

CANADA / JUDGMENT

Steernberg v. Steernberg

2006 BCSC 1672

COURT

Supreme Court of British Columbia

DECIDED

10 November 2006

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2006BCSC1672

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Steernberg v. Steernberg,

2006 BCSC 1672

Date: 20061110

Docket: L042353

Registry: Vancouver

Between:

Cheryl-Lynn Steernberg

Plaintiff

And

Frederick Bernard Steernberg, as Executor of the

Estate of Peter Steernberg, Deceased

And

James Ellerton, Juliana Miriam Steernberg, Patricia Marijka

Steernberg, Maria Petronella Steernberg, Frederik Bernard

Steernberg, as Beneficiaries of the Estate

Defendants

Before: The Honourable Madam Justice Martinson

Reasons for Judgment

Counsel for the Plaintiff

A. Farber and

E.A. Marshall

Counsel for the Defendant

K. Geddes

Date and Place of Trial:

May 1-12 and 23, 2006

Vancouver, B.C.

I. NATURE OF THE CLAIM

- [1] This is an application by Cheryl Steernberg to vary the terms of her husband Peter Steernberg's Will. It is opposed by Mr. Steernberg's children who are the other beneficiaries. Cheryl Steernberg and Peter Steernberg began living together in 1997 and were married on December 6, 1998. He was 68 years old and she was 47 years old at the date of the marriage. He died on May 13, 2004 of chronic obstructive pulmonary disease. It was the third marriage and ninth relationship for him and the second marriage for her. At the time of the marriage Mr. Steernberg had significant assets that were worth approximately \$1,700,000 at the time of his death. Mrs. Steernberg had assets worth \$2,030, having been discharged from bankruptcy shortly before they met.
- [2] They signed a Prenuptial Agreement on the day of their marriage which considered the question of what she would be entitled to under his will. They did not have legal advice. They both prepared wills consistent with the Prenuptial Agreement. He made two later wills; the final and operative one was executed April 26, 2002 and was consistent with, though not exactly the same as, the terms of the Prenuptial Agreement. The overall scheme was that: what each of them had before they began to cohabit would remain the property of that person and what they purchased after they began living together would be matrimonial property. She would retain 1% of his Estate for each year they lived together. The effect of the Will is that Mrs. Steernberg receives 10% of the Estate and each of the five children receives 18%. She says that the Will should be varied so that she receives 35% of the Estate.
- [3] The British Columbia Wills Variation Act says that if the Court is of the opinion that Mr. Steernberg died leaving a will that did not make adequate provision for Mrs. Steernberg's proper maintenance and support the Court can, in its discretion, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of his Estate for her: s. 2. A significant legal issue in this case is the effect of the Prenuptial Agreement upon the wills variation application in view of the Supreme Court of Canada's decision in

Hartshorne v. Hartshorne. Hartshorne is a family law case dealing with a prenuptial agreement in a situation where the parties had separated and the Court was dealing with a property claim under the British Columbia Family Relations Act. The prenuptial agreement was enforced.

- [4] There is also a dispute as to the size of the Estate. It relates to a property known as the Derby Road Property, registered in Mrs. Steernberg's name in February 1998. She and Mr. Steernberg signed an agreement known as the Derby Road Agreement; it says that if the property is sold he is to receive \$140,000 and they would share equally any additional amount obtained as a result of the sale. The children rely upon the Agreement. She says that because she acquired the property after they began to live together she is entitled to it in its entirety based on the later Prenuptial Agreement.
- [5] Mr. Steernberg was a very successful professional "water" engineer who operated a company known as J.P. Fire Protection. At the time they met Mr. Steernberg owned three lots on Hotel Lake on the Sechelt Peninsula, purchased in the 1960s with his wife of 25 years, Jean Steernberg. He and Cheryl Steernberg lived together from July 1997 until the date of his death in a home on one of the lots, known as the Garden Bay home. There are four children from his marriage to Jean Steernberg, Rik Steernberg, Maria Steernberg Hanson, Julianna Steernberg and Patricia Steernberg. He was also very close to his brother-in law, James Ellerton who was much younger than him, came to live with them from England and was treated as one of his own children. When I refer to "the children" I include Mr. Ellerton.
- [6] Mrs. Steernberg had a degree in psychology and training in counselling and was working full-time as a youth counsellor in White Rock at the time they met. She continued with that work until the summer of 1998 when they both agreed that she should find employment in the area in which they lived. She had been a legal assistant for a lawyer specializing in family law for some years before she obtained her degree in psychology. She was involved with issues concerning women's rights through her work with the Council of Women at the national level and at the provincial level. She obtained a Master of Psychology degree during the course of the marriage. She has two adult children.
- [7] After the decision was made that she would quit her job in the White Rock area Mr. Steernberg supported, financially and otherwise, her efforts to find employment. Part of the reason they entered into the Derby Road Agreement was that she hoped to operate a group home on that property. This did not happen. She ran for the local council. She ultimately opened a counselling business in a community near the Garden Bay home. He assisted her in renovating space for that purpose. She also assisted him with his work for J.P. Fire Protection although there is a dispute as to the extent of that assistance. As his health deteriorated so did his ability to work. She looked after him and that had an impact on her ability to work. She has not been employed since he died.

- [8] I have concluded that the Will should be varied to provide that Mrs. Steernberg receive 15% of the Estate rather than 10% and each of the children receives 17% of the Estate rather than 18%. I will explain my reasons for this conclusion after summarizing the arguments of Mrs. Steernberg and the children.

II. THE ARGUMENTS

- [9] I will review what Mrs. Steernberg and the children say generally, followed by their specific submissions on the Prenuptial Agreement and the Derby Road Agreement.

A. GENERALLY

1. The Facts

- [10] By the terms of the Will Mrs. Steernberg received the following specific bequests which included 1% of the residue of Mr. Steernberg's estate for each full or partial year that they lived together from July 15, 1997:

A. The right to live in my Garden Bay, British Columbia home until such time as it is sold. During the time that she occupies the house prior to its sale all the taxes, water charges, insurance, repairs and any other charges or amounts reasonably necessary for the general upkeep of this home are to be paid by my estate; and

B. All the paintings, furniture and furnishings that my said wife brought into our relationship and

C. My dining room furniture, six cherry wood chairs, china cabinet and buffet, kitchen oak table and six oak chairs, all kitchen utensils and kitchen equipment (excluding refrigerator and washer/dryer) and

D. All my shares of J.P. Fire Protection Advisors Ltd., and

E. One percent of the residue of my estate for each full or partial year that my said wife and I have lived together since July 15, 1997, for her own use absolutely.

- [11] The Will then gave 15% of the residue to each of his five children. It is agreed that the shares of J.P. Fire Protection Advisors Ltd. have no value.

2. Mrs. Steernberg's Position

- [12] Mrs. Steernberg says that as a result of the marriage she was left significantly disadvantaged after Mr. Steernberg's death. At the time of his death she had virtually no income other than the rental income from the Derby Road Property and no employment.

- [13] She moved to the Garden Bay home to be with him, but finding suitable employment there was difficult. He wanted her around a lot of the time and much of her time was spent assisting him with J.P. Fire Protection. She spent the better part of two years caring for her husband during his increasingly difficult and ultimately terminal illness. This involved

accompanying him to the hospital, driving him to appointments, picking up his medicine, shopping for him, looking after his oxygen, staying in constant contact with him by cell phone and looking after his needs day and night as he became increasingly dependent on her. While other family members did assist, the primary responsibility was hers.

