that he would therefore not be reading her emails anymore. There were, for the first time, lengthy gaps between their interactions in those last few months of Armida's life.

E. The Will and the Letter

[65] On August 21, 2018, Armida signed the Will before a lawyer, Lesley Midzain, and a legal assistant, both of whom are shown as having an address on Marine Drive in North Vancouver. The Will directs that the following cash gifts be paid from her estate:

- a) \$200,000 to Johanna;
- b) \$200,000 to Jennifer;
- c) \$20,000 to her family doctor, Dr. Woods; and
- d) \$20,000 to her friend, Robert E. McNair.

[66] The residue of the estate is left entirely to Geoffrey.

[67] The Will itself is silent as to the reasons for favouring Geoffrey in this way. However, on a date that is unknown, Armida went to see another lawyer, Kieran S. Morris, with an address on Hastings Street in Vancouver, to sign the Letter. That document states as follows:

To my children, Johanna, Geoffrey and Jennifer

Although I have left the bulk of my assets to Geoffrey, I want each of you to intelligently and thoughtfully understand the reasons I do so.

Johanna, I have been so very affected by your absence for many long years. You have deprived us and especially me, of your wonderful company. As my first born, my grief at not seeing you and my two grandchildren left a void in my life that could not be measured. I am happy that we had at last reunited be it at the time of my illness. I thank you for that.

Jennifer, what can I say that I haven't said before? You left home at 15 when you needed a mother the most. You had little guidance and even less positive example that you didn't get from your father. I blamed myself for years and even today, I can't explain the gulf between you and I. I hope it heals now. However, my love for you has never diminished and I hope that the chasm between you and I can be filled before this. As my baby, I needed you and you needed me. It happened only too infrequently. Be good to Jessica. She needs you Sweetie. Please don't let the years come between you and your daughter. Be happy dear. You deserve it. I have never seen you really happy.

Please make sure Jessica gets an education. It is so important. Your brother can help if you need it. He is kind and generous. Family means the world to him.

Geoff, you have been rock solid- my son, my friend, my helper, my comforter, my anchor to turn to when I needed an ear, a friend to turn to in my darkest periods. Yes, this Will does not evenly distribute my assets among the three of you, but as you can see, my reasons are rational and sane.

Many times, too numerous to count, you have saved me from yet another emotional upheaval. As you all know, emotion is a great part of what makes Armida Armida. Thank you for all that you have done for me. I needed you badly at times and you were always there for me - never too busy to help your mother.

I want the three of you to remain unified as a family. Please make a point of it because, in the end, family unity is all that matters. I've loved you all equally. You've no idea how difficult this is for me but I believe it's fair.

My grandchildren, as you know, have been a big part of my life. Anna and Katie, being the first two of five grandchildren, you have always held a special part in my heart. Dylan, you have been my little Geoffrey, kind and considerate beyond words. Brandon, you've always looked out for me, reaching out for my hand, getting my purse, my glasses. Jessica, you have always been my little Jennifer, kind, headstrong, and intelligent.

[68] The parties disagree about the likely date of the Letter.

[69] Johanna and Jennifer contend that it must have been signed in 2016, because, on October 28 and November 1 of that year, Armida, Geoffrey and Jennifer appeared before the same lawyer, Kieran S. Morris, to sign the Form A transfer transferring title to Armida's principal residence, as described above.

[70] Further, Johanna and Jennifer urge me to draw an adverse inference against Geoffrey because of his failure, as executor, to produce the files of any of these lawyers. They say the appropriate inference to be drawn is that the Letter was signed in 2016 and was therefore unconnected to the Will.

[71] Geoffrey takes a different view. He disputes the logic of the suggestion that the Letter and Form A transfer must have been signed at the same time merely because the same lawyer was involved. He submits that the Letter should be seen as closely connected to the Will, having regard to the similarities in the mindset on display in both. Further, he argues that Johanna and Jennifer have pleaded in the Notice of Civil Claim that the Letter was signed shortly after Armida made the Will, and are therefore precluded from arguing otherwise now.

