

CANADA / JUDGMENT

Tom v. Tang

2023 BCCA 221

COURT

British Columbia Court of Appeal

DECIDED

2 June 2023

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2023 BCCA 221 Tom v. Tang

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Tom v. Tang,

2023 BCCA 221

Date: 20230602

Docket: CA47649

Between:

Samsun Tom and Rose Tsai, both personally and in their
capacities as executors of the Estate of Bo Kam Tom, Deceased

Appellants

(Defendants)

And

Linda Tang, Faye Wong and Jack Tom

Respondents

(Plaintiffs)

Before:

The Honourable Mr. Justice Harris

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated July 16, 2021 (Tang v. Tom, 2021 BCSC 1399, Vancouver Docket S172155).

Counsel for the Appellants:

J. Whyte

S. Hobson, Articled Student

Counsel for the Respondents:

R.D. Lee

J.L. Driedger

Place and Date of Hearing:

Vancouver, British Columbia

February 14, 2023

Place and Date of Judgment:

Vancouver, British Columbia

June 2, 2023

Written Reasons by:

The Honourable Madam Justice Fenlon

Concurred in by:

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Butler

Summary:

The testator left a will in which she gave 85% of her estate to two of her children, the appellants, as recognition for the care they provided her in the last three years of her life. The testator's three other children, the respondents, who were each given 5% of the estate, brought a successful application under the Wills, Estates and Succession Act to vary the will. The appellants appeal this order and say the jurisprudence of this court requires that the testator's wishes be respected, as she had valid and rational reasons for the distribution she made. The respondents submit that this jurisprudence is inconsistent with the objective judicious testator test mandated by the Supreme Court of Canada, including in *Tataryn v. Tataryn Estate*.

Held: Appeal allowed in part. The cases relied on by the appellants, *Bell v. Roy Estate*, *Kelly v. Baker and Hall v. Hall*, do not stand for the principle that a testator's unequal treatment of adult children must be deferred to if the reasons given for the unequal distribution are valid and rational. Those cases, read in context, recognize that a testator's moral duty to adult children

must be assessed using the objective standard of the reasonable testator, and provide that the moral duty may be negated where there is just cause. Here, the testator did not meet the objective standard of a judicious parent, given that each child had a significant moral claim arising from their contributions to the family economy. To address this, while still respecting the testator's desire to reward the appellants, the will is varied to grant the appellants each 30% of the estate and the respondents each 13.3%.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

- [1] This appeal addresses the perceived conflict between the decisions of this Court in *Bell v. Roy Estate* (1993), 75 B.C.L.R. (2d) 213, 1993 CanLII 1262 (C.A.) [Bell CA], *Kelly v. Baker* (1996), 82 B.C.A.C. 150, 1996 CanLII 1596 [Kelly], and *Hall v. Hall*, 2011 BCCA 354 and the Supreme Court of Canada's decision in *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, 1994 CanLII 51.
- [2] The parties to this appeal are five siblings who have fallen out over the distribution of their mother's estate. Shortly before her death, the testator changed a long-standing will that gave each of the children an equal share of her property. She gave the two appellants, who had lived with her and provided the primary care for her in the last three years of her life, about 85% of the estate; she gave the other three children about 5% each. The three whose shares in the estate had been reduced commenced a wills variation action and one of them also sued in unjust enrichment. The unjust enrichment claim was dismissed at trial but the judge varied the will to more evenly distribute the estate. It is that order which is in issue on this appeal, and in particular whether the will should have been upheld given that the testator had valid and rational reasons for leaving significantly less to three of her children.

Background

- [3] The testator, Bo Kam Tom, immigrated to Vancouver in the 1960s with her husband when they were in their late 30s and their five children ranged in age from eight (Jack) to 17 (Samsun). Linda was 13, Faye 12, and Rose ten. (For clarity I will use first names, meaning no disrespect.) No one in the family spoke English when they arrived and they had very little money, living with a relative until they could rent a house. All members of the family worked remarkably hard, contributing whatever they earned to the common family purse. The girls worked at a variety of jobs in their teenage years including peeling shrimp, picking berries and vegetables, and working in a fish cannery. Mr. Tom drove a produce delivery truck and Mrs. Tom worked at a car wash. Samsun worked in his uncle's grocery store for the first two years to repay the money loaned to the family to purchase plane tickets to Canada.
- [4] The judge described the family's improving fortunes this way:

