

CANADA / JUDGMENT

Smith and Smith v. Smith

2004 BCSC 1676

COURT

Supreme Court of British Columbia

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2004 BCSC 1676 Smith and Smith v. Smith

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Smith and Smith v. Smith,

2004 BCSC 1676

Date: 20041216

Docket: No. LO22084

Registry: Vancouver

Between:

Michael Raymond Smith and Joanne Tracy Smith

Plaintiffs

And:

Janet Cecille Smith and Janet Cecille Smith, as Executrix of the Last Will of Terrance Bruce Smith,
also known as Terry Bruce Smith, Deceased

Defendants

Before: The Honourable Madam Justice Allan

Reasons for Judgment

Counsel for the plaintiffs:

David Paterson

Counsel for defendants

Robert A. Kasting

Dates and place of trial:

November 29 and 30 and

December 1 and 2, 2004

Vancouver, B.C.

- [1] This is an action brought under the Wills Variation Act, R.S.B.C. 1996, c. 490 (the "Act") for an order that the Court make "adequate, just and equitable" provision for the plaintiffs, Michael and Joanne Smith, adult children of the Testator, Terry Smith, who died on September 8, 2001 at the age of 55. The defendant Janet Smith, his widow, is the Executrix of Terry Smith's estate and the sole beneficiary under his will dated August 6, 1992. Because all the parties share the surname Smith, I will refer to them by their first names.

The circumstances of the plaintiffs and their relationship with their father

- [2] Michael, a mechanic for Coast Mountain Bus, is 32 years of age. He has worked for Coast Mountain Bus Company, formerly BC Transit, since 1991. He lives in a common-law relationship with Suzanne Anderson, a bus driver, and he is a stepfather to her two children. Their assets include approximately \$100,000 equity in their home at 5790 Abbey Drive in Delta, B. C. ("Abbey Drive"), which was formerly Terry and Janet's family home. Michael earns approximately \$60,000 a year and union benefits as a mechanic. In addition, he averages \$16,000 a year from work he does for his union. Ms. Anderson earns approximately \$43,000 a year plus union benefits.
- [3] Michael gave evidence with respect to his relationship with Terry. When Michael was young, his father was often away from home working but he described frequent family fishing trips and vacations. Michael was expected to do chores at home and he had a newspaper route when he was young. When he was 15, his parents separated. Michael lived with his mother until he attended BCIT in 1990, and then moved in with his father. Terry paid for Michael's tuition at BCIT and was instrumental in arranging an interview for him with what was then BC Transit. However, Michael got the job on his own merits and has obviously been successful in his career.
- [4] Terry purchased Abbey Drive a month or so before he married Janet in August 1991. Michael lived with them until 1992, when he moved out live with a roommate. He returned to the family home in 1994 after Terry had a heart attack, and lived there until 1997. Michael testified that his father asked him to return to do the yard work and help Terry up the stairs. He disputed Janet's evidence that he had returned home because he had financial difficulties. Mr. Wood, a friend of the family, who was often in the Abbey Drive home, understood that Michael was in financial trouble because his roommate had not been paying his share of the rent. Mr. Wood said he never saw Michael do any yard or house work and the suggestion that he had to help Terry up the stairs was laughable.

