

CANADA / JUDGMENT

Unger v. Unger Estate

2017 BCSC 1946

COURT

Supreme Court of British Columbia

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2017 BCSC 1946 Unger v. Unger Estate

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Unger v. Unger Estate,

2017 BCSC 1946

Date: 20171030

Docket: S154150

Registry: Vancouver

Between:

Lillis Belle Unger

also known as Lilis Bell Lenton Unger

also known as Lillas Belle Linten Unger

Plaintiff

And

Brenda Lorraine Ramsey, in her capacity as personal representative of the

Estate of Jacob Unger, also known as Jake Unger,

Marion Lindy, Brenda Lorraine Ramsey,

Jack David Unger and William Martin Unger

Defendants

Corrected Judgment: The cover page of the judgment

was corrected on February 2, 2018.

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for the Plaintiff:

Robert J. Cuddeford

Counsel for the Defendants:

Duncan K. Magnus

S. Barber (Articled Student)

Place and Dates of Trial:

Vancouver, B.C.

July 24-28, 31,

August 1 and 3, 2017

Place and Date of Judgment:

Vancouver, B.C.

October 30, 2017

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Introduction

[1] At this trial, the plaintiff Lillis Belle Unger, the wife of the deceased testator Mr. Jacob Unger, seeks a variation under the Wills Variation Act, R.S.B.C. 1996, c. 490 [WVA], of her husband's will of September 24, 2003 (the "Will"). She asserts that the Will did not make adequate, just and equitable provision for her and seeks a declaration to that effect and a provision that the Court considers adequate, just and equitable in the circumstances.

[2] The testator was born on April 7, 1931 and died on September 7, 2013 at the age of 82.

[3] The plaintiff is the second wife of the deceased. She was born on October 3, 1937 and is now 80 years old. Their relationship was lengthy and spanned approximately 34 years. They were married on March 13, 1981. The plaintiff had two children from her first marriage. The deceased had four children from his first marriage. All of the children are adults.

[4] The Will provided that after certain bequests the residue of the estate was to be divided equally among the four children of the deceased. The Will provided for two specific financial bequests of \$20,000 to his two daughters, Lorrain and Marion. The Will included the following clause:

I have not provided for my wife, LILAS BELL UNGER, in my Will because during my lifetime I caused to be transferred to my wife title to 50% of the property located at 22674 132nd Avenue, Maple Ridge, British Columbia and legally described as PID 008-852-243 Lot 14 Section 29 Township 12 New Westminster District Plan 25759 without any contribution from her to the acquisition or preservation of that property.

[5] The plaintiff's position is that a variation of her husband's Will is justified based on her legal and moral claims arising from their 34-year relationship and the promise made by the deceased to care for her.

[6] The main asset of the estate is 50% of the net sale proceeds from the sale of the matrimonial home located at 22674 132nd Avenue, Maple Ridge and various chattels located in the matrimonial home.

[7] The plaintiff seeks to vary the Will to provide a specific bequest to her of \$375,000.

[8] The defendants oppose any variation to the Will saying that it provided adequate provision to the plaintiff, and that any variation would be unfair to the defendants given the value of the plaintiff's assets and the value of the estate. The defendants further claim that the plaintiff wrongfully disposed of or converted chattels that belonged to the estate and should account for their value.

Facts

- [9] The plaintiff was born October 3, 1937 in Nova Scotia. She was married to Norman Carson and had two children, Brian and Mickey Carson. In the late 1970s she was living in Surrey and met Jacob ("Jake") Unger. Mr. Unger's son, Bill, was friends with her son, Mickey.
- [10] The plaintiff had last worked in 1966-67 when she worked cooking in a camp.
- [11] Mr. Unger had four children with his first wife: Brenda Lorraine Ramsey ("Lorraine"), Jack Unger ("Jack"), Bill Unger ("Bill") and Marion Conkey ("Marion").
- [12] Mr. Unger purchased a fishing boat and licence and began work as a commercial fisherman in the late 1960s.
- [13] In approximately 1968, Mr. Unger purchased a five-acre property in Surrey, BC (the "Surrey Property"). At first it only had a shack on it but over the next five years the family built a house on the property.
- [14] His children all assisted with clearing the land and building the house. The children also went out fishing with their father during the summer months.
- [15] In approximately 1971, Mr. Unger and his first wife divorced. Mr. Unger began a relationship with another woman which ended at some point in time.
- [16] After meeting Mr. Unger the plaintiff agreed to move in with him and break up with Mr. Carson. She moved in with Mr. Unger in approximately 1979 and lived at the Surrey Property. At the time, Brian was a young child and she agreed to leave Brian with Mr. Carson. At this time, Mr. Unger was still working on his fishing boat.
- [17] Mr. Unger paid for the plaintiff's divorce from Mr. Carson. The plaintiff did not make any claim against Mr. Carson since Mr. Unger did not want her to do so. She did not have any assets. The parties lived at the Surrey Property for approximately two years.
- [18] On March 13, 1981, Mr. Unger and the plaintiff were married. Shortly after the marriage Mr. Unger sold the Surrey Property for \$425,000 and the fishing boat and licence for approximately \$225,000. A portion of these funds were used to purchase the property located at 22674 132nd Avenue, Maple Ridge, BC (the "Matrimonial Home"). The Matrimonial Home was purchased for \$220,000 and it was registered in both their names as joint tenants.
- [19] On June 1, 1981, Mr. Unger provided to each of his four children cheques for \$10,000. At least some of his children's understanding was that this sum was to compensate them for working on the fishing boat.
- [20] The remaining funds were used to support the couple.
- [21] In June 1982, Mr. Unger purchased a lot adjacent to the Matrimonial Home at 22696 132nd in Maple Ridge (the "22696 Property"). This property was placed in his name alone. It was sold in approximately 1990 for \$265,000.