- [11] By July 1971, the family had saved enough money to allow Mr. and Mrs. Tom to purchase a small grocery store with an attached home in New Westminster and the family moved there. With the help of the children, Mrs. Tom got the store up and running in the summer of 1971. When Mr. Tom was satisfied that the store would provide sufficient income, he quit his delivery job and started working at the store full-time. All of the children except Samsun worked part-time at the store until it was sold in 1981. None of them were paid for that work.
- [12] The Tom family practice of the children working at the store without pay and otherwise handing over their pay cheques from other summer jobs to their parents continued throughout the 1970s. The children had the benefit of receiving pocket money, vehicles to commute to school and by and large had their living and school expenses paid for by their parents. The family was able to purchase housing, ultimately purchasing a house on West 64th street in Vancouver ("W.64th") in 1975. All the children have resided at W.64th at different points in their lives, several of them for many years including with their own children. The children also received generous graduation gifts from Mr. and Mrs. Tom upon their respective university graduations.
- [5] Mr. and Mrs. Tom made education of the children a priority. The children entered English language classes soon after arriving in Canada and entered the normal stream of grade school and high school shortly thereafter. Each of the five children obtained university degrees and went on to build a comfortable living for themselves and their families: at para 10.
- [6] The judge described the relationship of the five children with their parents as good and attentive, with those who were in Vancouver seeing the parents frequently, including at the family members' homes, at restaurants and on special occasions. He noted that Faye called her parents daily from Calgary and sent them \$200 every month for over 16 years. Mr. and Mrs. Tom treated the children to two Alaska cruises and some of the children reciprocated by taking their parents on holidays including cruises. Together they bought their parents a new BMW X3 in 2005: at para. 23.
- [7] Mr. Tom was diagnosed with cancer and died in December 2012. All of the children rallied around him and supported their mother during his illness: at para. 24.
- [8] The judge found that in the last three years of Mrs. Tom's life and following the death of her husband, all five children were dutiful and devoted to their mother, visiting or calling regularly, taking her to appointments, dim sum and social activities, staying with her when she needed support and visiting her when she was at the hospital and later the hospice. He noted that "[d]espite some of the normal tensions that arise in any family, there is no suggestion of estrangement nor that any of them were less than devoted and loving children": at para. 25. But the judge accepted that the appellants Rose and Samsun, and Samsun's wife Joyce, were particularly close to Mrs. Tom in the last three years of her life, saying:

[26] However, it is also clear from all the evidence that Rose, Samsun and Joyce were the primary caregivers to Mrs. Tom during the last three years of her life. With the exception of one or two months during those three years, either Rose or Samsun were living with Ms. Tom. Samsun and Joyce had alterations made to their house to accommodate Ms. Tom and she lived with them for extended periods. For many months during those three years, Rose would travel from California to live with her mother at W.64th. Samsun, Rose and Joyce took the primary role in daily care, shopping, exercise, keeping Mrs. Tom company, assisting to manage her medical needs and financial affairs. In late 2014, Mrs. Tom was injured in a motor vehicle accident and was diagnosed with cancer. Her care needs increased significantly in the last fourteen months of her life during which Samsun, Rose and Joyce remained the primary supports.

[27] While all the children were involved in her care and support, there is no question that Samsun, Rose and Joyce played a significantly greater role in caring for Mrs. Tom during the last three years of her life.

[Emphasis added.]

[9] In November 2014 Mrs. Tom went to see a lawyer, as she wanted to reward Samsun and Rose (the defendants at trial and the appellants on appeal) for their care and companionship by leaving them the house on West 64th Avenue. With some prescience, the lawyer cautioned against that approach, opining that so disproportionate a distribution could give rise to a successful wills variation action. Mrs. Tom did not go through with the change to her will at that time. It was not until just over a year later, on December 22, 2015, only seven days before her death, that Mrs. Tom signed the new will in issue in these proceedings, leaving the West 64th Avenue property--then worth about \$1.7 million--to Samsun and Rose equally and giving all of her children, including Samsun and Rose, an equal share in her remaining assets, worth about \$700,000: at paras. 31, 33-34.

[10] The judge described the effect of this change to the will, saying:

[36] After paying executor fees and other expenses, the net residue of the estate that would have been paid to each of the children at the date of death was in the range \$120,000. In addition, Rose and Samsun would each have received approximately \$850,000 of the value of W.64th. Of the total \$2.3 million value of their mother's estate, the Plaintiffs would each have received just over 5% while Rose and Samsun would each have received approximately 42%. I note that the proportions do not change significantly even if I were to employ the valuation of \$1.5 million for W.64th put forward by the Defendants.

[Emphasis added.]

[11] Prior to trial, the respondents Linda, Faye and Jack (the plaintiffs at trial) withdrew their initial challenge to the validity of the will. They also accepted the authenticity of a letter their mother had written in November 2014 explaining that she wanted to favour Rose and Samsun because they had cared for her and been a comfort to her since her husband's

death. The respondents indeed conceded that Rose and Samsun should receive preferential treatment--they disputed only the magnitude of that preference, contending that the will did not make adequate provision for them, and sought to vary it under s. 60 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13 [WESA] which provides:

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

[12] The judge agreed, saying:

[38] In my view, a variation of Mrs. Tom's will is justified in the circumstances. The purchase of W.64th was made at a time when the family was a joint economic unit, and the contributions of the Tom children to the economic life of the family following their arrival in Canada was substantial. While I accept that Rose and Samsun should be recognized for their significant sacrifices in the last three years of Mrs. Tom's life, I find that the distribution of the assets in the will does not make adequate, just, and equitable provision for the Plaintiffs in the overall circumstances of the case.