- [5] Because Terry was a director of the IWA credit union, he was able to assist Michael in getting a mortgage when Terry and Janet purchased a condominium from Janet's father in 1997. Until Terry died in 2001, Michael saw his father often and enjoyed cordial relations with Janet.
- [6] Joanne, a Family Justice Counsellor, is 39 years old. She lives in a common-law relationship with Glenn Miller and their two children aged 9 and 4 in Marysville, near Cranbrook. Mr. Miller has worked as a bus driver, but is presently at home looking after the children. Joanne earns approximately \$58,000 a year. She described her father, who had been President of the local IWA union chapter and started a credit union, as a hard working and busy man when she was a child. However, they were a close family that shared many activities. Both she and Michael frequently attended union activities with their father.
- [7] Joanne worked during the summers and the school year from grade 8 onwards. She also earned money while she was studying at the University of Victoria. Terry paid all of her tuition except the last term, when he was on strike and had recently separated from her mother. Shortly after she graduated and started work as a correctional officer in Burnaby she moved in with Terry who was then living in New Westminster. At first she paid little or no rent and did the housework. As she got more work, she paid him more rent and eventually, she paid full rent and they split the cost of a housekeeper.
- [8] When she moved into a basement suite with a friend, she remained close to her father and often sought his advice. In 1991, she got a job in Terrace and has not lived in the Lower Mainland since then. She and Glen moved to the Cranbrook area in 1995. Terry often saw her when he travelled on business, and Terry and Janet visited them on occasion. Joanne also visited them when she came to the coast to take courses. When Joanne bought a house in Terrace, she asked Terry for financial assistance. He told her to ask her grandmother, who loaned her \$3,000.
- [9] Joanne testified that when her paternal grandmother Myrtle MacFarlane visited her a few years before she died, Mrs. MacFarlane mentioned that she had saved \$80,000 because she was not travelling as much as she used to. Joanne testified that after Mrs. MacFarlane became ill with cancer, Mrs. MacFarlane asked Terry whether he had a will because she was "damned if Jan and her kid were going to get her money." Joanne said Terry simply replied "yes" and made no other comment. Later that day, Joanne asked her father if he had a will and again he replied "yes". When she asked him if it was in accordance with her grandmother's wishes, he said nothing. They had no other discussion about his estate.
- [10] Joanne, who met Janet in 1987 when Janet and Terry began dating, described a warming a loving relationship between them. She said that Janet was like a second mother to her and a devoted and loving grandmother to her children.

- [11] Joanne described the relationship between Terry and Janet as a good one. She was not aware of any problems, although she said that Janet travelled a lot, visiting her family in Manitoba and Alberta. Both Joanne and Michael suggested that Terry and Janet slept in separate bedrooms, but Janet denied that.
- [12] Terry raised Joanne to be independent and educated and, by all accounts, he was enormously proud of his daughter.
- [13] Counsel agree that both Michael and Joanne are independent, self-supporting adults in modest financial circumstances.

The defendant's circumstances and her relationship with Terry

- [14] Janet is 57 years old. She was born and raised in Manitoba and came to B.C. in 1971. She has two adult daughters from a previous marriage that ended in 1979. After her divorce she re-entered the work force and worked with a couple of law firms, an ad agency and a notary public. She then took a computer course and found employment first at Kwantlen College and then at Douglas College. In 1994, one of her daughters had a child and Janet joined the auxiliary staff so that she could spend time with her grandchild. In 2001, Douglas College changed their auxiliary policy: because she refused a call three times, her employment was terminated. She could have applied to be re-hired but she would have qualified at the lowest pay level. Terry suggested that she start a home-based business. She took steps to begin a ladies fashion business and, a month before Terry died, they both attended a seminar at the trade centre in Kelowna. She said that Terry was enthusiastic about her plans.
- [15] Janet and Terry did not live together until they married in August 1991. Janet had no savings or RRSPs and had only contributed towards a pension for two years.
- [16] One month before their marriage, Terry purchased the Abbey Drive home. Michael moved in with him and, after Terry's marriage to Janet, Janet and her younger daughter Renata joined them. Renata left in 1996. Terry and Janet lived at Abbey Drive until Terry's death.
- [17] The Abbey Drive house was always registered in Terry's name alone. Janet testified that she took care of the household and their social activities, and Terry managed their finances. She knew nothing about the mortgage or any of Terry's accounts or financial assets. Both their income tax returns were completed by Terry's accountant. They did not discuss his finances or estate planning issues.
- [18] In 1993, Terry and Janet purchased a condominium on Dynes Drive in Penticton for \$60,500. They held that property as joint tenants. Janet did not contribute any funds to that purchase. She testified that it was their intention to retire in the Okanagan. They rented the condominium to Janet's brother for several years. In the summers of 1999 and 2000, Joanne and her family vacationed there for a couple of weeks.