- [22] In approximately March 1993, Mr. Unger and the plaintiff separated. The plaintiff commenced matrimonial proceedings. On July 7, 1993, Master Tokarek issued an order declaring that the parties were irreconcilable pursuant s. 44 of the then Family Relations Act, R.S.B.C. 1996, c. 128 [FRA]. As a result of this order, the property, including the Matrimonial Home held in joint tenancy, was severed.
- [23] Mr. Unger registered the severance of the joint tenancy on the title to the Matrimonial Home. As such, at the time of Mr. Unger's death the Matrimonial Home was no longer held by Mr. Unger and the plaintiff as joint tenants.
- [24] In approximately October 1993, the plaintiff and Mr. Unger reconciled. The plaintiff testified that after the reconciliation Mr. Unger requested that she attend court to support him in a domestic assault case that had been brought arising out of Mr. Unger's assault of the plaintiff. The plaintiff attended and testified and Mr. Unger was given probation.
- [25] The plaintiff remained living with Mr. Unger in the Matrimonial Home until approximately March 2013 when Mr. Unger had to move to an assisted living facility.
- [26] On September 24, 2003, Mr. Unger and Lorrain attended at a law firm in Chilliwack and the Will was signed. At this time Mr. Unger and the plaintiff were living together in the Matrimonial Home. The Will appoints Lorrain as the Executrix and Trustee of the Will.
- [27] During their retirement years the couple lived in the Matrimonial Home with both of them providing services to maintain and enhance the property. The only income the couple earned was through a couple of years of swap meets that they attended together. They also travelled to the United States for many years during the winter months in an RV. They lived a frugal lifestyle.
- [28] Bill testified that his father lent him \$10,000 to buy a four-wheel drive and to assist in purchasing a house. He did not pay his father back. Jack testified that his father lent him \$20,000 to help him build a house. He paid his father back over a number of years. Lorrain testified that her father told her that he had lent money to the boys and so she and Marion should get a little extra under the Will.
- [29] In May 2010, Mr. Unger transferred approximately \$100,000 into a bank account held jointly by him and Lorrain. Lorrain testified that Mr. Unger told her that his wife was getting it all and he wanted his kids to have something.
- [30] From approximately 2010, the plaintiff suffered a series of health issues. She was hospitalized in October 2012 for many weeks and was in intensive care. She was discharged and ended up staying with Mickey for three months, who assisted in her convalescence. The plaintiff also suffers from rheumatoid arthritis and osteoarthritis, and has suffered a mini stroke.
- [31] By 2013, Mr. Unger was showing signs of dementia. He would wander through the home. Mickey came to stay at the Matrimonial Home to assist the plaintiff in caring for Mr. Unger.

- [32] By the end of March 2013, the plaintiff was not able to care for Mr. Unger at home, and he was placed into an assisted living facility. The plaintiff continued to visit her husband daily while he was in the facility and was present when he passed away on September 7, 2013.
- [33] Mr. Unger was a challenging individual who was not a supportive husband or father in many ways. The evidence supported that he was physically and emotionally abusive to some of his children and the plaintiff.
- [34] The plaintiff's children are both financially independent and in good health.

