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Wills Variation and Morality: The Centennial Update

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WILLS VARIATION AND MORALITY: THE CENTENNIAL UPDATE

I. Introduction

This year marks the centennial for dependants' relief legislation (more commonly referred to as wills variation legislation) in British Columbia. Despite the title of this paper, "The Centennial Update", we will not endeavor to provide a play-by-play of the jurisprudence over the past century. However, in the course of discussing a recent *Charter* challenge relating to substantially similar legislation in Nova Scotia, we will reflect on the underlying objective(s) of the legislation in British Columbia, and the challenges that arise while attempting to balance those objectives, testamentary autonomy, the moral claims of independent adult children, and the legislation in British Columbia.

Following a brief summary of the legislative provisions and general principles, we will delve into the Nova Scotia Supreme Court's decision in *Lawen Estate v. Nova Scotia (Attorney General)*[1] and its potential application in British Columbia. We will then follow in the tradition of providing an

1 2019 NSSC 162.

update on recent wills variation jurisprudence since the most recent update in 2018[2], focusing on the issues of cultural traditions, spousal claims, "valid and rational" reasons, estrangement, size of the estate, costs, and some useful practice points noted in the cases.

II. The Legislation and General Principles

On April 17, 1920, the *Testator's Family Maintenance Act*[3] received Royal Assent on the same day as the *Mother's Pensions Act*. The current legislation, the *Wills, Estates, and Succession Act*[4] ("*WESA*"), states as follows with respect to wills variation claims:

> Maintenance from Estate
>
> 60. Despite any law or enactment to the contrary, if a will-maker dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the will-maker's spouse or children, the court may, in a proceeding by or on behalf of the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the will-maker's estate for the spouse or children.
>
> [emphasis added]

Section 62 of *WESA* provides as follows:

> Evidence
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> 62. (1) In a proceeding under section 60, the court may accept the evidence it considers proper respecting the will-maker's reasons, so far as may be determined,
>
> (a) for making the gifts made in the will, or
>
> (b) for not making adequate provision for the will-makers spouse or children,
>
> including any written statement signed by the will-maker.
>
> (2) In estimating the weight to be given to a statement referred to in subsection (1), the court must have regard to all the circumstances from which an inference may reasonably be drawn about the accuracy or otherwise of the statement.
>
> [emphasis added]

The principles espoused in 1994 by the Supreme Court of Canada in *Tataryn v. Tataryn*,[5] continue to guide the courts. The language of the legislation confers a broad discretion on the court to make orders that are just in the specific circumstances and in light of contemporary standards and current societal norms. The two sorts of norms that must be addressed are the testator's legal obligations and moral obligations to his or her children. That is the yardstick against which

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2 Amy D. Francis and Allison A. Curley, Wills Variation: The Evolution of Contemporary Community Standards (CLEBC Estate Litigation Update 2018) (the "2018 Wills Variation Update").

3 S.B.C. 1929, c. 94.

4 S.B.C. 2009, c. 13.

5 [1994] 2 SCR 807 (*"Tataryn*").

the court must measure the terms "adequate, just, and equitable". Moral obligations are "found in society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards".[6] Legal obligations are not difficult to assess, or at least not any more difficult than the myriad of legal issues that go before the courts day in and day out. However, the weighing of moral obligations and testamentary autonomy is rarely a straightforward exercise, and can involve considerations of morality, cultural traditions, and an individual's right to liberty.