- [19] Terry had a heart attack in December 1993. Janet tried to get Terry, who weighed between 300 and 400 pounds, to change his eating habits. On his doctor's advice she arranged an intervention, which resulted in him attending an eating disorder clinic. Sometime after that, she tried to initiate a discussion about estate planning because she was concerned about his health. She testified that she asked him whether his legal affairs were in order and if he had made provision for Michael and Joanne. She said he replied that she did not need to worry about anything; everything was in order. He changed the subject and they never discussed it again.
- [20] Janet testified that she and Terry spoke a lot about their families. Terry expressed the opinion that he had done a lot for them: he had paid for their education, they lived with him for a time when they were young adults, and he felt he had assisted them with the jobs they obtained. He believed that they were "on their own" and had to plan for the future just as he did. She said that the topic came up several times through the years and he never changed his opinion.

Terry Smith

- [21] Terry was described by all the witnesses as larger than life in every way. As well as being a large man physically, by all accounts, he was a formidable personality, assertive, confident, generous and opinionated. Janet described him as "very warm, sincere, honest, funny and thoughtful with a heart as big as himself." He was proud of both of his children and their accomplishments.
- [22] There is no doubt that Terry had a strong and loving relationship with his children until his death. Terry and Janet were devoted grandparents to Joanne's children. There is no evidence of any behaviour that would warrant or suggest disinheritance.
- [23] The evidence is clear that Terry never discussed his financial affairs with his wife, his children, his friends or his business associates.
- [24] Mr. Paterson suggests that Terry would have been surprised to know that he left assets of \$700,000 outside his estate. Based on the evidence at trial, I doubt that very much. Terry may have been "tight-lipped" about his personal finances, but there is every indication that he was knowledgeable about them. He was a full-time officer of both the IWA Union Local and the National Office, serving for many years as Secretary-Treasurer. He dealt with complicated finances in his work and he had several bank accounts and RRSPs, as well as two pensions and two life insurance plans. Mr. Arcand, a friend and colleague who took over Terry's job, testified that Terry administered two pension funds, managed two offices and staff across Canada and audited all the local unions, which had an annual payroll of \$11 million.

Myrtle MacFarlane's will

- [25] Myrtle MacFarlane, Terry's mother, died the year before Terry. Janet testified that both she and Terry had assisted her before she went into care in 1999. Terry made the necessary arrangements with the care facility. Prior to Mrs. MacFarlane's death, she had one or more joint bank accounts with Terry and he helped her with her finances. Her will, executed April 7, 1995, made a number of bequests, including \$3,000 each to Joanne and Michael, and the residue of her estate to Terry. Terry, who was designated as her executor, never probated her will.
- [26] On Terry's death, Janet became Mrs. MacFarlane's executrix. She testified that she saw some joint cheques in an account held by both Terry and his mother, but when she made inquiries at the Credit Union, she was told that it was none of her business.
- [27] Mr. Paterson suggests that there is an issue as to the quantum of Mrs. MacFarlane's estate, which was blended with Terry's, and that Terry's \$98,000 RRSP account may have been purchased with proceeds from Mrs. MacFarlane's estate. That is speculation and there is no evidence as to what amount, if any, Terry inherited from his mother. In any event, no legal issue arises. Mrs. MacFarlane's estate passed to Terry (less the bequests to the plaintiffs) and became part of his estate.

The Testator's will

- [28] In March 1992, Terry phoned Ms. Rachel Campbell, a solicitor, and gave instructions to draw up a will with Janet as the executrix and sole beneficiary of his estate. If she predeceased him or died within 30 days of his death, his estate was to go to his children in equal shares. Ms. Campbell had no independent recollection of taking instructions from Terry, but her notes made March 25, 1992 state: "Terry - specifically wishes his new wife (Janet) to be sole ben. - kids take only after her. Kids over 19 + self - supporting." Ms. Campbell testified that those notes suggest that they discussed the provisions of the Act.
- [29] In accordance with those instructions, Ms. Campbell prepared Terry's will and sent it to him on March 26, 1992. He executed it on August 6, 1992.
- [30] Ms. Campbell has been a solicitor since 1984. She testified that she has taken instructions to prepare several hundreds of wills. It is her practice to advise clients of the provisions of the Act and the possibility that if a spouse or child is not mentioned or adequately provided for in a will, they may challenge that will.
- [31] Terry had been a client of the law firm for which Ms. Campbell works and a Director of the credit union for which the law firm acted. She had met him in 1983 when she was an articling student and had great respect for him. She described Terry as a large man who was very authoritative, impressive and imposing. He had a great recollection of events, especially finances. He was forthright and easy to deal with, and had no time for nonsense or legal jargon. He told her that he was happy in his new marriage.