He concluded that Rose and Samsun (through his estate, as he had passed away before trial) should receive specific gifts of \$300,000 each, with the remainder of the estate to be divided equally among the five siblings. He viewed this variation as striking an appropriate balance between Mrs. Tom's clear intent to recognize the role of Samsun and Rose, and to meet her moral obligations to her other children: at para. 40.

Issues on appeal

[13] The appellants challenge this variation; they identified three grounds of appeal, contending the judge erred by:

1. Failing to give effect to Mrs. Tom's valid and rational reasons for the unequal distribution of her estate;
2. Finding that Mrs. Tom did not understand the value of her estate; and
3. Failing to consider all of the factors relevant to assessing Mrs. Tom's moral duty to her adult children.

Standard of review

[14] An appeal court in a wills variation proceeding is in the same position as the trial judge; it is not required to defer to the trial judge's exercise of discretion: *Tataryn* at 813.

- [15] This standard of review differs markedly from the standard of review usually applied to discretionary decisions, as articulated in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19:
- [27] A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3, at pp. 76-77.
- [16] Justice Wilson explained the reason for this departure from the usual standard of review in *Pelech v. Pelech*, [1987] 1 S.C.R. 801, 1987 CanLII 57. She identified the statutory language as granting the right of appeal to a party that deemed itself prejudicially affected by a decision at first instance. She concluded that this very broad statutory right of appeal could only be given effect if the appellate court were able to intervene on the same basis as the trial judge in order to correct the prejudice complained of: *Pelech* at 817. In other words, as the statute allows an appeal where a party alleges only that they have been prejudiced by an order, that party should not also have to demonstrate the kind of errors articulated in *Penner*--which would constitute a higher bar--in order to receive a remedy.
- [17] This broad right of appeal continues to be reflected in WESA, the current version of the legislation:
- 72 A person who considers himself or herself prejudicially affected by an order under this Division may appeal to the Court of Appeal.
- [18] Deference is owed, however, to the judge's findings of fact, which must be accepted absent palpable and overriding error: *Kish v. Sobchak Estate*, 2016 BCCA 65 at paras. 43-45.
- [19] I turn now to the first ground of appeal.
1. Failing to give effect to the testator's valid and rational reasons for preferring Rose and Samsun: the perceived conflict between Bell/Kelly and Tataryn
- [20] The appellants argue that the judge erred in varying the will because he failed to recognize that mere unequal treatment of children is not a basis for varying a will: *Dunsdon v. Dunsdon*, 2012 BCSC 1274 at para. 136. They point to a long line of cases in which, they say, courts have declined to vary wills providing for significantly unequal treatment of adult children as long as the testator had valid (i.e., factually true) and rational (i.e., logically connected) reasons for that disposition, including *Bell CA* and *Kelly*. They say that this Court in *Hall* confirmed these principles, and went further, stating that the testator's reasons for disfavouring an adult child need not be justifiable, in the sense of being objectively reasonable:

[43] [I]t is not necessary to find the reasons were justifiable. It is enough if they were factually valid, and rational in the sense of having a logical connection to the act of disinheritance: *Kelly v. Baker* (1996), 82 B.C.A.C. 150 at para. 58.

[Emphasis added.]

[21] The appellants submit that the principles set out in *Bell CA*, *Kelly* and *Hall* are grounded in testamentary autonomy. Because the property to be distributed under the will belongs to the testator, it is hers presumptively to do with as she pleases. They note that the Supreme Court of Canada in *Tataryn* recognized the important value of testamentary autonomy, saying that "the exercise by the testator of [her] freedom to dispose of [her] property is to be interfered with not lightly, but only insofar as the statute requires": at 824. It follows, they say, that a court in a wills variation proceeding should be governed by, and accept, an explanation from the will-maker for unequal treatment of her adult children if the reasons are both valid and rational. The appellants rely on a number of cases in which such explanations have sufficed to largely preserve the testator's intentions as expressed in their will: *Yee v. Yu*, 2010 BCSC 1464; *Scott-Polson v. Lupkoski*, 2013 BCCA 428; *Trudeau v. Turpin Estate*, 2019 BCSC 150.

[22] The appellants contend that applying the principles set out in *Bell CA*, *Kelly* and *Hall* requires that Mrs. Tom's wishes be respected. They say their mother set out valid and rational reasons for the distribution made in her will. As to validity (i.e., whether the reasons were factually true), the 2014 letter described her reasons for the disposition she made: the appellants had provided her with the things she valued during the last three years of her life by attending to her daily needs, looking after her well-being, living with her, and bringing her comfort. The appellants submit that the respondents cannot show that those reasons were not valid--or were "false or unwarranted", in the terminology of *Bell CA*--given the judge's finding that the appellants "played a significantly greater role in caring for Mrs. Tom during the last three years of her life": at para. 27.

[23] As for whether the reasons were rational (i.e., whether they are logically connected to the act of disinheritance), the trial judge found them to be so, noting that the preference was in recognition of the appellants' significant sacrifice in caring for their mother in the last years of her life and that the respondents conceded that the preferential treatment given the appellants was rational in the circumstances: at para. 32.