III. The Charter Challenge in Nova Scotia

A. Lawen v. Lawen, 2019 NSSC 162 ("*Lawen*")

1. Overview

Nova Scotia has dependants' relief legislation that is substantially similar to s. 60 of *WESA*. The Nova Scotia statute, the *Testators' Family Maintenance Act* (*"TFMA"*),[7] does not place any limit on the ability of a testator's adult non-dependent children to bring moral claims for the variation of the testator's will. However, in May 2019, the Nova Scotia Supreme Court concluded in *Lawen* that sections 2(b) and 3(1) of the *TFMA* infringed upon testamentary autonomy and thus violated the right to liberty guaranteed by section 7 of the *Charter of Rights and Freedoms* (the *"Charter*"), and that the infringement was not justified under s. 1 of the Charter. The Court declared that sections 2(b) and 3(1) of the *TFMA* be read down to exclude "non-dependent" adult children from the operation of those sections. *Lawen* is currently under appeal.[8]

2. Testamentary Autonomy and Section 7 of the *Charter*

Prior to *Lawen*, no court in Canada had considered the issue of whether testamentary autonomy is a constitutionally protected right. As observed by McLachlin J. in *Tataryn,* dependants' relief legislation detracts from testamentary autonomy. However, the *Charter* was not argued in *Tataryn.* Section 7 of the *Charter* provides:

> Liberty
>
> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> [emphasis added]

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6 *Tataryn*, supra, at para. 28.

7 *Testators' Family Maintenance Act,* RSNC 1989, c. 465.

8 At the time of writing of this paper, the hearing of the *Lawen* appeal was set for February 2021 and no factums had yet been filed.

Notably, the jurisprudence with respect to the Charter has continued to evolve since the 1988 decision of the Supreme Court of Canada in *R. v. Morgentaler*[9] . The Court in *Lawen* tracked the evolution of the s. 7 liberty right, insofar as it is relevant to testamentary autonomy, as follows:

- The right to liberty "grants the individual a degree of autonomy in making decisions of fundamental personal importance", "without interference from the state".[10]
- Liberty includes "the right to an irreducible sphere of personal autonomy wherein individuals may make inherently private choices free from state interference". Decisions of fundamental personal importance can include "inherently private" matters which "by their very nature…implicate basic choices going to the core of what it means to enjoy individual dignity and independence".[11]
- The right to liberty does not protect property or economic rights.[12]

Section 7 of the *Charter* is not infringed if the deprivation of the right to liberty is in accordance with the "principles of fundamental justice". The court noted that the Attorney General of Nova Scotia made no reference to the principles of fundamental justice, and inferred that the Attorney General accepted that if a violation of the liberty interest was found, the violation would not accord with the principles of fundamental justice.[13]

The Court reviewed caselaw describing the nature and significance of testamentary autonomy. For example, in *Laramée v. Ferron,* the Supreme Court of Canada had discussed the significance of testamentary autonomy in the context of testamentary capacity:

> To deprive lightly the aged thus afflicted of the right to make a will would often be to rob them of their last protection against cruelty or wrong on the part of those surrounding them and of their only means of attracting towards them such help, comforts and tenderness as old age needs.[14]

As a further example, the South African Court of Appeal has stated that "not to give due recognition to freedom of testation, will…also fly in the face of the founding constitutional principle of human dignity. The right to dignity allows the living, and the dying, the peace of mind of knowing that their last wishes would be respected after they have passed away".[15]

The Court in *Lawen* concluded that "it is not…an absurd argument to say that the disposal of one's estate is a fundamental personal choice that is undermined by being subject to a purely "moral" claim by an independent adult child, justified by social expectations of what a judicious

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9 [1988] 1 S.C.R. 30 (*"Morgentaler*").

10 *Morgentaler,* supra, at p. 166.

11 *R. v. Malmo-Levine; R. v. Caine,* 2003 SCC 74, at para. 84, citing *Godbout v. Longueil (City*), [1997] 3 SCR 844 at para. 66, as cited in *Lawen* at para. 53.

12 Peter W. Hogg, *Constitutional Law of Canada,* 5th ed (Thomson Reuters, loose-leaf) at §47.7(b), cited by the Supreme Court of Canada in *Blencoe v. British Columbia (Human Rights Commission),* 2000 SCC 44 at para. 53.

13 *Lawen,* supra, at para. 62.

14 (1909), 41 SCR 391 at p. 409, cited at para. 41 of *Lawen*.