- [32] In cross-examination, Ms. Campbell testified that she could not recall if they had discussed his continuing obligations to his first wife under their separation agreement, his earnings or holdings or the value of his assets that would pass outside his estate. She did know that he had pensions and insurance.

Terry's estate and other assets

- [33] The statement of assets and liabilities that was prepared for probate purposes estimates the gross value of the estate at \$248,166.41. It lists the value of the Testator's real property (Abbey Drive) as \$78,020.18 (being the tax assessed value for 2001 of \$239,400 less the mortgage of \$161,379.82); the value of his personal property as \$170,146.23; and his debts and liabilities as \$35,734.49. Subsequently, Janet valued the equity in Abbey Drive at \$130,518, representing the sale value of the home at \$289,000 with an outstanding mortgage of \$158,481.10. Taking into account additional assets and debts, the net value of the estate was calculated at \$235,705.47.
- [34] An issue arose as to whether certain antiques that were in the Abbey Drive home at the time of Terry's death were from his mother's estate. The antiques were valued at \$7,200. Janet testified that only a dining room table and four chairs, valued at \$500, came from Mrs. MacFarlane's estate.
- [35] In addition, approximately \$500,000 worth of assets passed directly to Janet outside the estate. They consisted of the proceeds of two life insurance policies: \$207,361.54 and \$50,087.33; the proceeds of two pension plans: \$143,792.44 and \$95,078.15; and approximately \$15,000 in a joint bank account. Joanne had originally been the beneficiary of the larger insurance policy, but Terry had changed the designation to Janet in 1992. Janet elected to roll the pension plan proceeds into RRSPs in her name.
- [36] After Terry's death, Janet learned that he had also purchased a \$10,000 RRSP in her name. There was approximately \$15,000 in their joint bank account. Since she turned 55, she has received a CPP survivor benefit of approximately \$400.

The events following Terry's death

- [37] Janet testified that when Terry died, she did not know if he had a will. After she made inquiries, his lawyer's office faxed a copy of the will to her home three days later. She said Joanne found it and brought it to her, saying "This is Dad's will and Michael and I have read it and the son of a bitch has left everything to you".
- [38] Janet said she became alarmed when she discovered that there was no mortgage insurance on either the Dynes condominium or Abbey Drive. She asked Joanne if she and Michael wished to purchase the Dynes condominium for \$44,000, the value of the existing mortgage. Joanne and Michael purchased the condominium on January 24, 2002. The "Form A" sets out the market value of the property as \$44,000 and the consideration as "\$1 and natural love and affection". Janet initially testified that she had no idea if there was any equity in the

condominium when the plaintiffs purchased it. However, in cross-examination, she sated that she believed it was worth more than the amount owing on the mortgage.