- [14] She acknowledges that they both expected her to continue to work. She tried to continue working, with his support. However, by doing all of these things, she gave up the ability to devote her energies to her own counselling practice and to earn her own independent income.
- [15] Because of his dependence upon her she chose to open an office five minutes away from their home, not an ideal location, so she could travel back and forth between her office and their home. This was necessary as he refused to have other caregivers in the home and wanted her there.
- [16] She gave up Employment Insurance and Canada Pension Plan benefits that may have assisted her after his death. She worked hard for J.P. Fire Protection and did not receive any wage for that work.
- [17] She says she is suffering from a back injury which she sustained when she was 10 years old. It has gotten progressively worse, especially when Mr. Steernberg went on oxygen and she had to lift and move equipment.
- [18] She is now 54 years old and as such her employment options are limited. When he died she used approximately \$14,000 to \$15,000 of their money but is now left with very little income.
- [19] Much of the defence evidence and the cross-examination focused on the relationship between Mr. Steernberg and Mrs. Steernberg and on the relationship between Mrs. Steernberg and the children. She submits that the evidence shows that Mr. Steernberg could be belligerent, bossy, controlling, strong-willed and independent. He did not like to have his views challenged. She argues that while the marriage may not have been perfect and may not have always been happy, she stayed by him and he never asked her to leave. If he was complaining about her, he did it in secret and manipulative ways. She says "it was a marriage that sustained." She gives as an example a dispute that arose concerning the water in Hotel Lake. The two of them worked side by side, over many months, hosting meetings in a successful effort to resolve the problem.
- [20] Part of the defence evidence focused on her housekeeping. She says that this evidence was contradictory and went from praising her to being critical. She says her housekeeping style was not out of the ordinary.
- [21] She says it is telling that she completely supported Mr. Steernberg's desire to liquidate \$360,000 in assets to create a trust for his grandchildren. She even found someone to assist him in creating the trust. She did this even though doing so would mean that her share on his death would be significantly decreased.

[22] She says that Mr. Steernberg knew that the Will did not make adequate provision for her. He in fact received advice from a lawyer that it did not do so.

3. The Children's Position

[23] The children say that Mrs. Steernberg was not disadvantaged by this marriage. Rather, she received significant advantages. She overspent and did not make significant efforts to obtain full-time employment. Her evidence with respect to her contribution to J.P. Fire Protection is greatly exaggerated. While she did provide care to Mr. Steernberg she has exaggerated her role and minimized the role of the children, especially Patricia Steernberg and her family. His 2002 Notice of Reassessment shows that he earned a total income of \$27,068 and his 2003 Notice shows that he earned a total income of \$48,706. These levels of income show that he would not require a full time or even regular part time secretary or office assistant.

[24] The children submit that Mrs. Steernberg has greatly exaggerated her role as caregiver. She says she cared for him for some two years; there is however compelling evidence that he only needed real care for about two months before he died.

[25] The reason Mr. Steernberg married her was that she agreed that she would support herself financially. He funded her efforts to find employment. She, after agreeing to the Prenuptial Agreement, began a campaign to get him to change his mind about what she would receive. For example, she constantly asked him for one of the lots. This caused significant strife and adversely affected the relationship.

[26] The children point to the evidence relating to the March 26, 2001 will. Mr. Steernberg executed this will without her knowledge. The 2001 will gave her 1% of the residue of his Estate for each full or partial year that they lived together since July 1997. The rest of the Estate was left to his grandchildren in equal shares. The 2001 will, under the heading "declarations and appointments", provides notice of his unregistered beneficial interest in the Derby Lake Property. It also states that "in this Will I have not made a larger provision for my wife as she has already been adequately compensated by me during my life." She discovered the 2001 will in a safety deposit box and was clearly unhappy about it. She confronted him which led to an argument. As a result she filed a claim under the Land (Spouse Protection) Act, R.S.B.C. 1996, c. 246. She did not tell Mr. Steernberg that she had done so. He found out and was not pleased.

[27] Her anger at the contents of the 2001 will, which she read without permission, and the resulting confrontation with Mr. Steernberg about its contents, along with the scathing comments she made about him to her friends, show that she was much more concerned about the money than she was with the relationship and with Mr. Steernberg's happiness. Her evidence about what her concerns were is not credible.

[28] The fact that she filed a spousal lien and did not tell him she had done so shows that she was concerned only with the money. Her evidence that she filed it so that the tension would decrease and she could enjoy the time she had left with him is not credible.

- [29] When he died she had just left the hospital and when she received the call that he had died she did not go back, but rather went to the home and went through the safe to find the Will. In addition, she almost immediately started asking Rik Steernberg, the Executor, whether she could have one of the lots.
- [30] The children say that Mrs. Steernberg tried to interfere with Mr. Steernberg's relationship with them. They also say that she did what she could after Mr. Steernberg died to make the Executor's job very difficult.
- [31] They say that the evidence of Mrs. Steernberg that she could not work over the past two years and cannot work now is not believable. She has an obligation to become self-sufficient and can do so. She has simply chosen not to work.

B. THE PRENUPTIAL AGREEMENT

1. The Facts

- [32] Mr. Steernberg and Mrs. Steernberg signed the Prenuptial Agreement on the date of the marriage without independent legal advice. They only decided to get married a few days earlier as her father and his partner were coming to get married at their home. She typed a prenuptial agreement for her father. She typed this one as well.
- [33] The Prenuptial Agreement says this:
1. the parties agree one with the other that any property owned by them each individually prior to the time of the beginning to cohabit shall remain the property of that person, to be disposed of as that person sees fit either during their lifetime, or by way of their Will at the time of their demise.
 2. That if Peter predeceases Cheryl;
 - a) Cheryl has the absolute right to live in the marital home until such times as the home is sold and the contents auctioned or sold;
 - b) Cheryl shall retain 1% of Peter's estate for each year the two have lived together; and,
 - c) That Peter agrees that Cheryl shall, from the furnishings of the matrimonial home, select furnishings in order that she is able to furnish a new residence.
 3. In the event that Cheryl predeceases Peter, she leaves all her property, where ever situate, to Peter, according to her Last Will and Testament and trusting that he will divide her personal jewellery and other personal belongings between her children, Adam and Annette Klein, as he in his absolute discretion sees fit.
 4. That anything purchased after July 15, 1997 shall be considered matrimonial property and shall devolve to the surviving party upon the other's demise; and,

5. That any other specific bequests by one party to the other be done in writing either by way of a Last Will and Testament or by Appendices to this agreement which shall be dated signed and witnessed in the proper form.

[34] He made a Will at the same time, on December 6, 1998 and the terms of the Prenuptial Agreement are incorporated in that will. The only difference is that the will says 1% of "my gross Estate" and gives his "manager" the sole discretion to sell for the best value.

2. Mrs. Steernberg's Position

[35] Mrs. Steernberg agrees that at the time she signed the Prenuptial Agreement she knew that Mr. Steernberg wanted his Estate to go primarily to his own family and she had no general objections to that result. She also acknowledges that she said at the time that she did not want any of his money and that she in fact did not want any of his money. However, she says that she was hurt that he asked her to sign the Prenuptial Agreement on their wedding day. That was the first time the topic of a Prenuptial Agreement arose. She also did not know what, legally, she was giving up when she signed the Prenuptial Agreement.

[36] She says she typed it at his direction; this conclusion is supported by the fact that she agreed to leave all her property to him. She just signed the Prenuptial Agreement and thought that they would have a long happy life together. She said a number of times that she trusted him "implicitly" and wanted to enjoy her wedding day. She said that she did not know what the value of his Estate was so did not know what receiving 1% meant. She did not have any legal advice, let alone independent legal advice. She did not know what she was giving up. The fact that she was a legal secretary in a family law firm is not helpful as the evidence is that she did not draft a prenuptial agreement when she worked in that capacity. She agreed that the purpose of preparing the prenuptial agreement for her father was to protect his pre-marriage assets, but says that her father's situation, given the advanced age of her father and his partner, was entirely different.

[37] She says that at the time the Prenuptial Agreement was signed they gave no consideration to their possible future circumstances or to the future impact of the Prenuptial Agreement. In particular the Prenuptial Agreement did not address the question of spousal support and did not consider where she would live if he died. She says his health problems were not foreseeable. He was a healthy, active man. She thought they would have many years together. Because he was 68 years old and she was only 47 years old, the Prenuptial Agreement did not take into account that she would likely have a lengthy life ahead of her.

3. The Children's Position

[38] The children say that the Prenuptial Agreement should be enforced. Mrs. Steernberg knew that Mr. Steernberg would not marry her without such an agreement because he wanted to leave his Estate to his children. This was an appropriate thing for him to do. He and their mother bought the properties at issue on Hotel Lake together. Because they were separated but not divorced at the time of her death in 1982, all of her assets went to him. While he

would not honour her wishes with respect to the distribution of certain items, he told the children they would inherit his Estate.