[72] It is not necessary to determine with precision when the Letter was signed. I am satisfied that it reflects Armida's testamentary wishes in the period between 2016 and late 2021 and that it was intended to and does explain the rationale for her dispositions of property to her

children in the Will. A similar mindset is apparent in Armida's email to Geoffrey of August 11, 2021, cited above, in which Armida promised Geoffrey that, when she dies, he will inherit about \$2 million from her estate. In any event, I also agree with Geoffrey's submission that even if I were to accept that the Letter was signed in 2016, as Johanna and Jennifer contend, that fact would only serve to show that Armida harboured the same testamentary intent over that much longer a period.

F. Towards a New Estate Plan

- [73] By the end of 2021, however, the winds had begun to blow in a different direction. On December 28, 2021, two days after Armida sent the email to Geoffrey complaining about the rift that had arisen between them, and just a few hours after Johanna and Armida's disparaging exchange about Isela, Armida sent a text message to Johanna asking if Johanna would help her with her will. Johanna agreed to do so and they arranged to meet for that purpose on January 2, 2022. Neither Geoffrey nor Jennifer were advised of the meeting before it occurred. However, around that time, Armida shared with her sister, Alda, that she had decided to change her will.
- [74] The meeting took place at Johanna's house. While there, Armida produced and added to some handwritten notes (the "Notes") that contemplated a different scheme for distributing her assets after her death. The new scheme would have included separate bequests to each of the children and grandchildren individually. In the case of the grandchildren, they were to be earmarked for specified objects, such as "institute of higher learning" (in the case of Dylan and Brandon) and a down-payment for a home (in the case of Jessica). In addition, there was to be an additional bequest for an unstated purpose that was to be "contingent" and held in trust. The last line of the Notes suggests that Armida was contemplating the appointment of a professional executor, a suggestion that Johanna says she made in light of her experience with Thom's estate.
- [75] According to Johanna, the Notes were not yet complete when Armida put them back in her purse before having dinner and heading home later that evening.
- [76] Less than a week later, on January 8, 2022, Armida sent what is probably the most vitriolic of her communications to Geoffrey and Isela, although her ire on that occasion was directed exclusively at Isela. In it, she accused Isela of, among other things, manipulating Geoffrey with a view to ruining his relationships with Johanna, Jennifer and her, conduct which she attributed to Isela's "sheer jealousy". She promised to prevail in this imagined "war" between them because she is "more cunning than you". The email concluded with the following announcement:

My will has been changed. I don't trust you one little bit. You are not the person I thought you were.

G. Armida's Death and its Aftermath

- [77] Armida was admitted to the hospital with respiratory difficulties nine days later, on January 17, 2022. Her decline was rapid. After her first day there, she fell into a coma and remained in that condition until her death on January 26, 2022.
- [78] Later that day, Johanna and Geoffrey met at Armida's apartment. They disagree about what occurred there on that occasion.
- [79] According to Johanna, the Notes were sitting on the kitchen table along with some bank statements, utility bills and other financial documents. Bequests in specified amounts had, since she last saw them, been added to the Notes beside the names of the three children. She asked Geoffrey to call the lawyer to determine if there was a more recent will. She says that when they left, she took the Notes with her because Geoffrey had no interest in them. Geoffrey took only the Will and the Letter, which were retrieved from a filing cabinet in the den.
- [80] Geoffrey denies that the Notes were there in Armida's apartment at that time. His memory is that he first saw and discussed them with Johanna when she showed them to him at a meeting in her home a few days later.
- [81] In any event, when Johanna asked Geoffrey if he would consider distributing the estate in accordance with Armida's wishes as reflected in the Notes, he responded that he intended to carry out Armida's wishes as reflected in the Will. According to Johanna, he then commented that she had "made her bed" and that she could "now lie in it". To this, Johanna responded that she was "done with this family."
- [82] In his testimony at trial, Geoffrey denied having made that comment. However, he conveyed a very similar message in an email that he later sent to Johanna on February 18, 2022. There, he conveyed his suspicion that someone must have planted the "toxic seeds" to poison Armida against Isela in the last weeks of her life. The implication, thinly veiled, was that he considered Johanna to be the prime suspect. In particular, he accused Johanna of "making a guest appearance in the final phase of your mother's life" which, he said, "does not make up for past sins, lost time, whatever you want to call it." He concluded by telling her that he would appreciate receiving answers to questions like, "why did you decide to start speaking with mom after we told you she had cancer" and "why did mom became so angry and develop trust issues with me/Isela, during the very same time you were speaking to her."
- [83] Johanna and Jennifer commenced this action on June 22, 2022.
- [84] In separate proceedings, Geoffrey obtained a probate order in respect of the Will on July 6, 2022. The application was unopposed.