Financial Circumstances of the Defendants

- [35] Mr. Unger's children are all adults and have been financially independent of their father for many years.
- [36] Marion, the eldest daughter, lived with her father on the Surrey Property until she was 16 and then left home. She lives in Fort Nelson. Her husband has recently passed away. She suffers from a lung disease which requires her to be on oxygen. She needs a lung transplant. She is currently staying with friends but was planning on moving into a seniors' centre. The anticipated cost was \$240 a month. She has not worked since she was diagnosed with a second bout of cancer approximately eight years ago. The only income she receives is \$200 a month in the form of government assistance. She has applied for survivor benefits. She owns a trailer in Fort Nelson which she hopes to sell. She was unsure of how much equity she has in the trailer. She did not visit her father frequently because of the significant distance to travel, her poor health and financial circumstances. She did speak with him on the phone.
- [37] As a result of the significant health and financial constraints faced by Marion, the plaintiff agreed that the specific bequest to her was no longer being challenged and with the consent of all parties an order was made that the specific bequest to Marion should be immediately advanced to assist her with her immediate health and financial needs. It is assumed that this bequest has now been paid.
- [38] Lorrain has primarily worked in customer service jobs. She has no advanced education. She currently resides in a travel trailer which she owns with her husband on a rented plot in Chilliwack. This is her only asset. She currently works for a property management firm in Abbotsford managing two apartment buildings. She earns \$17 an hour. From 2010 to 2014 her income ranged from \$13,000 to \$27,000.
- [39] At the time that Mr. Unger was sick, Lorrain was living in Chetwynd, BC. As a result she was not able to visit her father while he was sick and in the care home. After her father died, she moved to Chilliwack so she could be closer to the issues regarding resolution of the estate.

- [40] Jack owns a dump truck which he uses to earn a living. He lives in a home worth approximately \$1.6 million with mortgages of approximately \$520,000. His home is his only asset aside from the dump truck. He is self-employed. While his father was alive he would see him about once a month. After his father became ill he saw him more frequently.
- [41] Bill, the youngest, had no assets when he separated from his wife in 2007. He has just recently paid off the debts from that separation. His current assets are a boat, pick-up truck and motorcycle. He owns a 25-foot trailer in which he lives. It is on a rented pad. His income in 2013 and 2014 was just over \$70,000. He had a very good relationship with his father and the plaintiff. He tried to see his father once a month. He visited his father more frequently while he was in the care home and hospital.

Financial Circumstances of the Plaintiff

- [42] When Mr. Unger sold his fishing boat and licence he placed \$20,000 in a tax-free savings account ("TFSA") and gave \$20,000 to the plaintiff which was placed in another tax-free savings account. They each were beneficiaries on the other's TFSA. The plaintiff received Mr. Unger's TFSA of \$20,000 after he died. The plaintiff, since the sale of the Matrimonial Home, has been living with her son Mickey in Qualicum Beach. She has very few expenses but does help out with the costs of groceries. Her main source of income is from Old Age Security and CPP benefits. She has the following incomes from 2010 to 2015 based off her tax returns:
- a. 2010 - \$9,139
 - b. 2011 - \$10,066
 - c. 2012 - \$10,570
 - d. 2013 - \$15,573
 - e. 2014 - \$19,012
 - f. 2015 - \$18,597.79
- [43] The plaintiff testified that she is currently earning the same amount of money as shown on her 2015 tax return. She currently does not have much in expenses since she is living with her son. She would like to purchase an apartment in Qualicum Beach so that she can live independently again. She also would like to travel overseas to see where her father had been stationed during World War 2.
- [44] The plaintiff has a number of bank accounts. As of July 12, 2017 they record the following amounts:

a.

Chequing Account

.958

\$1.05

b.

Chequing Account

.007

\$537,188.22

c.

USD Account

.228

\$747.00

d.

TFSA

\$2,101.08

[45] The amount in the chequing account 007 represents the amount remaining from the net sale proceeds of the Matrimonial Home that she received.

[46] The defendants raised issues in respect to various transactions that were made between the period of October 2011 and March 2014. The defendants allege that these transactions support their contention that there may be other assets that the plaintiff had at the time of Mr. Unger's death. What is not clear is how the plaintiff could have accumulated those assets based on the evidence in this trial. She did not have any assets when she entered the relationship with Mr. Unger. She did not work during the relationship. She had no means of earning money such that she could have acquired any other assets. There is no basis to make an adverse finding against the plaintiff that she has hidden assets. There is no credible basis for suggesting that the plaintiff has any other assets or had the means to acquire any other assets.

Value of the Estate

[47] An important issue is the value of the estate at the date of death.

Plaintiff's Position

[48] The plaintiff takes the position that the value of the estate should include the following:

a.

Proceeds from sale of Matrimonial Home

\$602,538

b.

CPP Death Benefits

\$2,500

c.

Tax Return

\$4,664

d.

Balance in joint account

\$104,860

[49] The plaintiff concedes that the funeral expense of \$5,009 and expenses paid for Mr. Unger's care at the assisted living facility of \$4,702 should be deducted. The plaintiff submits that the value of the estate is \$704,851.

[50] The plaintiff takes the position that the various chattels left in the Matrimonial Home belong to her as matrimonial property. The assets were all owned jointly and as such there is no merit in the claim made by the defendants that these assets form part of the estate. The value of the chattels sold at the garage sale supports that the chattels had collectively very little value.

Defendants' Position

[51] The defendants agree with the plaintiff that (a), (b) and (c) are all assets of the estate for a total estate value of \$609,702.80.