- [39] Mrs. Steernberg agreed that Mr. Steernberg would not marry her without the Prenuptial Agreement. She says she did not know what the Estate was worth, so that 1% was meaningless. However, she had lived with him for one and a half years and his assets, which included the three lots and his artwork and collectibles found in the house, were very well known to her. With her intelligence, education, and work as a family law assistant she would have known that by signing the Prenuptial Agreement she was giving up any right to make a claim, either upon separation or upon Mr. Steernberg's death. Her evidence that she did not know is not believable. She acknowledged to the Ellertons shortly after the marriage that she did not want his money and that she agreed to the Prenuptial Agreement, the Will and the Derby Road Agreement.
- [40] The situation she found herself in at the time Mr. Steernberg died was foreseeable at the date of the marriage. She knew he was 68 years old. He was not in good health. He smoked two to three packs of cigarettes a day. He was hospitalized with an illness just days before the marriage. She says he had pneumonia, the children say it was a swollen heart.
- [41] The children submit that it is not correct to say that at the time of the marriage support was not addressed. They did address it because they agreed that she would continue to be economically independent.
- [42] They say that all of the relevant factors under the Family Relations Act (see below) weigh in favour of enforcing the Prenuptial Agreement: it was not unfair; it was a short marriage, five and a half years; cohabitation is not relevant; all of the property was acquired long before the marriage; her interest in the Derby Road Property, being 50% of the increase in value, was a gift; she does not need assistance in becoming economically self-sufficient; and the care of her husband, while important, was short lived. Alternatively, a reapportionment under s. 65 would lead to the conclusion that the 10% share she got under the Will is appropriate.

C. SIZE OF THE ESTATE - THE DERBY ROAD PROPERTY

1. The Facts

- [43] Before the marriage Mr. Steernberg held a mortgage valued at \$143,500 on the Derby Road Property. The property was registered in the name of a woman with whom Mr. Steernberg previously had a relationship. The mortgage was in arrears. Mr. Steernberg and Mrs. Steernberg entered into the Derby Road Agreement on February 11, 1998, while they were living together, but before the marriage, whereby Mrs. Steernberg was to purchase the property for \$140,000. That Agreement describes Mr. Steernberg as the Financier and the parties agreed that if the property were sold he would be paid \$140,000 out the purchase price and 50% of the increase in value over \$140,000.

[44] Mrs. Steernberg was required to pay him not less than \$600 per month (which she got from renting the property) and she could use the property for whatever financial endeavour she chose. It is common ground that Mrs. Steernberg put no funds of her own into the purchase. Mrs. Steernberg and Mr. Steernberg pretended that she was an independent purchaser. She is now the registered owner of that property.

[45] It was placed in her name for tax purposes, so he would not have to go through foreclosure proceedings, and so that she would be in a position to apply to operate the property as a group home. The Derby Road Agreement was not registered as a mortgage or a lien. Her application to operate a group home was in the end turned down.

[46] The Derby Road Agreement says this:

The Owner [the wife] is purchasing the property from the Financier [the deceased] (through the owner Carol Cutteridge) for the amount of \$140,000 which negates the legal costs of foreclosing on this property as well as the time involved for the Financier.

It is agreed by the parties that there are renovations which are required to be done on this property, which renovations will be done in order to rent this property out. It is also agreed that these renovations will increase the value of the property.

It is agreed between the parties that should this property be sold, the Financier will be paid out \$140,000 which is the purchase price of the property together with 50% of the increased value over and above the purchase price.

It is agreed between the parties that the owner will receive 50% of the increased value over and above the purchase price and will be entitled to use the property for whatever financial endeavour she chooses, provided that the Financier is paid a monthly payment - to be agreed upon between the parties, but not to be less than \$600 per month, and she will be responsible for paying all insurance and taxes on the property and any repairs to the property which payment for same shall come out of any income the property shall produce.

Finally, it is agreed between the parties that the Owner shall keep an accurate accounting of all income and expenses related to this property and that the parties shall share in equal part the expenses related thereto.

[47] The Will refers to an unregistered interest in the Derby Road property in clause 7:

I hereby state and notify my Trustee that I have an unregistered beneficial interest in those lands and premises at 5422 Derby Road, Sechelt, British Columbia [legal description given], pursuant to agreement, dated February 11, 1998 with my wife who is the registered owner, such interest being the first \$140,000 in value of the said lands and premises plus one-half of their value above that sum, and which interest shall be disposed of as part of my Estate in accordance with this my Will.

[48] A similar clause was included in the 2001 Will.

2. Mrs. Steernberg's Position

- [49] Mrs. Steernberg submits that the Derby Road Property does not form part of the Estate and that she is entitled to this property. She says that clause 4 of the Prenuptial Agreement applies. That is the clause that says that anything purchased after July 15, 1997 shall be considered matrimonial property and shall devolve to the surviving party upon the other's demise. She purchased the property after July 15, 1997 and it therefore should be considered matrimonial property which is hers upon her husband's death. That clause, she says, in effect overrides the Derby Road Agreement.
- [50] She says that the following points are significant with respect to the Derby Road Property: the Agreement was executed in the presence of a lawyer who noted in writing that no legal advice was sought or given with respect to it; it was never owned by Mr. Steernberg; he never had more than an equitable interest in the property; there was never a mortgage registered against the property when it was owned by her; she made payments to him of \$600 on a monthly basis and paid taxes and insurance; it has never been sold by her; she is the registered owner.

3. The Children's Position

- [51] The children say that the Derby Road Agreement should govern. The Derby Road Property and the interest set out in the Derby Road Agreement is specifically included in clause 7 of the Will.
- [52] It is undisputed that Mr. Steernberg financed Mrs. Steernberg's acquisition of the Derby Road Property before their marriage. She did not have resources of her own. Her own evidence is that it was placed in her name for tax purposes, to avoid foreclosure costs and delays and to help her in her bid to run a group home from the premises.
- [53] Mrs. Steernberg said she drafted the lease with respect to the Derby Road Property when the property was leased to the tenants who currently continue to reside at the home. There is compelling evidence that after the marriage they discussed the Derby Road Agreement and Mr. Steernberg confirmed that it would continue to govern their respective interests in that property. Both James and Lou Ellerton testified about a conversation with Mr. Steernberg at their home during the Christmas holidays in 1998 in which the testator confirmed his view that the Derby Road Agreement governed. He provided Jim Ellerton, who was named as Executor in the Will, with a copy of the Derby Road Agreement. Mrs. Steernberg said in cross-examination that she had no recollection of that conversation, but could not deny that it took place. The Ellertons' evidence is therefore undisputed.
- [54] The children rely on post-marriage conduct by Mrs. Steernberg. She continued to honour the Derby Road Agreement for almost a year after the marriage, as evidenced by cancelled cheques which ceased in November 1999. While she said that the reference to mortgage payments on the cheques was her wording for paying off the line of credit, this should not be accepted. As she testified, she then unilaterally ceased making the monthly payments of \$600 without Mr. Steernberg's knowledge. She also stopped keeping records for the Derby Road Property without telling him that she had done so. Her own actions in making the \$600

monthly payments under the Derby Road Agreement for almost a year after the marriage contradict her testimony in direct that she considered the Derby Road Property to be a family asset upon her marriage to the testator.

- [55] The children say that Mrs. Steernberg's pleadings and her evidence are inconsistent as they relate to the Derby Road Property. They say that this conclusion is also supported by the testimony of each of the children and by a housekeeper, Shirley Bailey. Mr. Steernberg advised each of these witnesses that he was upset because he was no longer seeing the money from the Derby Road Property.

III. ANALYSIS

- [56] I will first consider the general legal principles that apply to a wills variation application. I will then turn to the legal principles that apply when the testator and the person applying for a variation have signed a prenuptial agreement that refers to what will happen if they die. Next I will consider the legal significance of the conduct of a person applying to vary a will. Finally I will apply these legal principles to the facts of this case.

A. GENERAL LEGAL PRINCIPLES

- [57] As noted at the outset, British Columbia law provides that 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, a judge may, in his or her discretion, order that the provision that the judge thinks adequate, just and equitable in the circumstances be made out of the testator's estate for the spouse or the children: Wills Variation Act, R.S.B.C. 1996, c. 490, ("the WVA"), s. 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.

- [58] The leading case on the proper legal analysis pursuant to s. 2 of the WVA is the Supreme Court of Canada's decision in *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, 93 B.C.L.R. (2d) 145, 3 E.T.R. (2d) 229. That case sets out the following legal principles.
- [59] The language of the WVA confers a broad discretion on the Court, which allows judges to craft results that are just in the specific circumstances of the case and which are adequate, just and equitable in light of contemporary standards, values and expectations (at ¶15). The WVA addresses two main interests - the "adequate, just and equitable provision for the spouses and children of testators" and testamentary autonomy; testamentary autonomy must yield to what is "adequate, just and equitable." (at ¶16-17).