III. Legal Framework

- [85] Section 60 of WESA states as follows:

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.

[86] In *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, the Supreme Court of Canada had occasion to clarify the principles to be applied in an action seeking relief under the predecessor to that provision, which was similarly worded. In her judgment, McLachlin J. (as she then was), writing for the Court, observed that the provision was enacted with a view to balancing two competing interests. The first was society's interest in ensuring that adequate, just and equitable provision is made for a will-maker's spouse and children. The second interest, said to be subordinate to the first, was society's interest in protecting testamentary autonomy.

[87] In striking the appropriate balance between them, she held that the court must assess the question of whether adequate, just and equitable provision has been made objectively, in light of contemporary societal standards. If the will-maker's chosen means of fulfilling her obligation to a spouse or child falls within the range of what is appropriate under that test, then the will should not be disturbed. In summary, the court should not interfere with the will-maker's choices lightly, and then only insofar as the statute requires.

[88] These same principles were later reiterated by Newbury J.A., writing for the Court, in *Chan v. Lee (Estate)*, 2004 BCCA 644, as follows:

[43] I accept the principle that judicial interference with testamentary autonomy should be minimized: the court should not start with a blank slate and write a will designed to right all the perceived wrongs of the past, nor interfere only to improve upon the degree of fairness of a will if the testator has met his obligations under the Act. If, and only if, he has not made "adequate provision" (as explained in *Tataryn*) for his spouse or children should the court act under s. 2 to vary the disposition of his estate. I also accept that, as stated by this court in *Swain v. Dennison* [(1966), 54 W.W.R. 606 (B.C.C.A.), aff'd [1967] S.C.R. 7], at W.W.R. 612, "the greatest care should be taken to appreciate the motives which swayed [the testator] in the disposition of his property or the justification which might be apparent for his decisions, and not merely to make a new will for the testator."

[Emphasis in original.]

[89] This court has previously identified a number of factors that may be considered in deciding whether to vary a will under that test. In *Yee v. Yu*, 2010 BCSC 1464 at para. 16, the following list was drawn from earlier jurisprudence:

- a) the disability of an adult child;
- b) an assured or implied expectation arising from the size of the estate, the child's treatment during the parent's life or from the child's contribution to the parent's assets;

- c) the financial circumstances of the child;
- d) the probable future difficulties of the child;
- e) the size of the estate and other legitimate claims;
- f) misconduct or poor character of the child;
- g) estrangement or neglect by the child to the parent;
- h) gifts and benefits made by the parent to the child during the parent's life; and
- i) unequal treatment of the child.

[90] Many of these factors have no application here. Neither side asserts that their own or another party's financial circumstances weigh in favour of a particular result. Armida gave no gifts or other benefits to any of her children during her lifetime, at least none that are relevant for this purpose. It is not alleged that Armida owed any of her independent adult children any legal duty.

[91] Rather, Johanna and Jennifer have advanced their claim on the basis that Armida is said to have owed each of her three children a moral duty to treat them equally in her will, or at least not as unequally as she did.