15 *BoE Trust Ltd. NO and another (in their capacities as co-trustees of the Jean Pierre De Villiers Trust 5208-2006)* (846/11) [2012] ZASCA 147 at para. 27, cited at para. 42 of *Lawen*.

person would do".[16] The Court also noted that the legislatures of other Canadian provinces have rejected the availability of such moral claims as a matter of policy.[17] The Court concluded that testamentary autonomy is not necessarily a purely economic or property matter, that it can rise to the level of fundamental personal choice of the kind contemplated in the caselaw under s. 7, and that sections 2(b) and 3(1) of the *TFMA* violated the right to liberty guaranteed by s. 7 of the Charter.[18]

3. Freedom of Conscience (Section 2 of the *Charter*)

The applicants in *Lawen* argued that a testator's "moral decision" should be regarded as a matter of conscience and that the *TFMA* provisions therefore violated the "freedom of conscience" guaranteed under s. 2(a) of the *Charter*, which provides as follows:

> Everyone has the following fundamental freedoms:
>
> (a) freedom of conscience and religion;
>
> […].

The applicants argued that section 2(a) is not limited to religious practices, ideas and beliefs, and that it extends to "non-theistic systems of belief and morality". The Court thoroughly discussed the jurisprudence pointing to a distinction between freedom of conscience and freedom of religion, and the suggestion in some of the cases that the freedom of conscience may be broader than the freedom of religion. The Court noted that in *Morgentaler*, Wilson J. posited that the decision whether or not to terminate a pregnancy was essentially "a moral decision, a matter of conscience". And so, in her view, the deprivation of the s. 7 right in those circumstances also offended s. 2(a) of the *Charter*.[19] However, not all moral decisions are matters of conscience. The Court in *Lawen* noted the following comments of Linden J.A., dissenting in part, in *Roach v. Canada (Minister of State for Multiculturalism and Citizenship)*:

> [45] It seems, therefore, that freedom of conscience is broader than freedom of religion. The latter relates more to religious views derived from established religious institutions, whereas the former is aimed at protecting views based on strongly held moral ideas of right and wrong, and not necessarily founded on any organized religious principles. These are serious matters of conscience. […]
>
> […]
>
> [47] […] <u>This would require a claimant to show that his or her conscientiously held moral views might reasonably be threatened by the legislation in question, and that the coercive burden on his or her conscience would not be trivial or insubstantial</u>.[20]
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> [emphasis in *Lamer* citing *Roach*]

16 *Lawen*, supra, at para. 60.

17 *Lawen,* supra, at paras. 23-40, and 60.

18 *Lawen,* supra, at paras. 61 and 134.

19 *Morgentaler*, supra, at pages 175-176, cited in *Lawen* at para. 67.

20 [1994] 2 FC 406, paras. 45 to 47, cited in *Lamer* at para. 70.

Ultimately, the Court interpreted the applicants' essential argument to be that the testator's "moral decision" (presumably in a general sense) should be regarded as a matter of conscience. Regardless of whether "conscience" stands apart from "religion", the court concluded that the applicants' argument was insufficient as a basis of asserting a right under s. 2(a) of the *Charter*. In doing so, Court agreed with the Attorney General's argument that, at the very least, "conscience" must mean something analogous to religious belief.

The applicants in *Lamer* have brought a cross-appeal regarding s. 2 of the Charter.

4. Section 1 of the *Charter*: the *Oakes* Test

The Court in *Lawen* concluded that the infringement of the right to liberty was not saved or justified under s. 1 of the *Charter.* Section 1 of the *Charter* provides:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be reasonably justified in a free and democratic society.

The framework for a section 1 analysis is set out in *R. v. Oakes*.[21] In the context of the challenge to the *TFMA,* the framework of the section 1 analysis can be described more specifically as follows:

1. Whether the objective of the impugned *TFMA* provisions is of "sufficient importance" to warrant overriding the right to liberty;
2. If so, whether the means chosen are reasonable and demonstrably justified (also known as the proportionality test) to which there are three components:
    a. Are the impugned *TFMA* provisions rationally connected to the objective in question?
    b. Do the impugned *TFMA* provisions impair the right to liberty as little as possible?
    c. Is the severity of the deleterious effects of the impugned *TFMA* provisions proportional to the importance of the objective in question?