- [39] On February 25, 2002, Janet designated her two daughters and Joanne and Michael as 25% beneficiaries each of the \$98,000 RRSP in the estate. Although Mr. Paterson notes that those designations are revocable, her gratuitous act suggests that there was no animosity between the parties at that time. She has not revoked that designation. Since Terry's death, Janet prepared a will in which her daughters are the beneficiaries.
- [40] In early 2002, Janet decided to sell Abbey Drive. Michael expressed an interest in buying it. Janet had a number of conversations with Mr. Wood, who was an experienced realtor in that area as well as a friend. He agreed to assist them with the sale without charging a real estate commission that would normally have been about \$12,000 plus GST.
- [41] Earlier, in December 1999, Mr. Wood had prepared a property valuation of Abbey Drive for Terry and Janet. He suggested that if they were to sell the home, the suggested list price should be \$265,900 to \$269,000 and the probable final sale price would be between \$257,000 and \$265,000. Shortly before his death, Terry asked Mr. Wood if Abbey Drive was worth \$275,000. Mr. Wood replied that it was and would likely increase in value in the next six to twelve months. Janet said Terry was considering retirement and had talked of moving to the interior or Manitoba.
- [42] When Janet inquired as to Abbey Drive's value after Terry's death, Mr. Wood told her that it should be listed in the \$290,000 range. Janet told him that she would sell the house to Michael for \$260,000. Mr. Wood testified that, at Janet's request he telephoned Michael and gave him that information. He said that Michael accepted and agreed that \$260,000 was an attractive price. I prefer his evidence to Michael's testimony that Mr. Wood told him the fair market value was \$260,000.
- [43] A mortgage broker, whom Mr. Wood had recommended to Michael, asked Mr. Wood the value of the home. When Mr. Wood replied that it would go on the market in the \$290,000 range, the broker asked whether Janet would give Michael a gift letter for the difference so that Michael could qualify for a mortgage for the entire sale price of \$260,000. Michael then went to his credit union and made the same arrangement there. In order to assist Michael, Mr. Wood faxed to the Credit Union a list of active listings in the same neighbourhood as Abbey Drive, ranging from \$264,000 to \$295,000. Michael took advantage of those comparables to obtain the mortgage, but at trial he testified that the comparables were for houses in a different neighbourhood and all had a higher assessed tax value. He denied that he received a "good deal" on the sale - some \$30,000 below market value.
- [44] The contract of purchase and sale listing the sale price as \$289,000 was executed on April 17, 2002. The completion date was to be June 12, 2002. Michael testified that at the last moment, Janet reneged on the whole deal and refused to complete. He consulted a lawyer who commenced a specific performance action on May 22, 2002.

- [45] Janet testified that Michael was happy when he obtained his mortgage approval on April 20 and relations within the family were fine. However, Joanne telephoned that night to ask what she was going to get out of the estate. When Janet replied that she did not know, Joanne told her that if she didn't get a commitment from Janet, she would contest the will. Janet telephoned Michael who said that Joanne should not have phoned her, but he also said that if Janet stood in the way of the sale, there would be trouble and he "would go after everything". Janet balked and received legal advice not to go ahead with the sale.
- [46] Joanne's version of her conversation with Janet was that she had told Janet that she wanted to talk about the distribution of the estate and Janet had replied that she could not make any decisions at that time. Joanne told her that she and Michael had to know Janet's intentions by July 13, 2002, but she never heard from Janet again.
- [47] Shortly before the hearing of a motion brought by Michael's lawyer, Janet agreed to complete the transaction. Michael's notary public, Mr. Dupuis, prepared the vendor's statement of adjustments. It mistakenly stated the balance due on completion to be \$288,517.61. It was necessary to write in the words "gift made by Vendor to Purchaser in the sum of \$28,900" and have Janet initial it. That reduced the balance due to \$259,617.61.
- [48] Ms. Kwichak had prepared a letter that Janet signed, stating that, as executrix of Terry's estate, she was granting a gift of \$28,900 to Michael with respect to the purchase (the "Gift Letter"). Michael testified that Ms. Kwichak asked if it was a gift or part of Michael's inheritance and Janet replied that it was a gift. Both Janet and Mr. Wood, who was also present, deny that such a conversation occurred, but Janet acknowledged that she had not asked Michael to formally acknowledge that he had received a benefit from the estate.
- [49] The sale completed and the net sale proceeds of \$100,411.22 were paid into the estate.
- [50] When Janet's mother died a year after Terry died, Janet returned to Manitoba to take care of her affairs. She decided to remain in Manitoba. Her daughters live in California and Grande Prairie, and she has no relatives in B.C.

The relevant law

- [51] The relevant provisions of the Act are sections 2 and 5:

Maintenance from estate

2 Despite any law or statute to the contrary, if a testator dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's spouse or children, the court may, in its discretion, in an action by or on behalf of the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the testator's estate for the spouse or children.