[92] It is well established that a will that distributes an estate unequally among the will-maker's independent adult children can, in some circumstances, constitute a sufficient departure from contemporary standards to justify relief under the statute: *Tom v. Tang*, 2023 BCCA 221. In *Ryan v. Delahaye Estate*, 2003 BCSC 1081, D. Smith J. described the principles that apply in such a situation as follows:

[67] The adequacy of a moral claim is not easy to assess, especially where a child has not been disentitled, but has received something less than her sibling. In the absence of express reasons for an unequal distribution, contemporary standards create a reasonable expectation of children sharing equally in a parent's estate. However, no legal obligation exists to do so. The court must be cautious that it does not use the legislation to rewrite the will and thereby disregard the testatrix's motives or reasons in distributing her estate in the manner she has chosen.

[93] In *Dunsdon v. Dunsdon*, 2012 BCSC 1274, Ballance J. added this note of caution:

[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.

- [94] A child's "reasonable expectation" of equal treatment can be negated if "just cause" is shown, that is, if the will-maker is seen to have had objectively valid and rational reasons for allocating less to that child: Tom.
- [95] I have already found that Armida's reasons for distributing her estate unequally in the Will are set out in the Letter. Section 62 of WESA states as follows:
- 62 (1) In a proceeding under section 60, the court may accept the evidence it considers proper respecting the will-maker's reasons, so far as may be determined,
- (a) for making the gifts made in the will, or
 - (b) for not making adequate provision for the will-maker's spouse or children,
- including any written statement signed by the will-maker.
- (2) In estimating the weight to be given to a statement referred to in subsection (1), the court must have regard to all the circumstances from which an inference may reasonably be drawn about the accuracy or otherwise of the statement.
- [96] Where, as here, a will-maker has expressly stated her reasons for distributing her estate unequally, the court must assess the sufficiency of those reasons objectively, as of the time of the will-maker's death. The test remains at all times an objective one, despite a few earlier appellate decisions that appear to suggest otherwise: Tom.
- [97] In some cases, unequal treatment has been found to be objectively justified by "a long period of separation, abandonment or estrangement" between the will-maker and the child receiving less. In *McBride v. Voth*, 2010 BCSC 443, Ballance J. summarised the court's evolving response to those situations as follows:
- [132] In the early development of the caselaw, a long period of separation, abandonment or estrangement between a child and testator was frequently, though not invariably, taken to militate against finding a moral duty to an adult child. The modern judicial trend indicates that the court will enquire into the role played by the testator in the estrangement or relationship breakdown, and where it is seen to be largely the fault of or at the insistence of a testator, it will likely not negate a testator's moral duty, and may even enhance it. The weight of the authorities also indicates that the court may discern a moral duty as a means of rectifying the testator's childhood neglect of the children: *Gray v. Gray Estate*, 2002 BCCA 94, 98 B.C.L.R. (3d) 389, *Doucette v. Clarke*, 2007 BCSC 1021, 35 E.T.R. (3d) 98 [Doucette]; *Tomlyn v. Kennedy*, 2008 BCSC 331, 38 E.T.R. (3d) 289; *Wilson v. Watson*, 2006 BCSC 53, 21 E.T.R. (3d) 285; *P.S.G. v G.G. Estate*, 2005 BCSC 1855; *Ryan*.
- [98] Thus, where the estrangement or relationship breakdown is seen to have been attributable to the will-maker's own "spite" or "stubbornness", the moral duty to provide adequately for the affected child will not be negated: *Wilson v. Watson*, 2006 BCSC 53. More recently, in *Enns v. Gordon Estate*, 2018 BCSC 705, Branch J. varied a will upon finding that the will-maker's stated reasons for an unequal distribution were "completely out of proportion to the

alleged offences, contained an element of spite, and failed to reflect actual existing conditions."