[52] They further claim that the assets in the home had a value of approximately \$26,500 and the plaintiff wrongfully sold or kept these assets. The value of the various assets was not professionally appraised but was based on estimates provided by Bill and Jack.

[53] The defendants dispute that the monies in the joint account that was set up in 2010 by Mr. Unger with Lorraine form part of the estate. The joint account funds did not flow into the estate but to Lorraine through the rights of survivorship.

[54] They further assert that the estate has liabilities that go beyond the funeral and care facility expenses. The majority of those fees related to legal fees spent by Lorraine in respect to the family litigation, probate, proof in solemn form of the Will, and the conveyance of the estate's interest in the Matrimonial Home.

Joint Bank Account

- [55] The issue respecting the transfer of \$100,000 in May 2010 into an account held jointly by Mr. Unger and Lorrain is whether the father intended to make a gift of the beneficial interest in the account upon his death to his children, or whether he intended his daughter to hold the assets in the account in trust for the benefit of his estate to be distributed according to his Will.
- [56] Historically when a father has transferred property to his child it was presumed that the transfer was intended as a gift. This is known as the presumption of advancement. In *Pecore v. Pecore*, 2007 SCC 17 [Pecore], the Supreme Court of Canada, however, narrowed this presumption and held that it does not apply in cases where the child was at the age of majority at the time of the transfer. Instead, transfers to children at the age of majority give rise to the presumption of a resulting trust, which places a burden on the adult child alleging that the transfer was a gift: *Pecore* at paras. 22-36.
- [57] At the time of the transfer Lorrain was an independent adult, and therefore she bears the burden of proving that the transfer was intended as a gift. In situations involving the transfer of financial assets, such as joint bank accounts, a key question is whether the parent transferred the assets into the joint account in order to have the child assist in managing the financial affairs of the parent or whether the parent indeed intended it as a true gift. The Court noted in *Pecore* at para. 45:
- [45] In cases where the transferor's proven intention in opening the joint account was to gift withdrawal rights to the transferee during his or her lifetime and also to gift the balance of the account to the transferee alone on his or her death through survivorship, courts have had no difficulty finding that the presumption of a resulting trust has been rebutted and the transferee alone is entitled to the balance of the account on the transferor's death.
- [58] The only evidence on the nature of the transfer comes from Lorrain and her evidence was that her father provided this money to her with the intent that his children would receive it.
- [59] The defendants further argue that the origins of the monies came from Mr. Unger's assets that pre-date the marriage, such as the sale of the Surrey Property, the fishing boat and the licence. Since these funds originated from the sale of the pre-marital property and were kept in a separate account by Mr. Unger, the plaintiff should have no entitlement to them.
- [60] A further factor is that the plaintiff admitted in the second notice to admit:
- 1 That the Plaintiff is not making a claim against the Bank of Nova Scotia bank account held jointly by the Defendants, Lorraine Ramsey and Jacob Unger, Deceased.
- [61] In all of the circumstances, the evidence supports that the 2010 transfer of \$100,000 into the joint bank account was intended as a gift, and therefore it should not form part of the estate. However, the amount does play a role in assessing whether Mr. Unger's moral obligation to his children has been fulfilled.

Payment of Legal Fees

[62] Section 97(1) of the Family Law Act, S.B.C. 2011, c. 25 [FLA], provides that the Supreme Court may:

- (a) determine any matter respecting the ownership, right of possession, or division of the property or family debt, and
- (b) despite sections 94 (2) [orders respecting property division] and 215 (2) [changing, suspending or terminating orders generally], and subject to subsection (3) of this section, make any order that is necessary, reasonable or ancillary to give effect to the division.

[Emphasis added.]

[63] Further, s. 85 of the Trustee Act, R.S.B.C. 1996, c. 464, provides that:

Costs of proceedings

85 The court may order the costs and expenses of and relating to the petitions, orders, directions, conveyances, assignments and transfers to be made in pursuance of this Act, or any of them, to be paid and raised out of or from the land or personal estate, or the rents or produce of them, in respect of which they must be made, or in the manner the court thinks proper.

[64] I acknowledge that the claim at hand, a wills variation action under the WVA, is distinct from the earlier family law claim. As such, I must also consider the principles governing costs in estate litigation.

[65] In *Steernberg v. Steernberg*, 2007 BCSC 953 at para. 21, Martinson J. provided a helpful statement of the principles governing the issue of costs in estate litigation:

[21] In *Vielbig v. Waterland Estate* (1995), 121 D.L.R. (4th) 485, 1 B.C.L.R. (3d) 76 (C.A.), the British Columbia Court of Appeal approved the following summary of the law made by Master Horn in *Lee v. Lee Estate* (1993), 84 B.C.L.R. (2d) 341 (S.C.), with respect to costs in estate actions and actions under the Wills Variation Act:

An order for costs in favour of a completely unsuccessful party against a completely successful party is a most exceptional order. The general rule is that costs follow the event and, while a court may depart from this rule, any departure is usually in the way of depriving a successful party of costs and not of awarding costs to an unsuccessful party. In either case, the usual rule should not be departed from simply because an unsuccessful party did not expect to lose .