[24] The appellants argue that in light of these findings, and without any evidence that one of the children was in financial need, the judge should have declined to vary the will in keeping with *Bell CA*, *Kelly* and *Hall*.

[25] For their part, the respondents say that the decisions in *Bell CA*, *Kelly* and *Hall* are inconsistent with the objective judicious testator test mandated by the Supreme Court of Canada in *Tataryn*. They unsuccessfully sought a five-justice division so that this Court could reconsider its earlier decisions. The respondents contend the *Bell/Kelly* model improperly insulates a will-maker's subjective values from an objective analysis that considers the

judicious parent, society's reasonable expectations, and contemporary community standards as required by Tataryn. The respondents point to a number of cases in which judges of the BC Supreme Court have raised concerns about the apparent conflict between the analytical framework articulated in Bell/Kelly on the one hand and that articulated in Tataryn on the other: see e.g., McBride v. Voth, 2010 BCSC 443 at paras. 135-42 and Hancock v. Hancock, 2014 BCSC 2398 at paras. 52-56.

- [26] I agree that this perceived conflict has been the source of some difficulty and concern in wills variation proceedings. However, and with respect, I conclude that when the cases are read contextually there is no conflict between Tataryn and the line of cases relied on by the appellants. To explain this conclusion, it is necessary to review the relevant cases at some length--once in order to understand the source of the concern, and a second time to resolve it.
- [27] I begin with Bell CA, decided in 1993. The appellants contend that in Bell CA this Court moved away from the long-standing principle established by the Supreme Court of Canada in Walker v. McDermott, [1931] S.C.R. 94, 1930 CanLII 1, that applying wills variation legislation requires judges to assess a will from the view of a "judicious father of a family seeking to discharge both his marital and his parental duty": at para. 96. They posit that in Bell CA, Justice Goldie, writing for the court, tipped the scales away from the objective testator standard called for in Walker, emphasizing instead that the subjective intentions of the testator were to be given effect as long as the reasons for the testator's unequal treatment of their children were rational and valid.
- [28] The appellants submit that in Kelly, (decided in 1996 shortly after Tataryn was released), this court affirmed Bell CA's emphasis on the subjective reasons of the testator, despite the Supreme Court of Canada's reaffirmation of the objective testator standard in Tataryn.
- [29] This divergence from Tataryn is said to have been affirmed by this Court in Hall which, as set out above, stated that "it is not necessary to find the reasons were justifiable. It is enough if they were factually valid, and rational": at para. 43.
- [30] In my view, this reading of Bell CA, Kelly and Hall underscores the importance of Lord Halsbury's caution that "a case is only an authority for what it actually decides". In Quinn v. Leathem, [1901] A.C. 495 (H.L.) at 506, he reasoned:

there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it.

[Emphasis added.]

With that caution in mind, I return to the three cases of concern with a focus on the facts and issues there addressed.

[31] In Bell CA, the testator had drawn a will leaving almost her entire estate to one of her three children and making no provision for the plaintiff daughter. The trial judge's decision is indexed at [1989] B.C.J. No. 1130, [1989] B.C.W.L.D. 1938 (S.C.). In his reasons, the trial judge recognized that the court must proceed from the point of view of a judicious parent, that the concept of moral duty or obligation was essential, and that a judicious testator may consider their moral duty to a family member discharged or depleted where they have been rejected or treated less considerately by that family member, citing *Price v. Lypchuk Estate* (1987), 11 B.C.L.R. (2d) 371, 1987 CanLII 165 (C.A.). The trial judge recognized that a judicious father might disinherit a child for good cause, or might not benefit a child who is already adequately maintained, citing *Dalziel v. Bradford* (1985), 62 B.C.L.R. 215, 1985 CanLII 427 (S.C.).

[32] The trial judge concluded that the testator and her daughter had experienced lengthy periods of no or little communication, that the testator believed she had provided adequate money to her daughter during her lifetime, that her daughter had not been able to care for or assist her, and that her son had provided her with care and company. He concluded that "if the facts were as she believed them to be, [the testator] was entitled to draw the will in the way in which it was drawn" and that the plaintiff had failed to meet her onus, as the person challenging the will, of proving that the circumstances the testator believed existed were not correct: at para. 37.

[33] On appeal, Goldie J.A. began his analysis by recognizing that testators will generally be found to be under a moral obligation not to disinherit any child absent good cause: Bell CA at paras. 20, 21 and 23. He framed the issue before him this way:

24 .[T]he question is whether good cause places a burden on the executor to displace a prima facie right on the part of a disinherited adult child to share in the estate of a deceased parent.

[34] He then reviewed the history of wills variation legislation, rejecting the opinion expressed by Leopold Amighetti, the author of a text on wills and estates, that the object of the legislation was relief of need and that it did not empower the court to substitute its own view of a more appropriate distribution, saying:

33 Mr. Amighetti in his text suggests this state of affairs is attributable to a failure on the part of the courts to identify relief of need as the primary purpose of the Act as distinct from a statutory power enabling the courts to substitute for the testator's views a distribution perceived to be more seemly. Whether this be so is not a matter for judicial reconsideration in this Court: the principle of a moral duty as stated in *Walker v. McDermott* is firmly established and its authority was reaffirmed by the Supreme Court of Canada in *McCarvill v. Jones*, [1962] S.C.R. 273 -- an appeal from British Columbia.