- [60] In looking at current societal norms, two sorts of norms are available and both must be addressed (at ¶28); together they provide a guide as to what is adequate, just and equitable in the circumstances. They are legal obligations and moral obligations.
- [61] Legal obligations are "the obligations which the law would impose on a person during his or her life were the question of provision for the claimant to arise" (at ¶28). The legal obligations may be found in the Divorce Act, R.S.C. 1985, c. 3 (2d Supp.), family property legislation, and the law of unjust enrichment (at ¶30). When, as in this case, the parties are not separated or divorced at the time of death the law nonetheless imposes uncrystallized legal obligations that a testator owes to his or her spouse (at ¶28).
- [62] Second, the Court should consider the testator's moral obligations to his or her spouse and children, in light of "society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards" (at ¶28). With respect to the moral obligation to a spouse, the Court concluded that most people would agree that although the law may not require a supporting spouse to make provision for a dependent spouse after death, a strong moral obligation to do so exists if the size of the estate permits. The moral obligation is broader than the legal obligation and is assessed at the date of death.
- [63] The moral duty is customized to each specific claimant. The test in determining whether a testator spouse has breached his or her moral duty is whether, as a just husband or wife he or she properly considered the situation of his or her spouse and an appropriate standard of living for that person: *Holland v. Holland* (1995), 9 E.T.R. (2nd) 119 (B.C.S.C.).
- [64] The moral claim of independent adult children is more tenuous than the moral claim of spouses. 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 (at ¶31).
- [65] Circumstances that will negate the moral obligation of the testator are "valid and rational" reasons for disinheritance. To constitute "valid and rational" reasons for 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.); *Clucas v. Clucas Estate* (1999), 25 E.T.R. (2d) 175 (B.C.S.C.); *Comeau v. Mawer Estate* (1999), 25 E.T.R. (2d) 276 (B.C.S.C.); and *Kelly v. Baker* (1996), 15 E.T.R. (2d) 219 (B.C.C.A.).
- [66] As between moral claims, some may be stronger than others. The Court must weigh the strength of each claim and assign to each its proper priority. In doing so, the Court should take into account the important changes resulting from the death of the testator. There is no longer any need to provide for the person who died and reasonable expectations following upon death may not be the same as in the event of a separation during lifetime. A will may provide a framework for the protection of the beneficiaries and future generations and the carrying out of legitimate social purposes. Any moral duty should be assessed in light of the person who dies' legitimate concerns which, where the assets of the estate permit, may go

beyond providing for the surviving spouse and children: *Tataryn* at ¶32.

- [67] The test of what is "adequate and proper maintenance and support" as referred to in s. 2 of the WVA 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 circumstances by reference to contemporary community standards: *Tataryn*; *Walker v. McDermott*, [1930] S.C.R. 44; *Price v. Lypchuk Estate* (1987), 11 B.C.L.R. (2d) 371 (C.A.); *Clucas*, above; and *Dalziel v. Bradford et al.* (1985), 62 B.C.L.R. 215 (B.C.S.C.).
- [68] When possible, all claims should be met. However, if an estate is not large enough to accommodate both the testator's legal and moral duties, then the legal duties should take priority (at ¶38).
- [69] In many cases there will be a number of ways of dividing the assets which are adequate, just and equitable. In other words, there will be a wide range of options, any of which might be considered appropriate in the circumstances. Provided that the testator has chosen an option within this range, the will should not be disturbed. Only where the testator has chosen an option which falls below his or her obligations as defined by reference to legal and moral norms, should the Court make an order which achieves the justice the testator failed to achieve. In the absence of other evidence a will should be seen as reflecting the means chosen by the testator to meet his legitimate concerns and provide for an ordered administration and distribution of his estate in the best interests of the persons and institutions closest to him. It is the exercise by the testator of his freedom to dispose of his property and is to be interfered with not lightly but only in so far as the statute requires (at ¶33).

B. SIGNIFICANCE OF A PRENUPTIAL AGREEMENT TO A WILLS VARIATION CLAIM

- [70] *Tataryn* did not deal with the question of the significance of prenuptial agreements in the wills variation context. The leading Court of Appeal decisions in British Columbia considering the effect of prenuptial agreements are cases in which there was an express waiver of the right to apply under the WVA. The Court in those cases concluded that such prenuptial agreements do not bar a wills variation claim and are just one factor to consider: *Boulanger v. Singh* (1984), 59 B.C.L.R. 383, 16 D.L.R. (4th) 131, 18 E.T.R. 1 (C.A.); *Wagner v. Wagner Estate* (1991), 62 B.C.L.R. (2d) 1, 85 D.L.R. (4th) 699, 44 E.T.R. 24 (C.A.), leave to appeal to S.C.C. denied (1992), 89 D.L.R. (4th) vii; *Lobe v. Lobe Estate* (1996), 13 E.T.R. (2d) 126 (B.C.S.C.), *aff'd* (1997), 37 B.C.L.R. (3d) 138, 17 E.T.R. (2d) 275 (C.A.); *Howard v. Howard Estate* (1997), 32 B.C.L.R. (3d) 1, 16 E.T.R. (2d) 161 (C.A.); and *Chutter v. Chutter Estate*, 2000 BCCA 205.

- [71] It has been suggested that in view of the Supreme Court of Canada's decision in *Hartshorne v. Hartshorne*, 2004 SCC 22, prenuptial agreements will likely be treated with more deference by the courts in the wills variation context: see for example. AnnaMarie Laing; *Use of Marriage/Separation Agreements to Defeat Wills Variation Act Claims*, Estate Litigation: Attaching the Will 2005, Trial Lawyers Association of British Columbia (May 2005); and Edward F. Macaulay, *An Update on the Wills Variation Act*, Estate Litigation - 2005 Update The Continuing Legal Education Society of British Columbia (November 2005),.
- [72] I have concluded, with respect, that the Court's analysis in *Hartshorne* is of limited assistance in the wills variation context. *Hartshorne* dealt with Part V of the Family Relations Act, R.S.B.C. 1996, c. 128, (the "FRA"). The scheme of the FRA is that, in the absence of a prenuptial agreement, each spouse is entitled to an undivided one-half interest in family assets (s. 56) subject to the Court's power to change the division if it is unfair having regard to the six factors set out in s. 65(1). That section states:
- (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to
 - (a) the duration of the marriage,
 - (b) the duration of the period during which the spouses have lived separate and apart,
 - (c) the date when property was acquired or disposed of,
 - (d) the extent to which property was acquired by one spouse through inheritance or gift,
 - (e) the needs of each spouse to become or remain economically independent and self sufficient, or
 - (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,
- the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.
- [73] Where there is a prenuptial agreement that comes within the definition of a marriage agreement the agreement is binding (s. 61) subject to the Court's power to change the agreement if it is unfair, based on the s. 65(1) factors.
- [74] The Court in *Hartshorne* emphasized the fact that domestic agreements are explicitly permitted under the FRA (at ¶35). The Court, in a majority decision, said that the primary policy objective guiding the Courts' role in division of assets on marital breakdown in British Columbia is fairness; fairness is achieved by reviewing either the presumptive division provided for in the FRA itself, or the parties' private agreement in light of the factors set out in s. 65 of the FRA. To give effect to that legislative intent, parties must be encouraged by Courts to enter into marriage agreements that are fair, and to respond to the changing circumstances of their marriage by reviewing and revising their own contracts for fairness

when necessary (at ¶8).