In probate or administration actions or in proceedings for the construction of wills, the rule may be more frequently departed from. In such cases where the validity of a will or the capacity of the testator to make a will or the meaning of a will is in issue, it is sometimes the case that the costs of all parties are ordered to be paid out of the estate. This is upon the principle that where such an issue must be litigated to remove all doubts, then all interested parties must be joined and are entitled to be heard and should not be out of pocket if in the result the litigation does not

conclude in their favour. The estate must bear the cost of settling disputes as a cost of administration . The question to be asked in such case [sic] is whether the parties were forced into litigation by the conduct of the testator or the conduct of the main beneficiaries.

But the case is different where the litigation does not relate to the validity of the will or the capacity of the testator or the construction of the will. Actions brought under dependants' relief legislation presume the validity of the will and the capacity of the testator and that his intentions are clear. There are not doubts to be settled. The remedies provided by such legislation are directed to the maintenance and support of the dependants of the testator and are based on public policy. The legislation does not invalidate the will, it merely permits the court to vary the provisions made by the testator. So an unsuccessful action under such legislation cannot be said to have been caused by a testator, or to have been necessary to enable the estate to be distributed. The action does not benefit the estate.

- [66] The rule in *Steernberg* - that beneficiaries acting in their personal capacity in wills variation actions will be personally liable for costs - is often applied by BC courts: see e.g., *Doucette v. McInnes*, 2012 BCCA 235 at para. 28. However, the court has discretion not to follow the general rule and has departed from it on several occasions, notably where beneficiaries have been drawn into the dispute because of the testator's conduct and failure to make adequate provisions: see e.g., *Todd v. MacDonald Estate*, 2009 BCSC 537 at para. 6; *Griese v. Syvret*, 2013 BCSC 1601 at para. 80.
- [67] In my view, the situation in this case warrants a departure from the general rule. The testator's decision to provide nothing through the Will to his spouse of 34 years made a claim for variation very likely, if not inescapable. Further, although the family law claim is distinct from the current wills variation action, they are strongly connected. They concern the same property and address the same public policy issue, namely the maintenance and support of the spouse. As a result of this connection, I am persuaded that it is appropriate for the Court to exercise its discretion. I therefore conclude that the costs of legal fees to convey one-half of the Matrimonial Home, for probate, and to prove the Will in solemn form should be paid out of the estate upon the passing of accounts by the executrix.
- [68] The family law action was resolved and a consent dismissal order entered on January 23, 2017, which dismissed the action without costs to any party. It is not clear on what basis the executrix is seeking to have actual legal fees incurred in dealing with the family law action paid for out of the estate in light of that consent order. I am not persuaded, based on the limited submissions and case law cited, that the legal costs should be paid out of the estate. However, I am going to provide leave to the parties to make further written submissions in respect to these legal expenses.

Chattels in the Matrimonial Home

- [69] The thrust of the defendants' submissions was that the majority of the assets in the Matrimonial Home belonged solely to Mr. Unger and had a value.

- [70] There were some tools that Mr. Unger owned prior to his relationship with the plaintiff and that he likely used exclusively. These limited old tools would have had very little resale value. Many of the tools no longer worked and the ones that did work were sold at the garage sale.
- [71] It is my view that the majority of the assets that were in the Matrimonial Home upon Mr. Unger's death were family assets and had a very low value.
- [72] The total amount earned on the garage sale was \$4,075. There were extensive efforts made by Brian, Mickey and their friends to clear the Matrimonial Home of extensive debris. The debris consisted of garbage, old building materials, scrap rusted steel, rotting wood, broken glass, cans of old paint and chemicals, old bikes, kitchen utensils, old propane cylinders, and old tires. The estimate was that 6.3 tons of garbage was removed from the Matrimonial Home. In addition a great deal of material was burned for four days in a bonfire. A clean up of this magnitude would have been very expensive but Brian, Mickey and their friends performed the clean-up without charge except for some reimbursement for travel expenses, food and drinks.
- [73] It was appropriate and necessary that the plaintiff and her sons take steps to clear the Matrimonial Home so that it was ready for sale. This should have been a cost that the executrix shared given that half of the Matrimonial Home was registered in the estate's name.
- [74] There is no basis that the assets remaining in the Matrimonial Home had a value of \$26,500 as submitted by the defendants. At most the old tools that worked had a value of a few hundred. The old tractor was sold for \$800 and the ride-on lawn mower for \$500. If one off-set the time, energy and cost of the clean-up from the value of these old items, the estate has not been deprived of any value.
- [75] There is no basis for the claim that the plaintiff wrongfully converted any of the assets for her own use or was unjustly enriched.
- [76] The counterclaim brought by the defendants is dismissed.