[Emphasis added.]

[35] Having thus squarely affirmed the nature of the moral duty as stated in Walker, which recognized an objective standard of assessment, Goldie J.A. returned to the issue on appeal: whether the testator had just cause to disinherit the appellant, and where the burden of proof lay. He concluded that the trial judge was right to find there was evidence supporting the testator's reasons for disinheriting her daughter, and that the burden then shifted to the plaintiff to show that the reasons were false or unwarranted: Bell CA at paras. 35-36. Justice Goldie then said:

36 I think [the trial judge] was right both in this approach and in his finding that the burden then lay upon [the plaintiff] to show that the reasons [the testator] acted upon were false or unwarranted. This places more emphasis on the intentions of the testatrix and less on those which might be imputed to her by reference to the reasonable testator. In my view this is the correct conclusion to be drawn from the 1971 amendment to s. 2 of the Act. Chapter 64 of S.B.C. 1971 added to s. 2, subss. (3) and (4) which read as follows:

- (3) In an action under this section 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 his will; or
 - (b) for not making adequate provision for his wife, husband or children, including any statement in writing signed by the testator.
- (4) In estimating the weight to be given to a statement referred to in subsection (3), the court shall have regard to all the circumstances from which an inference may reasonably be drawn as to the accuracy or otherwise of the statement.

37 It is clear the legislature wished to ensure that otherwise inadmissible evidence was before the court as an aid to the court in the exercise of its discretion.

38 Moreover, it is apparent from subs. (4) that the weight to be given evidence of the testator's reasons is affected by its accuracy and not by morally acceptable or unacceptable content. I do not say the legislature swept away any objectively determined moral duty. I do say, however, that the actual intentions of the testator are to be given an effect which is largely denied by reliance upon the notionally objective reasonable testator.

[Emphasis added.]

[36] There are a number of points to be drawn from a careful reading of this part of the reasons. First, in the context of Goldie J.A.'s earlier recognition that the moral duty of the testator must be assessed from the standpoint of a reasonable testator (para. 29) and of the principles firmly established in Walker (para. 33), paras. 36-38 cannot be read as a departure from an objective analysis. They are, rather, a recognition that the analytical framework also requires the court to take into account the principle of testamentary autonomy (subsequently confirmed in Tataryn at 824) and the long line of cases recognizing that the moral duty of a testator to provide for adult children is negated where there is just cause.

- [37] Second, these paragraphs record Goldie J.A.'s view that the 1971 amendment to the WVA, which empowered the court to consider evidence of a testator's reasons that would otherwise be inadmissible, supported his conclusion that the moral duty analysis must include consideration of the testator's reasons for disinheriting a beneficiary.
- [38] Third, these paragraphs are an interpretation of ss. 2(3) and (4) of the WVA (now s. 62 of WESA). At para. 38, Goldie J.A. notes the Legislature's direction that the weight to be given to a statement will depend on how accurate that statement is, not on whether the reasons in the statement are morally acceptable. In short, he found that ss. 2(3) and (4), as evidentiary provisions, were concerned with understanding the testator's reasons, not with assessing their objective merit from the point of view of a reasonable testator and modern community standards. The final sentence of para. 38, repeated below for ease of reference, is a recognition that the court must give some consideration to the subjective intentions of the testator--which would not be the case if the court were to use only the objective yardstick of the judicious testator:
- [38] [T]he actual intentions of the testator are to be given an effect which is largely denied by reliance upon the notionally objective reasonable testator.
- [39] In summary, in my view Bell CA did not reject the objective judicious parent standard. Goldie J.A. was addressing the question of who bore the onus of establishing "good cause" to disinherit an adult child, and how that could be demonstrated. He recognized the long-standing principle that a testator's moral duty to an adult child may be negated where the testator has objectively valid and rational reasons to disinherit--i.e., just cause. It is, accordingly, hardly surprising that the decision focused on whether the testator's reasons for disinheriting the appellant sufficed to negate her moral duty to her daughter since that was the live issue in the case.
- [40] I turn again to Kelly, decided two years after Tataryn. In that case the plaintiff's mother disinherited him, leaving her entire estate to his three siblings. The plaintiff had left home at 17 and chose to have almost no contact with his parents or siblings. The judge concluded that need was not a factor. As in Bell CA, the central issue on appeal and at trial was whether the testator was justified in excluding the plaintiff from any share in her estate: Kelly at paras. 1-3.
- [41] The trial judge found there was just cause. He admitted into evidence and relied on two letters, one written by the plaintiff's then wife and another written by his father. The letters demonstrated that the plaintiff's parents had tried to reach out to him without success given his fixed determination to have nothing to do with them.
- [42] On appeal, the plaintiff contended the judge erred in admitting these letters. This Court, relying on ss. 2(3) and (4) of the WVA and Bell CA, found the letters to be admissible.