- [75] The Court noted that the authorities say that courts should respect private arrangements that spouses make for the division of their property on the breakdown of their relationship. This is particularly so where the agreement in question was negotiated with independent legal advice (at ¶9). Having said that, the Court had to consider the proper interpretation of s. 65, noting that fairness cannot be determined simply on the basis of an agreement's consistency with the statutory scheme (at ¶8).
- [76] The Court, in discussing the differences between separation agreements and marriage agreements, said that there should not be a "hard and fast" rule with respect to the deference to be afforded to marriage agreements. They define the parties' expectations from the beginning, usually before any rights are vested and before any entitlement arises: often, perhaps most often, a desire to protect pre-acquired assets or an anticipated inheritance for children of a previous marriage will be the impetus for such an agreement." (at ¶39). The Court set out this two part test (at ¶47):

The ultimate point then, is this: in determining whether a marriage agreement operates unfairly, a court must first apply the agreement. In particular the court must assess and award those financial entitlements provided to each spouse under the agreement, and other entitlements from all other sources, including spousal and child support. The court must then, in consideration of those factors listed in s. 65(1) of the FRA, make a determination as to whether the contract operates unfairly. At this second stage, consideration must be given to the parties' personal and financial circumstances, and in particular to the manner in which these circumstances evolved over time. Where the current circumstances were within the contemplation of the parties at the time the Agreement was formed, and where their Agreement and circumstances surrounding it reflect consideration and response to these circumstances, then the plaintiff's burden to establish unfairness is heavier. Thus, consideration of the factors in s. 65(1) of the FRA, taken together, would have to reveal that the economic consequences of the marriage breakdown were not shared equitably in all of the circumstances.

- [77] The Court noted that where the parties have anticipated with accuracy their personal and financial circumstances at the time of distribution, and where they have truly considered the impact of their choices, then, without more, a finding that their Agreement operates unfairly should not be made lightly (at ¶46).
- [78] The Court made some important observations about foreseeability of change. The parties would usually not be expected to deal with their present situation without any consideration of how they expect their lives to evolve over time. A certain degree of change is foreseeable most of the time. The question is the extent to which the unimpeachably negotiated agreement can be said to have contemplated the situation before the Court at the time of the application (at ¶43).

- [79] There are a number of reasons why I have concluded that the Court's analysis in Hartshorne is of limited assistance in the wills variation context. First, the Court in Hartshorne was specifically focused on only one legal obligation owed after separation, that relating to the division of property under the FRA. Other legal obligations are found in the law of unjust enrichment and the Divorce Act.
- [80] Second, the Court in Tataryn concluded that the second part of the two-part wills variation test, dealing with moral obligations, is distinct from and goes beyond legal obligations. As noted above, the Court said that most people would agree that although the law may not require a supporting spouse to make provisions for a dependent spouse after death, a strong moral obligation to do so exists if the size of the estate permits.
- [81] Third, the FRA explicitly provides that a marriage agreement will prevail unless a spouse can prove that it is unfair. Hartshorne was decided in that context. There is no such provision in the WVA.
- [82] Finally, while both the WVA and the FRA consider fairness, each does so in a different context. The FRA is concerned with the situation in which a relationship breaks down and each person continues with his or her separate life; the WVA is generally concerned with a relationship that would have sustained but for the death.
- [83] This Court was recently asked to dismiss a wills variation claim at a summary trial, using the Hartshorne analysis. It was argued that a prenuptial agreement that included a specific waiver of the right to claim under the WVA barred the claim. The parties were not separated at the time of death. Mr. Justice Macaulay dismissed the application, concluding that the position set out in the prenuptial agreement cases referred to above still applies; Hartshorne has not changed the analysis: *Ward v. Ward*, 2006 BCSC 448.
- [84] In *Lobe* the Court concluded that it could not accept that contemporary community standards would dictate that a judicious person in Mr. Lobe's position would, in arranging for the disposition of his estate, have been expected to depart "from what was agreed at the outset, was consciously adhered to throughout, and had never become the subject of concern or complaint" (at ¶30). It does not follow, however, that the moral obligation owed will always be met because there is a prenuptial agreement and the agreement has been followed. The Court in *Lobe* also pointed out that where an agreement purports to preclude estate claims, it is not a bar to a claim but becomes a consideration to be taken into effect in assessing the moral obligation of the testator at the time of his death, having regard to the circumstances prevailing at that time (at ¶25). Where there is no such express waiver, as in this case, the prenuptial agreement will at best be a consideration only.

- [85] Such an agreement will usually reflect the parties' own view of what is fair in their circumstances at the time the agreement is made. It may or may not, in a particular case, reflect their view as to what is fair in the circumstances that are reasonably foreseeable at that time. Their opinion on these questions is entitled to some weight. This is particularly so when there has been independent legal advice or an informed choice not to obtain such advice.
- [86] However, the Court retains the discretion under the WVA to come to a different conclusion when assessing the situation at the date of death. This is in keeping with one of the main interests the WVA addresses: the adequate, just and equitable provision for the testator's spouse. The test is an objective one. A case by case analysis is required.
- [87] The contents of a prenuptial agreement dealing with what is to happen upon death may also constitute evidence of the testator's reasons for making the dispositions made in the will, or for not making adequate provision for the spouse or children as envisioned by s. 5(1) of the WVA:

5(1) In any 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.

C. THE SIGNIFICANCE OF CONDUCT

[88] Section 6 of the WVA refers to the character or conduct of a person making a claim:

The court may

- (a) attach the conditions to an order under this Act that it thinks fit, or
- (b) refuse to make an order in favour of a person whose character or conduct, in the court's opinion, disentitles the person to the benefit of an order under this Act.

[89] This Court has concluded that the character or conduct of the claimant after the death of the testator is not a relevant factor: *Sammon v. Stabler*, 2000 BCSC 1048. I agree. Conduct after death may be relevant to the issue of costs: *Handlen (Guardian ad litem of) v. Handlen Estate*, 2001 BCSC 1792.

[90] I turn then to the question of conduct or character before death. The focus in this case was on conduct. The Court in *Sammon v. Stabler* accepted this summary of the trend of the authorities on the question of conduct:

[32] .

Absent overwhelming conduct repudiating the relationship on which the applicant is relying, courts have refused to disqualify for: adultery following the deceased spouse's desertion; a "short extra-marital affair"; long separation, apparently mutually agreeable; separation at the behest of the deceased spouse; remoteness or estrangement between a parent and a child; the dysfunctionality of the marriage; the participation of the applicant in a foreign divorce proceeding on advice of counsel to protect her separation settlement; being addicted to gambling and using a power of attorney, just before the deceased died, to take over her modest bank account; a refusal to move the marital home; not enforcing payments pursuant to a separation agreement or otherwise claiming support during the deceased's lifetime; refusing to respond to a dying husband's pleas to visit him; obtaining a personal representation grant to administer the estate; leaving an abusive relationship upon doctor's advice; having been acquitted of her husband's murder; commencing divorce proceedings; and cruelty.

D. APPLICATION TO THE FACTS OF THIS CASE

[91] I will apply the legal principles to the facts of this case by: making the necessary findings of fact; determining the size of the Estate; considering the legal obligations owed to Mrs. Steernberg, considering the relevance of Mrs. Steernberg's conduct; and considering the moral obligations owed to Mrs. Steernberg and the children.

1. Findings of Fact

[92] I make the following findings of fact with respect to the matters in dispute.

[93] There is no doubt based on all of the evidence that Mr. Steernberg always intended that the bulk of his Estate would go to his children. This was very important to him and he structured his life with that in mind. He was looking for a partner who would not be financially dependent upon him. He brought Mrs. Steernberg into his home on the basis that she was economically self-sufficient.

[94] With respect to the Prenuptial Agreement, I am satisfied that Mrs. Steernberg was aware of the approximate size of the Estate when she signed it. They lived together for one and a half years and his Estate consisted primarily of the home in which they lived, the two lots on either side, and his artwork and his collectibles found in the home.

[95] I am satisfied that she knew how important the Prenuptial Agreement was to him and that he would not marry her if she did not sign it. She knew he wanted to leave the vast majority of his Estate to the children. She received a "wooing" ring several months before the wedding which is like an engagement ring. The question of marriage would likely have arisen then. She was the first woman of the many with whom he had a relationship that he considered marrying; he did so because of her independence. It is inconceivable that he would not have discussed his views about a Prenuptial Agreement with her well before the wedding date, given the strength of his views and his previous actions.