Basic Governing Legal Principles

- [77] This case must be determined under the WVA since Mr. Unger died while that Act was still in force. Section 186 of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13, applies to a will executed if the will-maker dies on or after the date on which Part 4 comes into force. The new statute came into force on March 31, 2014 and since Mr. Unger died prior to that date the WVA applies.
- [78] The relevant provision of the WVA is s. 2 which reads:

Maintenance from estate

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

[79] This requires a two-step process to be followed with the first question being was adequate provision made for the proper maintenance and support of the applicant? If the court finds that adequate provision has been made then the inquiry goes no further. If adequate provision has not been made, the second step is to consider what provision would be adequate, just and equitable in the circumstances: *Eckford v. Vanderwood*, 2014 BCCA 261 at para. 49.

[80] The leading case in the area, *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 [*Tataryn*] sets out the two fundamental interests protected by the WVA. The first is the adequate, just and equitable provision for a will-maker's spouse and children; the second is the will-maker's testamentary autonomy (at pp. 515-516). The second interest must yield to the first and main interest: *Heathfeld v. St. Jacques*, 2015 BCSC 505 at para. 49.

[81] In considering the first interest the court must assess the will-maker's legal and moral obligations. The legal obligation considers what the law would have imposed on the will-maker had the question for the provision of his wife arisen during his life. The Court in *Tataryn* provided the following guidance at pp. 821-822:

Where provision for a spouse is in issue, the testator's legal obligations while alive may be found in the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp), family property legislation and the law of constructive trust ... Maintenance and provision for basic needs may be sufficient to meet this legal obligation. On the other hand, they may not. Statute and case law accepts that, depending on the length of the relationship, the contribution of the claimant spouse and the desirability of independence, each spouse is entitled to a share of the estate. Spouses are regarded as partners. ...

[82] The moral obligation was described as: "society's reasonable expectations of what a judicious person would do in the circumstances": *Tataryn* at p. 821.

[83] Mr. Unger also owed a moral claim to his children; however, as noted in *Tataryn*, the claim of the spouse is usually stronger. As noted at pp. 822-823

most people would agree that although the law may not require a supporting spouse to make provision for a dependent spouse after his death, a strong moral obligation to do so exists if the size of the estate permits. Similarly, most people would agree that an adult dependent child is entitled to such consideration as the size of the estate and the testator's other obligations may allow. While the moral claim of independent adult children may be more tenuous, a large body of case law exists suggesting that, if the size of the estate permits and in the absence of

circumstances which negate the existence of such an obligation, some provision for such children should be made: *Brauer v. Hilton* (1979), 15 B.C.L.R. 116 (C.A.); *Cowan v. Cowan Estate* (1988), 30 E.T.R. 216 (B.C.S.C.), *aff'd* (1990), 37 E.T.R. 308 (B.C.C.A.); *Nulty v. Nulty Estate* (1989), 41 B.C.L.R. (2d) 343 (C.A.). See also *Price v. Lypchuk Estate*, *supra*, and *Bell v. Roy Estate* (1993), 75 B.C.L.R. (2d) 213 (C.A.) for cases where the moral duty was seen to be negated.

[84] The principles that apply to the legal and moral duties respecting spouses and children were summarized in the case of *Wong v. Soo*, 2015 BCSC 1741 at para. 70:

1. The WVA addresses two main interests – the "adequate, just and equitable provision for spouses and children of testators" and testamentary autonomy.
2. There are legal obligations and moral obligations and both must be considered. Together they provide a guide as to what is adequate, just and equitable in the circumstances.
3. Testamentary autonomy must yield to what is adequate, just and equitable.
4. Legal obligations are the obligations which the law would impose on a person during his or her life if the question of provision for the claimant arose. These may be found in the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) or other family legislation. Where the parties are not separated or divorced at the time of death, the law will still impose uncrystallized legal obligations that a testator owes to his or her spouse.
5. Moral obligations to a spouse includes the notion 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.
6. The moral obligation is broader than the legal obligation and is assessed at the time of death.

Griese v. Syvret, 2013 BCSC 1601; *Steernberg v. Steernberg*, 2006 BCSC 1672; and *Tataryn*.

[85] As the Court of Appeal observed "it is not a viable option for the court to approve a disposition that substantially prefers the moral claims of the adult independent children to those of a long-term caring and dedicated spouse": *Picketts v. Hall (Estate)* 2009 BCCA 329 at para. 62.

[86] The plaintiff is 80 years old and consideration must be given to what her needs are for the remainder of her life. As Mr. Justice Finch, as he then was, noted in *Frolek v. Frolek* [1986] B.C.J. No. 1869 (S.C.) at para. 24:

[24] it is not the purpose of the Wills Variation Act to enable an applicant to build up an estate of her own, but rather to ensure that she is appropriately maintained and supported during her lifetime.