IV. Discussion

- [99] The primary question to be answered in this case is whether the \$200,000 bequests to Johanna and Jennifer fall within the range of legacies that a judicious parent in Armida's position could reasonably have left to two of her three children in her will. If not, then the Court must decide what variation will suffice to meet that standard.
- [100] Although the Will does not disinherit Johanna and Jennifer completely, it provides for a distribution that is heavily lopsided in Geoffrey's favour. Leaving aside the two smaller gifts to others, Johanna and Jennifer are each to receive a fixed amount reflecting approximately 10% of the estate's total value, as measured at the time of Armida's death. On the other hand, Geoffrey is to receive the remaining 80% or so, as well as the entire benefit of the growth in the value of the estate's appreciating real property thereafter.
- [101] It is not seriously disputed that the resulting imbalance calls out for an explanation. In support of his argument that the \$200,000 bequests to Johanna and Jennifer were sufficient to satisfy Armida's moral duty to them, Geoffrey relies on *Sinitsin Estate*, 2024 BCSC 534, where a bequest of \$260,000 from a similarly sized estate, the equivalent of about 13%, was held to be sufficient for that purpose in the circumstances of that case. However, as Johanna and Jennifer argue and Geoffrey acknowledges, each case turns on its own facts and *Sinitsin* is easily distinguished. Geoffrey's main argument in support of the Will is that Armida provided an adequate explanation for the unequal distribution in the Letter.
- [102] The Letter articulates the following reasons for Armida's testamentary choices:
- a) Johanna's "absence" from Armida's life "for many long years", which resulted in a painful "void" when she was unable to see Johanna, Anna and Katie;
 - b) the "gulf" or "chasm" that arose between Armida and Jennifer after she left home as a teenager, resulting in their mutual need for one another being met "only too infrequently"; and
 - c) Armida's consistently close relationship with Geoffrey, whom she describes as "rock solid-my son, my friend, my helper, my comforter, my anchor to turn to when I needed an ear, a friend to turn to in my darkest periods" who has "[m]any times, too numerous to count saved me from yet another emotional upheaval" and is "always there for me - never too busy to help your mother".

- [103] Johanna and Jennifer do not dispute that Armida was estranged from each of them at various times and in varying degrees, generally as described in the Letter. Nor do they dispute that Armida's relationship with Geoffrey was generally as Armida described it in the Letter, at least until the last two years of her life. They do not assert that Armida's stated reasons for distributing her estate unequally were entirely without foundation in fact, at least as matters stood in 2018.
- [104] Rather, the focus of their claim is on the underlying causes of those estrangements, which they attribute primarily to Armida. In particular, they say that, in each case, Armida treated them unfairly, failed to recognise her own role in causing the ensuing rifts, and then remained embittered against them without justification for many years thereafter. As a result, they say, the reasons in the Letter, when viewed objectively, cannot fairly be said to justify the lopsided distribution in the Will.
- [105] There is evidence to support each of those assertions.
- [106] Johanna's account of the history of and reasons for the dispute between her and Armida over Armida's access to Anna and Katie is generally supported by the report of Dr. Elterman. Armida resorted to litigation in an effort to avoid having to respect Johanna and Thom's boundaries. The litigation ended with Dr. Elterman's recommendation in favour of a limited form of access that appears to have been much closer to Johanna's position than Armida's. Moreover, the surviving email exchanges between them in the years that followed suggest that Johanna tried at least twice to improve their relationship, with the assistance of counseling, but that her overtures were rebuffed for no apparent reason other than spite.
- [107] Although Jennifer did not make similar efforts to reconcile after she left home as a teenager, the circumstances of her departure tend to bolster, rather than diminish, Armida's moral duty to her. Armida appears to recognise as much in the Letter, revealing that "for years" she blamed herself for the rift between them and that "even today" she was unable to explain it. When their relationship soured again after Jennifer's separation from Ray, Jennifer had good reason to complain about Armida's behaviour and her subsequent refusal to acknowledge the harm she had done.
- [108] When Armida's bitterness reached a plateau, as it did vis-à-vis Johanna in 2010, Jennifer in 2018 and Geoffrey and Isela in the last two months of Armida's life, Armida resorted to using her estate plan as a weapon, in an apparent effort to settle scores.
- [109] In 2010, she signalled her displeasure with Johanna by placing Geoffrey and Jennifer on title to her principal residence, to the exclusion of Johanna.
- [110] In 2018, although by then reconciled with Johanna for four years, she still remained bitter enough about what had occurred between them, and between her and Jennifer since Jennifer's childhood, that she opted for the lopsided distribution in the Will.