- [96] She also knew that by signing the Prenuptial Agreement she was giving up the right to make further claims against him if they separated; she knew that she was giving up the right to make a claim against his Estate. She told both James Ellerton and Lou Ellerton shortly after the wedding that she agreed to the Prenuptial Agreement; she did that because she in fact agreed to it. She took a chance; she hoped that as time went on her husband would see things differently and treat her more generously in this respect. As time did go on she encouraged him to do so. When she discovered the 2001 Will she was concerned that he was becoming less rather than more generous. Her actions in filing a spousal lien were understandable in the circumstances though it would have been preferable to have told him she had done so.
- [97] I am also satisfied that she participated in the drafting of the Prenuptial Agreement and it was not just a case of Mr. Steernberg dictating to her what he wanted to include. She prepared a prenuptial agreement for her father the same day. She had experience as a legal assistant in a family law firm. While she may not have drafted prenuptial agreements she knew the general language required; he did not.
- [98] She could have asked that the wedding be postponed if she had wanted to obtain legal advice. She chose not to do so. This was not a case where the wedding had been planned for a significant period of time, with a large guest list. Getting married was almost a spur of the moment decision because a justice of the peace would already be at their home to perform the ceremony for her father.
- [99] What she did not know, because she did not have any legal advice, is what she would specifically be entitled to in the absence of the Prenuptial Agreement, either upon separation, or under the WVA. She also did not know what the legal effect of the Prenuptial Agreement would be.
- [100] It was foreseeable at the time the Prenuptial Agreement was signed that Mr. Steernberg could die within the time frame that he did become ill and die. He was 68 years old at the time the marriage. He was not in good health and they both knew that. He was hospitalized a few days before the wedding. He smoked two to three packs of cigarettes every day.
- [101] The decision that Mrs. Steernberg would quit her employment in White Rock was a mutual one. The drive was some five hours long, which was difficult for her. He also wanted her company. Having said that, I am also satisfied that both Mrs. Steernberg and Mr. Steernberg intended that she would continue to work full-time during their marriage. He supported, both financially and otherwise, her efforts to find full-time employment in the area in which they lived. This is evidenced by the financing arrangement made for the Derby Road Property, his support of her campaigns, and the financial support he provided to set up her counselling practice. While they hoped that Mrs. Steernberg would continue to earn a good income during their marriage, they did not address in the Prenuptial Agreement the question of her ongoing support in the event of separation or death.

- [102] The evidence showed that Mr. Steernberg was a very talented and industrious man who had been quite successful educationally and financially. He had many good qualities. He was also a very difficult man. He was strong willed and opinionated, and as a result had difficulty accepting views that were different from his own. While he wanted a wife who worked he was also somewhat old fashioned, wanting a partner who would attend to his many needs and spend significant time with him; he wanted it both ways.
- [103] This caused conflict. For example, he did not like it when she challenged his views. He did not like it when she was away with work relating to the Council of Women. Conflict was also caused by Mrs. Steernberg in that she fairly early was persistent in trying to get Mr. Steernberg to change the Prenuptial Agreement.
- [104] Although these problems existed, I am also satisfied that there was a level of love and mutual respect in their marriage. It was not a perfect marriage but not many marriages are perfect. She had much to offer in the relationship. I was impressed by the wide circle of supportive friends Mrs. Steernberg has, after living in the area for a relatively short period of time. This speaks positively of her personality, in spite of the way in which the children tried to portray her.
- [105] I agree with Mrs. Steernberg's counsel that while Mr. Steernberg may have had a lot of complaints near the end of his life, he did not tell her about his concerns. Nor did he leave her. She stood by him during his illness.
- [106] I am not able to say with precision when Mr. Steernberg's health significantly deteriorated. I am however satisfied that for about two years before he died, he required and demanded a lot of attention as a result of his illness. He wanted his wife to be the one to provide that attention. He sabotaged her efforts to hire a caregiver. It was therefore reasonable for her to try to find employment nearby. This caregiver role and the requirement to work nearby adversely affected her ability to earn an income.
- [107] In reaching this conclusion I have considered the evidence that during this time frame he presented himself to others as not needing much help. I accept that he did so. This was part of his macho image. However, he continued to make demands upon Mrs. Steernberg.
- [108] With respect to J.P. Fire Protection, I conclude that Mrs. Steernberg did some work for the company which benefited both of them. This included travelling with him and assisting him as his health deteriorated, doing the necessary typing of documents and delivering documents. It could not, however, be characterized as near full-time work.
- [109] I conclude that Mr. Steernberg loved all of his children very much and was proud of each of them, in his own way. He had good reason to be proud. His relationship with his son was somewhat tumultuous, but that can largely be attributed to Mr. Steernberg's difficult personality. He also loved his grandchildren very much and was very proud of each of them, also for good reason.

- [110] I reject the suggestion by the children that Mrs. Steernberg acted inappropriately in her role as Mr. Steernberg's wife. Some of the evidence led in this respect, especially the evidence relating to her housekeeping, was mean-spirited. She was a gracious host and there was much socializing at the home. There was nothing out of the ordinary in the way she managed the household.
- [111] I also reject the suggestion that Mrs. Steernberg actively interfered with Mr. Steernberg's relationship with the children. There was, no doubt, some conflict; that is not out of the ordinary. However, the fact that she encouraged Mr. Steernberg to set up a trust of a significant value for the benefit of his grandchildren, and in fact facilitated the process, even though this would reduce her entitlement under the Prenuptial Agreement and the Will, demonstrates her good faith in this respect.
- [112] I have considered the evidence presented by the children relating to her actions immediately after the death. This was a very stressful time for everyone and taken in the context of the evidence as a whole they do not support the assertion by the children that she was only concerned about his money. The actions of the Executor immediately following the death were less than generous.
- [113] With respect to the Derby Road Property, I am satisfied that it was the intention of both Mr. Steernberg and Mrs. Steernberg that the Derby Road Agreement would remain in place, notwithstanding the Prenuptial Agreement. This conclusion is supported by the evidence that Mr. Steernberg, in Mrs. Steernberg's presence and with her agreement, gave Mr. Ellerton the Prenuptial Agreement, the Will and the Derby Road Agreement on the basis that they were all enforceable. I am satisfied that Mrs. Steernberg acted upon the Derby Road Agreement by continuing to make the \$600 monthly payments required by the Agreement after the marriage. I reject her evidence that they were made for a different purpose.
- [114] I am not satisfied that Mrs. Steernberg's ability to find work is impacted by any health issues. She has not made efforts to find employment over the past two years, in part, I am sure, because of the impact of her husband's death and the pressures and stress of this litigation.

2. Size of the Estate

- [115] The only real issue relating to the size of the Estate is the status of the Derby Road Property.
- [116] Because the Derby Road Agreement and the Prenuptial Agreement are both valid contracts the question is the relationship between them. The Derby Road Agreement says that Mr. Steernberg is entitled to \$140,000 plus 50% of the property's increase in value over \$140,000. The Prenuptial Agreement says that any property acquired by either party after they began cohabiting (the Derby Road Property was acquired after that date) would be matrimonial property, and upon the death of one of the parties, would devolve to the surviving party. Clause 4 states:

That anything purchased after July 15, 1997 shall be considered matrimonial property and shall devolve to the surviving party upon the other's demise.

[117] Two questions arise: did clause 4 of the Prenuptial Agreement supersede or rescind the Derby Road Agreement? If so, what is the effect of clause 4? If, as Mrs. Steernberg argues, clause 4 of the Prenuptial Agreement were intended to "override" the Derby Road Agreement, then she would, by operation of clause 4, be entitled to Mr. Steernberg's interest in the Derby Road Property. This can be accomplished based on either implied rescission of the Derby Road Agreement or by accord and satisfaction.

[118] I have found based on extrinsic evidence that both Mr. Steernberg and Mrs. Steernberg intended that the Derby Road Agreement would remain in place, notwithstanding the Prenuptial Agreement. Clause 4 of the Prenuptial Agreement is ambiguous; it is not clear whether it applies to the Derby Road Agreement or not. I can consider extrinsic evidence of the surrounding circumstances relative to the making of the Prenuptial Agreement and as to the manner in which it was carried out or performed when a clause is ambiguous: *Palansky v. Palansky* (1993), 89 Man. R. (2d) 1, 41 A.C.W.S. (3d) 1010 (Q.B.).

[119] Therefore, in spite of the fact that the contradictory language of the Derby Road Agreement and Prenuptial Agreement could lead to the conclusion that the Prenuptial Agreement may have been intended to replace the Derby Road Agreement, the evidence of the parties' intentions shows that there was either no implied rescission or no accord and satisfaction. They intended that the Derby Road Agreement would continue to operate. That Agreement therefore prevails; Mr. Steernberg's interest in the Derby Road Property forms part of his Estate.