[43] The plaintiff also challenged the judge's finding that his conduct justified the testator's decision to disinherit him. The will specifically referred to the exclusion of the plaintiff as a beneficiary, stating:

About four years ago my adopted son, JAMES PHILIP KELLY, chose to abandon the family and live a life morally unacceptable to us. It is for this reason that I have not included him as a beneficiary in my Will.

The plaintiff submitted that since the will was made in 1974, only four years after he left home, and 16 years before the testator died, the testator did not have a sound basis for saying that he had abandoned the family at the time the will was made: Kelly at para. 54.

[44] Writing for a unanimous Court, Justice Finch (as he then was), acknowledged that the reasons found by the trial judge for the testator's disinheritance of the plaintiff went beyond those expressed in the will, as the trial judge took into account the testator's view of the plaintiff's conduct shortly before she died. It is in the context of this dispute over the relevant timing of the testator's reasons that the critical passage in Kelly must be understood. Justice Finch rejected the notion that the testator's decision to disinherit her son had to be justifiable at the time the will was made, concluding to the contrary that the testator's reasons are to be assessed at the time of death, saying:

58 The law does not require that the reason expressed by the testator in her will, or elsewhere, for disinheriting the appellant be justifiable. It is sufficient if there were valid and rational reasons at the time of her death - valid in the sense of being based on fact; rational in the sense that there is a logical connection between the reasons and the act of disinheritance.

[Emphasis added.]

[45] Read in light of the issue before him, it is apparent that Finch J.A. was addressing the timing of the assessment of justifiability--he was not saying that the reasons for disinheriting a child do not need to be objectively justifiable. The confusion that has arisen around this passage could have been avoided if the words "at the time the will is made" had been inserted after the words "the law does not require that the reason expressed by the testator in her will, or elsewhere, for disinheriting the appellant be justifiable". However, those words are implicit in the reasoning, given the issue being addressed.

[46] In short, nothing in para. 58 suggests that a testator's reasons for disinheriting a child need not be objectively justifiable in accordance with the standard of a reasonable and judicious parent. Indeed, the opening lines of para. 58 expressly recognize that the task of the court in a wills variation proceeding "is to decide whether, at the date of the testator's death, her will was consistent with the discharge of a good parent of her duties to her family" (emphasis added).

- [47] I turn finally to Hall, which is said to adopt a framework of accepting subjective testamentary intentions rather than the objective judicious testator framework called for in Tataryn. In Hall, the testator disinherited the plaintiff who had been given to serial estrangements from his parents: at paras. 1-2. The trial judge found the plaintiff's rejection of his mother negated any moral obligation she owed him: at para. 26.
- [48] On appeal, the plaintiff raised three issues. The first two related to the admissibility of evidence, and were not acceded to. The third and central issue on appeal was whether the plaintiff was entitled to an equal share of his mother's estate. In addressing this ground of appeal, Justice Nielsen, writing for a unanimous court, began by reviewing the analytical framework in Tataryn. She described the question on appeal as whether the trial judge erred in finding that the testator's "testamentary autonomy trumped any moral obligation she owed to [the plaintiff]": at para. 40. She then said:
- [43] [The testator] gave three reasons for disinheriting [the plaintiff]. The first was his lengthy estrangement from her. The second was her view that he was capable of being financially independent. The third was the comparative love and support she had received from [the plaintiff's brother] and his family, whom she viewed as her "only family". To succeed in his challenge to her will, [the plaintiff] must establish these reasons were false or unwarranted: *Bell v. Roy Estate* (1993), 75 B.C.L.R. (2d) 213 (C.A.) at para. 36. In considering that proposition, it is not necessary to find the reasons were justifiable. It is enough if they were factually valid, and rational in the sense of having a logical connection to the act of disinheritance: *Kelly v. Baker* (1996), 82 B.C.A.C. 150 at para. 58.
- [Emphasis added.]
- [49] Although I agree that the words I have underlined in the passage above suggest that the testator's reasons do not have to be objectively reasonable, the court is quoting from para. 58 of *Kelly*, which, as I have demonstrated, does not stand for that proposition. In any event, the court in *Hall* was concerned with whether the plaintiff had met his burden of proving that the facts his mother had understood to be true and relied on in making her will were false or unwarranted and did not negate her moral duty to him. Immediately following the much quoted passage at para. 43, Nielsen J.A. went on at paras. 44-48 to assess whether the family history and dynamics negated the moral duty that the testator would otherwise have owed to her son to provide him with a share of the estate, concluding:
- [48] In essence, [the testator] owed no legal duty to [the plaintiff]. Nor did the evidence reveal a moral obligation that entitled him to share in her estate. I am satisfied the trial judge made no error in finding her reasons for disposing of her estate in the manner she chose were not false or unwarranted, and that her will was entitled to deference.

[Emphasis added.]