Evidence

5 (1) In an action under section 2 the court may accept the evidence it considers proper of the testator's reasons, so far as ascertainable,

- (a) for making the dispositions made in the will, or
- (b) for not making adequate provision for the spouse or children,

including any written statement signed by the testator.

- (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.

[52] The leading authority with respect to judicial reapportionment of the assets of a deceased's estate is *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, 93 B.C.L.R. (2d) 145. The Court considered the meaning of the phrase used in the Act, "adequate, just and equitable", at 814:

The words "adequate, just and equitable" may be interpreted in different ways. At one end of the spectrum, they may be confined to what is "necessary" to keep the dependants off the welfare rolls. At the other extreme, they may be interpreted as requiring the court to make an award consistent with the lifestyle and aspirations of the dependants. Again, they may be interpreted as confined to maintenance or they may be interpreted as capable of extending to fair property division. Complicating these questions are the issues of the weight to be placed on the "right" of the testator to dispose of his estate as he chooses -- i.e., testamentary autonomy -- and the equities as between the beneficiaries: spouses and children. Different courts, applying a variety of approaches to these questions, have, over time, arrived at different interpretations of the meaning of "adequate, just and equitable".

Whatever the answers to the specific questions, this much seems clear. The language of the Act confers a broad discretion on the court.

[53] The *Tataryn* test requires a court to assess both the legal and moral obligations that the testator owed to his or her spouse and children. After considering the testator's legal obligation to a spouse in that case, the Court considered the legal and moral duties towards children at 822-23:

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.

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. It is to the determination of these moral duties that the concerns about uncertainty are usually addressed. There being no clear legal standard by which to judge moral duties, these obligations are admittedly more susceptible of being viewed differently by different people. Nevertheless, the uncertainty, even in this area,

may not be so great as has been sometimes thought. For example, most people would agree that although the law may not require a supporting spouse to make provision for a dependent spouse after his death, a strong moral obligation to do so exists if the size of the estate permits. 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: *Brauer v. Hilton* (1979), 15 B.C.L.R. 116 (C.A.); *Cowan v. Cowan Estate* (1988), 30 E.T.R. 216 (B.C.S.C.), *aff'd* (1990), 37 E.T.R. 308 (B.C.C.A.); *Nulty v. Nulty Estate* (1989), 41 B.C.L.R. (2d) 343 (C.A.). See also *Price v. Lypchuk Estate*, *supra*, and *Bell v. Roy Estate* (1993), 75 B.C.L.R. (2d) 213 (C.A.) for cases where the moral duty was seen to be negated.

[emphasis in original]

[54] It is conceded in this case that Joanne and Michael have no legal claim on Terry's estate. The issue is the extent, if any, of the testator's "moral" obligation to them. In *Tataryn*, the Court found that, with two "grown and independent sons", the moral claims "cannot be put very high" and there was no evidence that they had contributed to the estate.

[55] Although each case is fact specific, cases before and *Tataryn* have considered a series of factors in determining the extent of the testator's moral obligation, including the size of the estate, the views of the testator, inter vivos gifts and the relative needs of the parties.

[56] Madam Justice Satanove summarized the relevant principles in *Clucas v. Clucas Estate* (1999), 25 E.T.R. (2d) 175, [1999] B.C.J. No. 436 (S.C.) at para. 12:

Many cases have been decided under the Wills Variation Act. The considerations governing the court's decisions have evolved over time and there is a fairly comprehensive set of competing principles to which effect must be given. I have endeavoured to summarize these as follows:

1.

The main aim of the Act is the adequate, just and equitable provision for the spouses and children of testators. (*Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 (S.C.C.))

2.

The other interest protected by the Act is testamentary autonomy. 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 insofar as the statute requires. (*Tataryn*, *supra*)

3.