3. Legal Obligations to Mrs. Steernberg

[120] Mr. Steernberg did not have any legal obligations to his children at the time of his death so the question is what his legal obligations were to Mrs. Steernberg. They involve property rights found in the FRA and spousal support obligations found in the Divorce Act.

a. Property Rights

[121] The FRA distinguishes between "marriage agreements" and other domestic contracts ("ante nuptial or post nuptial settlements that are not a 'marriage agreement'"). The formalities of a "marriage agreement" are set out in s. 61 of the FRA. To be a marriage agreement it must take effect on the date of the marriage (s. 61(2)).

[122] In this case, the Prenuptial Agreement cannot be considered a "marriage agreement" within the meaning of Part 5 of the FRA because it purports to take effect at the time they began to live together (which was prior to the date of the Prenuptial Agreement's execution), contrary to s. 61(2): *King. v. King* (1996), 28 B.C.L.R. (3d) 382, 26 R.F.L. (4th) 371 (S.C.) at ¶31-32.

[123] As the Prenuptial Agreement is not a "marriage agreement" the power of the Court to vary it is found in s. 68, which allows the Court to make any order that, in its opinion, should be made to provide for the application of all or part of the settled property for the benefit of either or both spouses or a child of a spouse or of the marriage. However, the same principles and factors, as well as procedures (including the onus of proof), tend to apply to s. 68 applications as to s. 65 applications: see *Speed v. Speed* (1994), 51 A.C.W.S. (3d) 1105, [1994] B.C.J. No. 2740 (S.C.) (QL); *King* (1996); *Pavlis v. Pavlis*, 2000 BCSC 565; *Soja v. Soja*, 2004 BCSC 935; *Schlenker v. Schlenker* (1999), 72 B.C.L.R. (3d) 203, 1 R.F.L. (5th) 436 (S.C.), *Wittel v. Wittel*, [1999] B.C.J. No. 3035 (S.C.) (QL); and, *Clapci v. Clapci*, 2004 BCSC 853. The Hartshorne analysis applies: *Soja*. Section 68 gives a court wider discretion than s. 65, so the Court is not limited to the s. 65 factors: *T.L.A.T. v. W.W.T.* (1996), 26 B.C.L.R. (3d) 319, 24 R.F.L. (4th) 51 (C.A.) at ¶24.

[124] I will now apply the two-step test from Hartshorne to determine if the Prenuptial Agreement would have been enforced had Mrs. Steernberg and Mr. Steernberg separated before Mr. Steernberg's death.

[125] As noted above, step one of the two part Hartshorne analysis requires that I apply the Prenuptial Agreement. In particular I must assess and award both the financial entitlements provided to each spouse under the Agreement and other entitlements from all sources. In this case the Agreement does not deal with spousal support. Therefore I will first assess and award the financial entitlements under the Agreement. Then I will consider the question of spousal support.

i. Entitlement under the Prenuptial Agreement

[126] The Prenuptial Agreement establishes that Mrs. Steernberg would not have been entitled to any major assets. Clause 1 of the Prenuptial Agreement states that each spouse would retain ownership of the assets that each of them owned at the time of their cohabitation. The first part of clause 4 of the Prenuptial Agreement indicates that they expected that any assets acquired by either of them during the cohabitation and marriage would become matrimonial property. The vast majority of the assets were pre-cohabitation assets belonging to Mr. Steernberg. The Agreement gave her 1% of his Estate of each year they lived together which amounts to 7% of the Estate. She could select furnishings in order that she would be able to furnish a new residence. She could live in the matrimonial home until it was sold. The timing of the sale was out of her hands. The Agreement did not make any provision for her support. It did not provide for a place for her to live once the matrimonial home was sold.

ii. Entitlement to Spousal Support

- [127] The British Columbia Court of Appeal recently considered the question of entitlement to spousal support in *Yemchuk v. Yemchuk*, 2005 BCCA 406. This Court summarized the observations made in *Yemchuk* with respect to entitlement this way in *R.S.R. v. S.M.R.*, 2006 BCSC 1404 at ¶40:
1. There is no *prima facie* entitlement to spousal support, even in a long marriage. Trial judges must exercise their discretion in light of the objectives of spousal support orders as set out in s. 15.2(6) of the Divorce Act (the "Act"), and after having considered all the factors set out in s. 15.2(4) of the Act.
 3. Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement. Great disparities in the standard of living that would be experienced by a spouse without support are often revealing of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship lasts, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution (at ¶ 35, quoting from *Moge v. Moge*, [1992] 3 S.C.R. 813.)
 4. While the comments in *Moge* were made in the context of a judgment focused primarily on compensatory support, judges should not seek to pigeon-hole the application before them into one of the three predominant models of support identified in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 but bear in mind all of the factors and objectives listed in the Act in determining whether there is entitlement to support (at ¶36).
 5. There is a close relationship between entitlement to support and quantum of support. What has emerged is a very broad basis of entitlement, with quantum operating as the only obvious limitation (at ¶36, quoting *Bracklow*, which in turn quotes at ¶50 the observations of Professor Rogerson in *Spousal Support After Moge*, footnote omitted).
- [128] The British Columbia Court of Appeal has recently emphasized that on the question of quantum of support the Spousal Support Advisory Guidelines reflect the current law and awards outside the range may be subject to appellate review: *Yemchuk*; *Redpath v. Redpath*, 2006 BCCA 338; *Stein v. Stein*, 2006 BCCA 391.
- [129] The following provisions of the Divorce Act, dealing with the types of orders that can be granted and factors and objectives, are relevant:

Spousal Support Order

15.2(1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums or such lump sum and periodic sums as the court thinks reasonable for the support of the other spouse.

Factors

15.2(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

Objectives

15.2(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[130] I will first consider the spousal support factors. In this case they cohabitated for seven years. Both worked and Mr. Steernberg was the primary income earner while his health permitted him to work. There was no agreement or arrangements with respect to spousal support in the event of separation. They both intended that she would continue to work. Mr. Steernberg had significant means as a result of his profession and his large asset base. Mrs. Sternberg did not have significant means. She was though gifted an interest in the Derby Road Property which gave her the ability to decide when that property would be sold. Just before his death she was 52 years old and he was 74 years old. She was the major caregiver during his illness.

[131] I turn next to the spousal support objectives. Mrs. Steernberg obtained advantages as a result of the marriage and cohabitation. She lived a significantly more expensive lifestyle than she otherwise might have. Mr. Sternberg assisted her financially in her efforts to develop her career and to upgrade her professional qualifications. She was in a better financial position just before his death than she was at the time they began cohabiting. She has lived in the matrimonial home for almost two and one half years since the date he died. She received some benefits under the Will. She was gifted an interest in the Derby Road Property.

- [132] She also suffered disadvantages as a result of the marriage. She gave up her full-time employment in White Rock. She assisted her husband to some extent in his business to the detriment of her own business. The fact that he wanted her to live in Garden Bay and work nearby limited the job opportunities available to her. For the two years before he died, he needed and demanded a lot of attention. She accommodated him and doing so impacted adversely upon her ability to earn an income during that time and after his death.
- [133] She has work experience and professional training and it is reasonable that she make every effort to re-enter the workplace on a full time basis. It must be kept in mind however that she is now 54 years old, seven years older than she was when she entered the relationship; that may make it more difficult to obtain suitable employment.
- [134] In my opinion, considering all the factors and in light of the spousal support objectives, Mrs. Steernberg would have been entitled to some spousal support. Quantum would likely have been consistent with what she would be entitled to under the Spousal Support Advisory Guidelines.
- [135] With respect to step two, I must consider whether, in view of the s. 65(1) factors and other factors relevant under s. 68, the Prenuptial Agreement would have operated unfairly. For convenience of reference I will repeat the second part of the Hartshorne test: (at ¶47)

The court must then, in consideration of those factors listed in s. 65(1) of the FRA, make a determination as to whether the contract operates unfairly. At this second stage, consideration must be given to the parties' personal and financial circumstances and in particular to the manner in which these circumstances evolved over time. Where the current circumstances were within the contemplation of the parties at the time the Agreement was formed, and where their Agreement and circumstances surrounding it reflect consideration and response to these circumstances, then the plaintiff's burden to establish unfairness is heavier. Thus, consideration of the factors in s. 65(1) of the FRA, taken together, would have to reveal that the economic consequences of the marriage breakdown were not shared equitably in all of the circumstances.