- [111] In the last two months of her life, now apparently animated by her imaginary "war" against Isela, the new estate plan she was considering would have eliminated Geoffrey's residual interest and replaced it with specific bequests to each child and grandchild. She appears to have forgiven Johanna sufficiently by then to have contemplated leaving her the same amount as Geoffrey (both were to receive \$350,000, while Jennifer was to receive a more modest increase to \$275,000, with most of the balance distributed among the grandchildren).
- [112] What emerged at each stage of that history was not the estate plan of a judicious parent, but rather that of a vindictive one whose testamentary choices turned unduly on the degree to which her three children, or their spouses, happened to be in or out of favour when the documents were prepared.
- [113] A judicious parent would have recognised her own role in bringing about and then failing to heal the rifts that arose over the years between parent and child. I am satisfied that the lopsided distribution in the Will falls outside the range of options that a judicious parent would have selected in the circumstances.
- [114] Having decided on that basis to vary the Will, the final question that arises for determination is the extent of the variation required. Johanna and Jennifer seek an order distributing the estate equally among the three children. I have concluded that such an order would overshoot the mark.
- [115] Although I have found that the lopsided distribution in the Will was not adequately explained in the Letter, I am satisfied that the Letter discloses a sufficient reason for favouring Geoffrey to some extent. This case is, in that sense, similar to Tom. There, the will-maker left an estate valued at approximately \$2.3 million. She had changed her will near the end of her life to recognise the special contribution made by two of her five children in caring for her in her last three years. The previous will would have divided the estate equally among all five children. The new will allocated 85% of the estate to the two favoured children, and 5% to each of the three others. The three children whose shares had been reduced successfully sued for a variation of the will. In allowing the claim in part, the trial judge granted the favoured children specific gifts of \$300,000 each, in recognition of their special contribution in those last three years, but otherwise divided the estate equally. In allowing the appeal in part, the Court of Appeal replaced that order with a more modest variation, allocating the favoured children 30% each, with the remaining 40% divided among the other three children equally.
- [116] Here, a similar result ought to flow from the special role that Geoffrey played over the years in Armida's life, regardless of Armida's various quarrels with Johanna and Jennifer and the reasons for them. The evidence generally supports Armida's observations in the Letter about the special bond they had and the emotional and practical support that he provided to her for much of her life. He welcomed her intimate involvement in virtually every aspect of his family life. He was willing to tolerate or at least forgive her abrasiveness, intrusive

behaviour and occasional outbursts, to an extent that Johanna and Jennifer were not.

[117] In support of their argument for an equal distribution, Johanna and Jennifer argue that all of this changed near the end of Armida's life, when it became Geoffrey's turn to fall out of favour just as they had. I do not find that argument persuasive.

[118] First, there was no comparable rift between Armida and Geoffrey lasting years, nor was there likely to be even if Armida had survived longer than she did. Although, during those last months, Geoffrey appears to have cut off contact with her at times out of frustration with her behaviour, those gaps proved to be relatively short-lived, with the relationship restored to equilibrium usually after just a few days. Even after sending the scathing email of January 8, 2022, Armida was texting friendly messages to Isela on January 13, 2022, as if nothing had happened.

[119] The volatility of her behaviour lends support to Geoffrey's view that Armida's mental health was deteriorating in those last months. Her hostile emails took on an even more paranoid and irrational tone than before. Her close friend, Kathleen Copps, had the impression that she might be suffering from dementia.

[120] Overall, I am not persuaded that the deterioration in Geoffrey's relationship with Armida in the last two years of her life undermines the validity of the rationale articulated in the Letter for favouring Geoffrey in the Will.

[121] In all the circumstances, I have concluded that the Will should be varied to distribute 50% of the estate to Geoffrey and 25% to each of Johanna and Jennifer, after paying the cash gifts to Dr. Woods and Mr. McNair.

V. Summary and Conclusion

[122] The action is allowed in part. I am ordering the Will varied in the manner set out in the previous paragraph.

[123] The parties have leave to speak to costs if they are unable to agree on the appropriate order in light of my decision.

"Milman J."

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