The test of what is "adequate and proper maintenance and support" as referred to in s. 2 of the Act is an objective test. The fact that the testator was of the view that he or she adequately and properly provided for the disinherited beneficiary is not relevant if an objective analysis indicates that the testator was not acting in accordance with society's reasonable expectations of what a judicious parent would do in the circumstance by reference to contemporary community standards. (Tataryn, supra; Walker v. McDermott (1930), [1931] S.C.R. 94 (S.C.C.); Price v. Lypchuk Estate (1987), 11 B.C.L.R. (2d) 371 (B.C.C.A.); Dalziel v. Bradford (1985), 62 B.C.L.R. 215 (B.C.S.C.))

4.

The words "adequate" and "proper" as used in s. 2 can mean two different things depending on the size of the estate. A small gift may be adequate, but not proper if the estate is large. (Price v. Lypchuk Estate, supra)

5.

Firstly, the court must consider any legal obligations of the testatrix to her spouse or children and secondly, the moral obligation to her spouse or children. (Tataryn, supra)

6.

The moral claim of independent adult children is more tenuous than the moral claim of spouses or dependent adult children. But if the size of the estate permits, and in the absence of circumstances negating the existence of such an obligation, some provision for adult independent children should be made. (Tataryn, supra)

7.

Examples of circumstances which bring forth a moral duty on the part of a testator to recognize in his Will the claims of adult children are: a disability on the part of an adult child; an assured expectation on the part of an adult child, or an implied expectation on the part of an adult child, arising from the abundance of the estate or from the adult child's treatment during the testator's life time; the present financial circumstances of the child; the probable future difficulties of the child; the size of the estate and other legitimate claims. (Dalziel v. Bradford, supra and Price v. Lypchuk, supra)

8.

Circumstances that will negate the moral obligation of a testatrix are "valid and rational" reasons for disinheritance. To constitute "valid and rational" reasons justifying disinheritance, the reason must be based on true facts and the reason must be logically connected to the act of disinheritance. (Bell v. Roy Estate (1993), 75 B.C.L.R. (2d) 213 (B.C.C.A.); Comeau v. Mawer Estate, [1999] B.C.J. No. 26 (B.C.S.C.); and Kelly v. Baker (1996), 15 E.T.R. (2d) 219 (B.C.C.A.))

9.

Although a needs/maintenance test is no longer the sole factor governing such claims, a consideration of needs is still relevant. (*Newstead v. Newstead Estate* (1996), 11 E.T.R. (2d) 236 (B.C.S.C.))

Have Joanne and Michael received any benefit from Terry's estate?

- [57] Michael testified that, soon after his father's death, he removed Terry's guns at Janet's request and took Terry's golf clubs with Janet's approval. Janet arbitrarily assigned a value to both the guns and the golf clubs at \$1,500 each. Although they were not formally valued, Michael does not dispute those values. Michael testified that he also required some old clothing of his father's, but nothing else of value from the estate.
- [58] Mr. Kasting suggested that Joanne and Michael each received a benefit of \$8,000 as a result of the purchase of the Dynes condominium. I do not agree. The condominium was not an asset of the estate. Upon Terry's death, Janet, as joint tenant of the condominium, became the sole owner of that property. In any event, there is no evidence to suggest that there was equity of \$16,000 in that property when the plaintiffs assumed the mortgage of \$44,000. The fact that it was purchased for \$60,500 in 1993 does not establish its current market value. Its 2002 assessed value as of July 1, 2001 was \$42,800. Its 2003 assessed value as of July 1, 2002 was \$43,600. No appraisal of the property was placed in evidence.
- [59] The assessed value of Abbey Drive for tax purposes in 2002 was \$268,700. Both the plaintiffs and the defendant obtained appraisals of the value of Abbey Drive as of June 11, 2002. Mr. Grauer for the plaintiffs estimated its value as \$258,500 by the cost approach and \$266,000 by the comparison approach. Mr. Link for the defendant estimated its value as \$285,400 by the cost approach and \$285,000 by the comparison approach. Both appraisers criticized the other's appraisal. I conclude that both appraisals revealed frailties and strengths. I accept Mr. Link's unchallenged evidence that the comparison approach is more representative of market value than the cost approach. Averaging the two comparison approach estimates of \$266,000 and \$285,000 would yield a fair market value of \$275,500 at the time of the transaction.
- [60] Regardless of the appraisals, I conclude that Michael in fact received a benefit of \$28,900 from the estate. He paid \$260,000 for the Abbey Drive home. He was unable to get a mortgage for the full amount. Only when Mr. Wood obtained the comparables and Janet provided the Gift Letter in the amount of \$28,900 was Michael able to obtain a mortgage for the full \$260,000 purchase price. Those comparables, which were satisfactory to all of the parties and the credit union, easily establish a value of \$289,000 for the property. That evidence is just as compelling, if not more so, that the "after the fact" appraisals obtained in the heat of litigation. I conclude that Michael received a benefit from the estate of \$28,900 in respect to that transaction.