- [136] I am not satisfied that the Prenuptial Agreement operated unfairly. This was a marriage of nearly five and one half years. The property at issue was almost entirely acquired by Mr. Steernberg before the marriage. Many of the current circumstances were within the reasonable contemplation of the parties at the time the Agreement was signed. Mr. Steernberg was 68 years old and I have concluded that he was in poor health and both he and Mrs. Steernberg knew this. His illness and subsequent death, and the time within which his death occurred, were foreseeable. They both intended that she would continue to support herself and therefore be in a position to continue to do so. Their personal and financial circumstances evolved over time in a predictable way, given their circumstances at the time the Agreement was signed. The Agreement did consider and respond to those circumstances. Though the Agreement did not address the question of spousal support upon separation, I have concluded that Mrs. Steernberg would be entitled to some spousal support.

[137] I have considered the fact that Mrs. Steernberg did not obtain legal advice about the Prenuptial Agreement. She is an intelligent, educated woman. I have found that: she was aware of the approximate size of the Estate. She knew before signing the Prenuptial Agreement how important it was to Mr. Steernberg to preserve his pre-marriage assets for his children. She had some experience in family law matters and she knew that she could obtain legal advice. She could have postponed the wedding. She simply decided to proceed without the benefit of that advice. She therefore made an informed choice not to obtain legal advice when she could easily have done so.

[138] As noted above the Court in Hartshorne said that courts should respect private arrangements that spouses make for the division of their property on the breakdown of their relationship, particularly when the agreement was negotiated with independent legal advice. A person who makes such an informed choice not to obtain legal advice should not be in a better legal position than a person who did obtain legal advice.

[139] I have also taken into account the following comments of the Court of Appeal that the purpose of the agreement at issue in that case had been to protect the husband's pre-marital assets (S.M.J. v. R.H.C.W., 2005 BCCA 254 at ¶31) :

At para. 78 of her judgment the trial judge finds that the agreement is unfair in not providing any share of the appellant's assets after six and a half years. This is most perplexing because it characterizes as unfair the central purpose of many if not most cohabitation agreements. This is recognized in Hartshorne where in a discussion comparing marriage agreements with separation agreements Bastarache J. referred to the motivation for cohabitation agreements:

39 ... In some cases, marriage agreements ought to be accorded a greater degree of deference than separation agreements. Marriage agreements define the parties' expectations from the outset, usually before any rights are vested and before any entitlement arises. Often, perhaps most often, a desire to protect pre-acquired assets or an anticipated inheritance for children of a previous marriage will be the impetus for such an agreement.

[Emphasis Added]

b. Spousal Support

[140] I have addressed entitlement to spousal support in the context of the Hartshorne analysis. I conclude, for the same reasons, that she would have been entitled to some spousal support.

c. Conclusion - Legal Obligations to Mrs. Steernberg

[141] Mr. Steernberg met his legal obligation to his wife with respect to the division of family assets. Even in the absence of the Prenuptial Agreement there would have been a significant reapportionment in his favour.

[142] However, his legal obligation with respect to assets is only one aspect of his broader legal obligation to her. He also had a legal obligation to pay spousal support and that obligation was not addressed in the Prenuptial Agreement.

4. Mr. Steernberg's Moral Obligation to Mrs. Steernberg

[143] As I have already noted, the moral obligation owed by Mr. Steernberg is separate from and goes beyond the legal obligation Mr. Steernberg owed to her. The fact that they signed a prenuptial agreement specifically dealing with what would happen upon death is one consideration in assessing this moral obligation. There was no express waiver of the right to apply under the WVA. However it specifically contemplates the death of each party and deals with what Mrs. Steernberg would receive upon his death. The Will is consistent with the Prenuptial Agreement.

[144] In this case the Prenuptial Agreement likely reflected what Mr. Steernberg thought was fair from his subjective perspective at the time the agreement was signed. It may also have reflected his subjective view of what was fair with respect to the circumstances that were foreseeable. I have found that while Mrs. Steernberg, an intelligent, well-educated woman, may not have liked the Prenuptial Agreement, she made an informed choice to sign it, knowing that she could obtain legal advice and knowing for some time that he would not marry her without it.

[145] While I have concluded that the date of Mr. Steernberg's death was foreseeable and that the fact that he became ill was foreseeable, it was not foreseeable that Mr. Steernberg would insist that she care for him herself, rather than hire a paid caregiver, during the last two years of his life. Nor was it foreseeable that assuming this caregiver role would have an adverse impact upon Mrs. Steernberg's ability to earn an income.

[146] The Will provides that she receive 10% of the Estate, being approximately \$117,000. As a result of the death she received some survivorship benefits, though they were not significant. She was gifted an interest in the Derby Road Agreement by Mr. Steernberg. That interest is estimated to be \$32,500, based on a drive by appraisal. Had she not acted as caregiver for so long, the provisions of the Will would have met Mr. Steernberg's moral obligations to her. However, in the circumstances existing at the date of death, something more was required to meet his moral obligation to her.

5. The Relevance of Mrs. Steernberg's Conduct

[147] The children claim that Mrs. Steernberg's behaviour both before and after Mr. Steernberg's death should be considered in assessing her WVA claim. However, as discussed, conduct after death is not relevant to this analysis.

[148] With respect to conduct before his death, they say in essence that she treated him badly and was much more concerned about getting him to change his Will than she was about his well-being. It can be seen from my findings of fact and review of the legal principles that apply that I do not accept that there was misconduct that would disentitle Mrs. Steernberg.

6. Mr. Steernberg's Moral Obligations to his Children

[149] Mr. Steernberg had a legally enforceable moral obligation to his natural children, but not to James Ellerton. A major aspect of Mr. Steernberg's moral obligations to his children is the fact that the vast majority of his Estate involved assets that he and his children's mother, Jean Steernberg, accumulated and which he received upon her death. Mr. Steernberg and Jean Steernberg were separated at the time of her death; the evidence is that he did not honour her dying wishes. He did however assure the children that the legacy created by their mother would stay within the family. There was also an understanding between Mr. Steernberg and his children that they would inherit the bulk of his Estate.

[150] The inheritance will also be of financial assistance to each of the children. Each of them has done well in life. However, all of the children have financial obligations. None of them can be considered wealthy. Rik Steernberg works as a Manager of the Traffic Department at GT Teleservices in Saskatoon, Saskatchewan. He has three children, Peter, Marie and Trudy Jean. Julianna Steernberg is a single mother. Her daughter is Jean Marie. She has recently been re-employed in the film industry as an audio consultant following an injury.

[151] Maria Steernberg Hanson has been a highly accomplished marine photographer for some 25 years and has her own business, Seasnaps. She was involved in an airplane accident in May 2004, just before Mr. Steernberg died and was severely injured. She may not be able to return to her career. Patricia Steernberg works part-time for a logging company in Gibsons doing forestry silvaculture on the Sunshine Coast. She and her long time partner Fraser Bakewell have two children, Robeline and Eric.

[152] James Ellerton is retired from the military. He lives in Prince George and has been married to his wife, Lou, for 37 years. They have four children, one of whom is adopted and autistic. Their special needs child is now an adult and they still partially financially support her. They also look after three special needs children in their home; this is funded by the Ministry of Social Services.

[153] Mr. Steernberg met his moral obligation to his children in his Will.

IV. CONCLUSION

[154] I have concluded that the Will addresses Mr. Steernberg's moral obligation to his children and many aspects of his legal and moral obligations to Mrs. Steernberg. It does not go quite far enough in addressing all aspects of his legal and moral obligations to his wife. While he was entitled to choose among a wide range of options to meet his legal and moral obligations to her the option he chose fell somewhat below the range. This estate is large

enough to accommodate all his obligations. As a result the Will does not make adequate provision for the proper maintenance and support of Mrs. Steernberg as that term is defined in Tataryn.

[155] It is adequate, just and equitable that the Will be varied to provide that Mrs. Steernberg receives 15% of the Estate rather than 10%, and the children, including Mr. Ellerton, each receive 17%, rather than 18%.

[156] The parties have agreed that there will be a further hearing with respect to costs generally and with respect to Mrs. Steernberg's concern that counsel for the executor and the children took a substantial sum of money out of the Estate for legal fees before the trial started.

"D. Martinson, J."

The Honourable Madam Justice D. Martinson

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