- [50] Justice Nielsen therefore determined that the disinheritance was in accordance with the standard of a judicious parent. Apart from the unfortunate paraphrasing of Kelly in para. 43, there is nothing in the actual analysis to suggest that the court in Hall departed from the Tataryn framework, and in particular an objective assessment of the testator's moral duty to her adult children.
- [51] In summary, Bell CA, Kelly and Hall do not stand for the principle that a testator's unequal treatment of adult children must be deferred to, without regard to the objective standard of the reasonable testator and current social norms, as long as the subjective reasons given for the unequal distribution are valid and rational. These cases recognize instead that a testator's moral duty to adult children must be assessed from the viewpoint of a reasonable testator, and that the moral duty may be negated where there is just cause.
- [52] It follows that the judge did not err when he assessed the respondents' application to vary the will using the objective standard of the judicious parent mandated by Tataryn.
- [53] Before turning to the ultimate question of whether the will should be varied in the circumstances of this case, it is helpful to consider the second and third grounds of appeal: whether the judge erred in finding the testator did not understand the value of her estate, and whether the judge failed to consider relevant factors in applying the Tataryn framework.
2. Finding the testator did not understand the value of her estate
- [54] The judge considered whether the testator understood the value of her estate, saying:
- [37] While it is clear Mrs. Tom sought to favour Rose and Samsun, it is less apparent on the evidence before me how clearly she understood the scale of the unequal treatment under the will. There was some evidence that Mrs. Tom followed the value of her stock portfolio quite closely during some period between 2013 and 2015. However, it is less clear if she was still following her stocks closely as her health deteriorated in the latter part of 2015. There is no evidence before me about the valuation of her stock portfolio between 2013 and the date of her death. It is also unclear what Mrs. Tom would have understood the value of W.64th to be at the relevant times and in particular in December 2015.
- [Emphasis added.]
- [55] The appellants acknowledge that the language used by the judge is equivocal and does not amount to a clear finding that their mother did not appreciate the value of her estate. But they say the judge must have relied on her lack of awareness as a factor since he immediately moved in the next paragraph to the conclusion that a variation of Mrs. Tom's will was justified in the circumstances.

- [56] The respondents contend it was open to the judge to make this finding. They submit there was no evidence that the lawyer who drew the will had explained the implications of leaving the house to Samsun and Rose as a specific legacy. They point out that Mrs. Tom may not have appreciated that all of the estate expenses, including the executor's fees and tax penalties would be paid out of the residue, and therefore would disproportionately diminish the respondents' share.
- [57] As I read this passage of the reasons, the judge found only that it was not clear on the record whether Mrs. Tom fully understood the value of her stock portfolio and the West 64th Avenue property. Given that conclusion, the judge should have resolved the question by reference to the burden of proof. As the challengers to the will, the burden lay on the plaintiffs (the respondents on appeal) to prove that their mother did not understand the effect of the dispositions she made. They led no evidence that she was not aware of the value of her assets. To the contrary, the limited evidence before the court on this question pointed to the deceased knowing that she was treating the appellants substantially differently from the respondents in her will, and that she intended to do so. The court had before it evidence that Mrs. Tom followed her stock portfolio regularly, seemingly as a form of entertainment, until at least 2015. In addition, in the ordinary course, Mrs. Tom would have received an annual notice of assessment from BC Assessment setting out the value of her home. Finally, Mrs. Tom's lawyer informed her in November 2014 that he believed the distribution she intended to include in her will was disproportionate enough that it would give rise to an action to vary the will, which he thought would likely be successful.
- [58] In light of this record and the burden of proof, it was not open to the judge to rely on the testator's lack of knowledge of the value of her estate as a basis for varying the will. However, even assuming that he did so, it would not constitute an overriding error. Although the judge in the first line of the next paragraph stated his conclusion that the will should be varied, he expressly relied on the moral obligation of the testator to all of her children given their contributions to the acquisition of the estate:
- [38] In my view, a variation of Mrs. Tom's will is justified in the circumstances. The purchase of W. 64th was made at a time when the family was a joint economic unit, and the contributions of the Tom children to the economic life of the family following their arrival in Canada was substantial. While I accept that Rose and Samsun should be recognized for their significant sacrifices in the last three years of Mrs. Tom's life, I find that the distribution of the assets in the will does not make adequate, just, and equitable provision for the Plaintiffs in the overall circumstances of the case.
- [59] In summary, I would not give effect to this ground of appeal.
3. The judge failed to consider relevant factors in assessing the testator's will
- [60] It is convenient to deal with this ground of appeal in conjunction with the ultimate issue--whether the will should be varied.

[61] The appellants contend the trial judge erred in focusing exclusively on the contributions of the respondents to the family economic unit in the 1960s and 1970s. They say he overlooked all the other factors relevant to an assessment of whether a testator has fulfilled a moral duty to independent adult children, which include:

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

(See e.g., *Dunsdon* at para. 134; *Yee* at para. 16.)

[62] In the present case, the appellants say that none of these factors gave rise to any particular duty on the part of the testator to provide for the respondents, noting that the respondents were not disinherited, but instead were to receive between \$100,000 to \$120,000 under the terms of the will. Most importantly, they say the judge failed to consider the countervailing benefits received by all of the children which negated any enhanced moral duty on the part of their mother to remember them in her will. The appellants point to the testator's findings in relation to Linda's unsuccessful unjust enrichment claim in support of this submission. They say Mrs. Tom's moral obligation to her five children was therefore a neutral factor, and that she was entitled to recognize and reward the particular moral duty she had to the appellants Rose and Samsun, who provided her with care and comfort in the last three years of her life.