[87] Although this statement was made pre-*Tataryn*, the needs of the plaintiff continues to be an important factor.

Discussion

Legal Duty

- [88] The applicable family law legislation, the FLA, came into force on March 18, 2013.
- [89] Under s. 81 (b) of the FLA, each spouse is entitled to an undivided half interest in all family property which includes all property owned by at least one spouse as well as beneficial interests of at least one spouse: see. s. 84(1). However, excluded from the family property is, among other things, any property acquired by a spouse before the relationship began, and any property derived from such property or disposition of such property: s. 85(1).
- [90] The evidence supports that the plaintiff would have had a claim to any monies in the bank account of Mr. Unger at the time of his death.
- [91] With respect to the Matrimonial Home, the defendants contend that the plaintiff would not have had a claim under the FLA, as it was purchased using proceeds of excluded property, namely the Surrey Property and the fishing boat and licence.
- [92] The evidence supports that the plaintiff did not provide any initial consideration in exchange for being put on title. Under the common law, a husband's transfer of property into the joint names of he and his wife was traditionally presumed to be a gift: see Waters et al., *Waters' Law of Trusts in Canada*, 4th ed (Toronto: Thomson Carswell, 2005) at 413. Although the continued existence of this presumption has been weakened or cast into doubt in recent jurisprudence, the BC Court of Appeal, in *V.J.F. v. S.K.W.*, 2016 BCCA 186 [V.J.F.] at para. 50, stated that:
- [50] Where the evidence is insufficient or equivocal and the transfer was made by husband to wife, the law normally provides an evidentiary presumption that a gift was intended and the burden of persuasion shifts to the opposite party to rebut on the balance of probabilities
- [93] The evidence in the case at hand supports that Mr. Unger intended the transfer of property to be a gift. In the Will, Mr. Unger explicitly states that he transferred 50% of the property to the plaintiff without any contribution, and in my view no other evidence rebuts this.
- [94] The BC Court of Appeal in *V.J.F.* noted, however, that s. 85 of the FLA complicates the gifting of property between spouses when the property is derived from "excluded property". To reconcile potential inconsistencies between the law of gifts and the FLA, the Court provided clarification in *V.J.F.* at paras. 74-75:
- [74] With all due respect to the contrary view, I conclude that the new FLA scheme does not constitute a "complete code" that "descends as between the spouses" and eliminates common law and equitable principles relating to property. Rather, the scheme builds on those principles, preserving concepts such as gifts and trusts, and evidentiary presumptions such as the presumption of advancement between spouses.

[75] I do not interpret the FLA as reversing the gift or requiring that it be ignored because of the spouses' separation. Nor do I agree that the FLA effectively 'prohibits' gifts between spouses, as Mr. F. suggested. (See para. 56.) Gifts between spouses can continue as they have through the ages. It would take much clearer wording to render them suddenly revocable or null or illegal. (See the comments of Chief Justice Farris in a slightly different context in *Duncan v. Duncan* (No. 2) [1950] B.C.J. No. 50 at para. 13 (S.C.), *aff'd* [1950] B.C.J. No. 41. (C.A.).)

[Emphasis in original.]

[95] Applying V.J.F., I am of the view that for the purpose of this analysis the plaintiff's 50% would have been presumed a gift under the common law. Further, the evidence supports that this presumption would have likely stood, as the Will is consistent with the finding of a gift, and no other evidence has rebutted it. As a result, the plaintiff's 50% stake would not have been "excluded property" under the FLA - only the 50% held by Mr. Unger himself would have been "excluded property". The plaintiff's 50% stake would have instead fallen back into the communal pool as "family property": see V.J.F. at para. 76. Therefore, the plaintiff's family law claim to the Matrimonial Home would have been for at least 25% of its total value.

[96] It is also of some significance that but for the order of Master Tokarek made in 1993 arising from the family law action the plaintiff brought, it is highly likely that the Matrimonial Home would have remained in joint tenancy and would have passed to the plaintiff. Furthermore, prior to Mr. Unger's death, the plaintiff could have applied under s. 95 of the FLA for an unequal division of family property, or under s. 96 for a division of excluded property, in the event that an equal division was significantly unfair, considering the duration of their relationship and other related factors. As the spouses' relationship spanned many years, and the plaintiff contributed to the maintenance and preservation of the Matrimonial Home, her potential claim could have been for much more than 25%.

[97] In addition to property division, the FLA also states that a spouse is entitled to spousal support. Part 4, Division 7 provides that spouses have a duty to provide support in consideration of the conditions, means, needs, and other circumstances of the other spouse, including the length of time they lived together, the functions performed by each during this time, and any agreements between them: see ss. 160-162. Based on the needs of the plaintiff, the length of her relationship with Mr. Unger, and the nature of their relationship, the plaintiff would have had a potential claim for support against Mr. Unger.