The plaintiffs' submissions

- [61] Mr. Paterson submits that Terry bestowed few benefits on his children during his lifetime. When he and his first wife executed a separation agreement in 1987, he agreed to pay child support for Michael and to pay the cost of Joanne's education. He was contractually obliged to pay most of Joanne's tuition at the University of Victoria and he voluntarily paid Michael's tuition for his one year course at BCIT. Both children lived with him, paying no rent or reduced rent, when they were young adults.
- [62] Terry and his first wife bought an older car for Joanne in 1983 when she graduated from high school. Other than that, Terry did not expend any large outlay of cash, gifts or property on either of the plaintiffs. Joanne was initially the beneficiary of one of his life insurance policies, but he changed that designation to Janet when they married.
- [63] Mr. Paterson submits that Terry did not fulfil his moral obligation to his children. He suggests that a just and equitable result would be to divide Terry's estate three ways, giving the plaintiffs about \$80,000 each. Janet would receive the same amount, in addition to the approximately \$500,000 she received outside the estate.

The defendant's submissions

- [64] Mr. Kasting submits that Terry fulfilled both his legal and moral obligations to his children by educating them, helping them get "set up" as adults and instilling strong values of independence in them. He suggests that a testator can "disinherit" his children for positive as well as negative reasons.

Conclusion

- [65] The estate of \$236,000 is a relatively small one. Terry was financially savvy, and ensured that his children obtained the necessary education and values to guarantee their financial integrity and independence. Janet, who is presently 57 years of age, has not worked since 2001. She has not decided whether she will return to the workforce. All of the evidence suggests that Terry deliberately left his estate and the assets outside his estate to Janet, secure in the knowledge that Michael and Joanne were independent and self-supporting and comfortably settled in stable and fulfilling careers. By all accounts (except some comments by Michael that I discount) Terry and Janet were happily married. I find that Terry was fully aware of the nature and value of his assets and gave informed instructions to Ms. Campbell to prepare a will that reflected his true wishes and satisfied his legal and moral obligations.
- [66] I have concluded that Michael has received benefits totalling \$31,900 from the estate: a gift of \$28,900 to enable him to get a mortgage for Abbey Drive, two or more guns and the golf clubs. Neither Joanne nor Michael received any benefit from the estate from their purchase of the Penticton condominium.

- [67] Mr. Kasting states that Janet believes that Joanne should receive a benefit from the estate equal to that bestowed on Michael. Accordingly, there will be a direction that \$31,900 be paid from the estate to Joanne. Otherwise, I find that Terry satisfied both his legal and moral obligations to the plaintiffs. There was nothing unreasonable or irrational about his instructions to leave his entire estate to Janet. Michael's claim is dismissed.
- [68] Finally, an issue arose with respect to a set of dishes that Terry purchased on a trip to Russia. When he brought them home, Janet indicated that she did not want them. Terry told Joanne that she could have them, but she had no room in the car to take them at that time. Janet agrees that the dishes belong to Joanne, although she has never actually given them to her and Janet took them with her to Dauphin, Manitoba when she moved. Those dishes should be delivered to Joanne forthwith at Janet's expense. They should be shipped appropriately to prevent damage.
- [69] Counsel may address the issue of costs at a convenient date.

"M.J. Allan, J."

The Honourable Madam Justice M.J. Allan

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