[63] The respondents take a different view. They recognize that many of the factors to be considered are not significant in the present case, including need and the children's standard of living since all are financially independent adults. They acknowledge there are no competing legal claims on appeal, and that the estate was large enough to satisfy all of the testator's moral obligations to her children. However, in their view it is significant that most of Mrs. Tom's \$2.3 million estate consists of West 64th Avenue which was purchased as a direct result of the labour and financial contributions of the entire Tom family, such that leaving that asset specifically to Samsun and Rose results in an unfair and disproportionate

benefit to them.

- [64] Although the judge did not review all of the factors listed above, he was not required to do so. He focused on the relevant points, reviewing the size of the estate, determining that none of the children had a legal claim against it, and finding that the live issue before him was whether Mrs. Tom had made adequate provision for her children in light of their moral claims to a share in her estate, and in particular whether their early contributions required something greater than a 5% share.
- [65] The appellants stress that in the part of his reasons addressing the wills variation claim, the judge does not refer to the benefits received by all of the children, which they say adequately compensated them for their contributions to the family. But he was alive to those benefits, having reviewed them in considerable detail in his findings relating to Linda's claim for unjust enrichment: at paras. 9, 12, 14 and 20. The finding at para. 22 that all of the children had "a moral claim to a portion of the estate arising in part from the functioning of the family as a single economic unit during the years leading up to the purchase of W. 64th" evidently relates to the wills variation analysis.
- [66] As I have earlier noted, the judge found, and the respondents indeed conceded, that Rose and Samsun deserved to be preferred because of their significantly greater role in caring for their mother in the last three years of her life: at para. 27. But this was not a case of the testator's moral obligation to her other three children being reduced by reason of estrangement or their misconduct. The judge found all five children continued to be dutiful, devoted and loving to their mother: at para. 25. It is not the decision to favour Rose and Samsun that calls into question whether the will provided adequately for the respondents--it is rather the degree to which they were favoured.
- [67] I agree with the judge's assessment that Mrs. Tom did not meet the objective standard of a judicious parent in giving almost 85% of her estate to Rose and Samsun, and roughly 5% to each of Faye, Linda and Jack. The moral claim arising from the children's contributions to the family economy--which enabled Mr. and Mrs. Tom to purchase a store, a home, and ultimately the West 64th Avenue property and to retire when Mrs. Tom was 53--was significant. Those contributions were markedly different from the kind of chores and contributions to a family enterprise provided by children and adolescents, which is a normal part of family life and in general, not compensable: see also *Antrobus v. Antrobus*, 2009 BCSC 1341 at para. 185, aff'd 2010 BCCA 356; *McDonald v. McDonald*, 2017 BCCA 255 at paras. 74-78. The parties were in fact adults during the bulk of the family's income generating years. Linda turned 19 in 1972, the year after the store was purchased. Faye turned 19 the following year and Jack, the youngest, turned 19 in 1977. Rose and Samsun were also adults contributing to the family economic unit at this time. Further, all of the children had been equally close to and supportive of their mother for her entire life, other than during the last three years.

- [68] I turn now to what would constitute adequate provision. The judge made an order giving Rose and Samsun a specific bequest of \$300,000, directed the West 64th Avenue property to be sold and the rest of the estate to be shared five ways equally. In my view, given the uncertainty relating to the ultimate value of the estate to be distributed, it is preferable to designate percentage distributions: *Graham v. Chalmers*, 2010 BCCA 13 at para. 42. It is also important to respect Mrs. Tom's desire to significantly benefit Rose and Samsun. I would accordingly retain the direction that the West 64th Avenue property be sold, but direct that the appellants should each receive 30% of the entire estate, and that the remaining 40% should be shared equally among Faye, Linda and Jack for an award of about 13.3% each. The testator's desire to reward Samsun and Rose with a larger share of her estate is met by giving them just over twice as much of the estate.
- [69] In real terms, assuming the value of \$2.3 million found by the judge, his award is very similar: \$300,000 to each of the appellants plus 20% of the remaining \$1.7 million value of the estate, or \$340,000, would give each of the appellants \$640,000 or roughly 27.8% of the estate, and each of the respondents \$340,000, or approximately 14.7% of the estate, close to the percentages I would put in place. However if, as seems likely, the value of the real property has increased since trial, the order I would make will provide the appellants with a more generous sum than would be the case under the trial order, because the use of percentages will preserve the distinction between the distributions to the appellants and respondents over the entire estate, which the judge's order would not do.

Disposition

- [70] The appeal is allowed in part by directing that Rose and Samsun each receive 30% of the estate, and Linda, Faye and Jack each receive an equal share of the remaining 40% of the estate. Given that success has been divided, the parties should bear their own costs of the appeal.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Mr. Justice Butler"

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