[98] Based on the preceding analysis, I am of the view that the plaintiff would have had a strong claim for both the division of property and spousal support per Mr. Unger's uncrystallised legal obligations.

Moral Duty

[99] In *J.R. v. J.D.M.*, 2016 BCSC 2265, the Court set out the factors to consider in assessing the moral claim in a second marriage at para. 92:

In assessing the strength of the legal and moral obligations owed by a testator to a second spouse, the court will consider factors such as:

- (a) The length of the marriage;
- (b) When and how the testator's assets were acquired;
- (c) The contribution of the second spouse;
- (d) How family assets would be divided under the applicable family legislation upon marriage breakdown;
- (e) Competing obligations with the children from the first marriage;
- (f) Financial circumstances of the spouse;
- (g) The size of the estate; and
- (h) The magnitude of assets passing to the spouse outside of the estate in consequence of other pre-death transactions undertaken by the testator.

[See *Wong v. Soo*, 2015 BCSC 1741 at paras. 73-82; *Saugestad v. Saugestad*, 2006 BCSC 1839, varied on different grounds 2008 BCCA 38; *Mawdsley v. Meshen*, 2010 BCSC 1099, affirmed 2012 BCCA 91; *Ciarniello v. James* 2016 BCSC 1699]

[100] The moral duty of a testator in a second marriage was also considered by Russell J. in *Saugestad v. Saugestad*, 2006 BCSC 1839 [*Saugestad*] at paras. 121-130, varied on a different ground 2008 BCCA 38. An important consideration in determining the moral obligation owed to a second spouse is that spouse's contribution to the estate as set out in *Saugestad* at para. 126:

[126] The more limited moral claim of a second wife where the bulk of the testator's estate was acquired during a first marriage was also considered as a relevant factor in *Howard v. Howard Estate* (1997), 32 B.C.L.R. (3d) 1, 16 E.T.R. (2d) 161 (C.A.) at para. 5 (although there was also a prenuptial agreement in that case). Along a similar line of reasoning, in *Price v. Lypchuk Estate* (1987), 11 B.C.L.R. (2d) 371, 26 E.T.R. 259 (C.A.), the fact that the testator's estate had been built up by the joint efforts of the testator and his second wife was a factor considered by Lambert J.A. in the majority's decision not to vary the will in favour of the children of the testator's first marriage (at 382 B.C.L.R.). Thus, the contribution of a spouse to the estate is an important factor in determining the moral entitlement of that spouse.

[101] Mr. Unger's purported rationale for excluding the plaintiff from the Will was not valid. Clause 6 of the Will suggests that Mr. Unger caused 50% of the Matrimonial Home to be transferred to the plaintiff without any contribution by her to the acquisition or

preservation of the property. The Matrimonial Home was initially registered in joint tenancy at the time of its purchase in 1981. It was only as a result of the order of Master Tokarek in the family law action that the joint tenancy was severed. Furthermore although the plaintiff did not financially assist in the payment of the purchase price she did make contributions to the preservation and enhancement of the Matrimonial Home in the 30 plus years of ownership.

Disposition

[102] The legal and moral obligations that Mr. Unger owed the plaintiff are high. From a legal obligation she was his partner for 34 years, married for 32 years and remained with him despite his abusive conduct towards her. She looked after him to the best of her abilities and remained by his side until his death.

[103] In weighing the totality of the evidence in light of the legal principles, I conclude that Mr. Unger failed to discharge his legal and moral duty to his wife when he provided her with nothing under his Will. The testamentary autonomy of Mr. Unger must yield to this. These claims support that an "adequate, just and equitable" provision for her requires that she receive 30% of the residue of the estate. The remaining 70% will be equally distributed between the defendants. Given the circumstances of the joint bank account and the additional sums provided to the defendants, along with this residue, Mr. Unger's moral duties to his adult children are satisfied.

[104] The following order is made:

1. Clause 3 G of the Will of Jacob Unger dated September 24, 2003 is varied to read: TO DIVIDE all the rest and residue of my Estate 30% to Lillis Belle Unger and the remainder equally amongst such of my children namely:
 - i. Marion Lindy;
 - ii. Brenda Lorrain Hebein;
 - iii. Jack David Unger;
 - iv. William Martin Unger.

The remainder of clause G and the Will is unchanged.

[105] The parties should provide submissions in respect to the costs of this action and whether the legal costs incurred by the executrix in respect to the family law action can be claimed against the estate. The written submissions should be provided to the registry within 60 days of the publication of these reasons. If either of the parties request the opportunity to make oral submissions on these two issues, the parties can reserve a date through Supreme Court Scheduling to reappear before me.

"The Honourable Madam Justice Forth"

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