In *Lawen,* the Attorney General identified the "pressing and substantial objective" to be as follows: "balancing the legitimate proprietary interests of his or her heirs in respect of family provision…", or in other words "balancing the importance of a testator's will with that of ensuring that the financial needs of spouses and children of testators are adequately met".[22] The Court noted that while the objective as identified by the Attorney General might describe the purpose of the *TFMA* as a whole, the whole of the *TFMA* was not under attack. In the Court's view, the Attorney General had not identified any pressing and substantive objective that is served by the inclusion of non-dependent adult children in the class of "dependants" eligible to apply under the *TFMA.*[23]

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21 [1986] 1 SCR 103.

22 *Lawen,* supra, at para. 84.

23 *Lawen*, supra, at paras. 84-85 and 97.

The Court noted that regardless of the Attorney General's stated position, the "specific legislative act that is impugned here – allowing a non-dependent adult child to advance a claim against an estate for "adequate provision"- rests on a moral justification.[24] In considering whether a purely moral objective could be a "pressing and substantive" objective under the first part of the *Oakes* test, the Court noted the distinction between morality in the general sense, and "fundamental conceptions of morality". In particular:

- On the one hand, "public morality" cannot be a legitimate objective under the s. 1 analysis. As stated by Justice Sopinka in *R. v. Butler*, "[t]o impose a certain standard of morality solely because it reflects the convention of a given community is inimical to the exercise and enjoyment of individual freedoms, which form the basis of our social contract".[25]
- On the other hand, government may legislate to protect "fundamental conceptions of morality", an example of which is the avoidance of harm to society (which was found to be the true objective in *R. v. Butler*).[26] Put another way, morality can be the basis for legislating "for the purposes of safeguarding the values which are integral to a free and democratic society".

The Court then went on to conduct the "proportionality test" presupposing the legislative objective was to impose a "moral standard on testamentary dispositions". However, the Court concluded that <u>if</u> the legislative objective of imposing a moral standard on testamentary disposition was in fact a pressing and substantial one (without deciding that issue since that was not the objective identified by the Attorney General), then the components of the second stage of the *Oakes* test were satisfied. In the end, in the Court's view, the section 1 analysis failed at the first stage of the *Oakes* test as the Attorney General had not set out a pressing and substantial objective for the impugned provisions.

B. Potential Application of the Charter Issues in British Columbia?

As indicated above, *Lawen* is under appeal.

At the time of the writing of this paper, *Lawen* has only been referred to in one reported decision in British Columbia. In *Jean-Richard-Dit-Bressel v. Carr*[27], the Court granted leave to certain defendants to amend their response to civil claim to bring a constitutional challenge to the wills variation provisions of *WESA*. Although the matter was scheduled for trial in October 2020, it has been resolved without the matter coming before the court for determination.

The courts in British Columbia have not yet had an opportunity to assess whether s. 60 of *WESA* infringes either s. 7 or s. 2(a) of the *Charter*, and if so, whether the infringement is justified under s. 1. There may well be an occasion for the British Columbia courts to do so before all appeals of

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24 *Lawen,* supra, at para. 96.

25 *R. v. Butler*, [1992] 1 SCR 452 at page 492, cited in *Lawen* at para. 87.

26 *R. v. Butler,* supra, at p. 521, cited in *Lawen* at para. 88.

27 2020 BCSC 946.

Lawen have been exhausted. In the interim, the authors make the following observations and comments:

1. In *Lawen,* the constitutional challenge was brought as a stand-alone court proceeding, rather than within the context of an existing wills variation action. The "first applicant" was the executor, and the "second applicant" was the residuary beneficiary under the will. Following a preliminary application in 2018 in which the Attorney General sought a summary dismissal based on lack of standing, the Court was satisfied that both applicants should be given public interest standing (and given that ruling, it was not necessary to deal with the issue of private standing at the preliminary application).[28]
2. As indicated above, in *Jean-Richard-Dit-Bressel v. Carr,* a British Columbia case, the defendants were granted leave to amend their Response to Civil Claim (i.e. within the context of the existing wills variation action) to raise the constitutional challenge.
3. At the substantive hearing in *Lawen,* the applicants were denied s. 24 (private interest) standing given that their "own" rights had not been infringed. However, in certain circumstances, might s. 24 standing might be granted either to an executor (or theoretically even to the testator during the testator's lifetime[29]), such as where the applicant is in a position to provide specific evidence showing the infringement of the testator's right to liberty, and/or freedom of conscience?
4. Section 2(a) of the *Charter* was found not to be engaged in *Lamer*. However, because the applicants were limited to public interest standing, there was no factual underpinning to support anything other than the general assertion that a testator's "moral decision" is tantamount to a "matter of conscience". However, if a testator's "reasons" are based on strongly held moral views that do not accord with current societal norms, would it be open to a court to conclude that the wills variation legislation is a "coercive burden" on that particular testator's conscience.
5. Regarding section 1 of the *Charter*, and the application of the *Oakes* Test:
    a. Can it be said that the legislative "objective" (whatever it might be) is of sufficient importance to override charter rights, when the legislature in British Columbia has not restricted or limited a testator's ability to make *inter vivos* gifts that render a wills variation claim essentially moot (even where it is clear that the *inter vivos* gift was made with the intent of avoiding the effects of the wills variation legislation)? Examples from recent cases include *Mayer v. May*er, 2018 BCSC 2225, where the assets had been put into joint tenancy. Also, in *Larochelle v. Soucie Estate*, 2019

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28 *Lawen Estate v. Nova Scotia (Attorney General),* 2018 NSSC 188 (the *"Lawen Standing Application*") at para. 24.

29 In the *Lawen Standing Application,* the Attorney General had argued that the constitutional issue could equally be raised by a testator who is in the process of preparing a will. The Court noted that while that was "theoretically possible", it agreed with the concerns expressed by the applicants that "such a person might be reluctant to disclose their personal testamentary views to family members in circumstances that might create some internal controversy" (at para. 25).

BCSC 1329, where the assets had been transferred to an alter ego trust (and the plaintiff was unsuccessful in setting aside the trust).

b. Does the fact that most other jurisdictions in Canada have narrowed the class of potential claimants to exclude non-dependent adult children detract from the argument that the legislative "objective" (again, whatever it might be) is of sufficient importance to override charter rights?

IV. Update on Recent Decisions

A. Cultural Traditions

On October 8, 1971, Prime Minister Pierre Elliot Trudeau declared multiculturalism (and bilingualism) to be an official part of Canadian policy. In his speech to the House of Commons, he stated:

> [T]here cannot be one cultural policy for Canadians of British and French origin, another for the original peoples and yet a third for all others. For although there are two official languages, there is no official culture, nor does any ethnic group take precedence over any other. No citizen or group of citizens is other than Canadian, and all should be treated fairly.
>
> […]
>
> The individual's freedom would be hampered if he were locked for life within a particular cultural compartment by the accident of birth or language.[30]

The last sentence cited above was followed by a statement about the vital importance that every Canadian, whatever his origin, being given a chance to learn at least one of the two official Canadian languages. Ideally, an individual's freedom within Canadian society will not be hampered by language barriers. Canada is proudly a multi-cultural society that strives to embrace other cultures and traditions. However, are there limits to embracing such traditions when it comes to testamentary dispositions? We note the following comments of Rice J. in 2006 in *Prakash v. Singh et al*:

> [58] In modern Canada, where the rights of the individual and equality are protected by law, the norm is for daughters to have the same expectations as sons when it comes to sharing in their parents' estates. That the daughters in this case would have this expectation should not come as a surprise. They have lived most of their lives, and their children have lived all of their lives, in Canada.
>
> [59] A tradition of leaving the lion's share to the sons may work agreeably in other societies with other value systems that legitimize it, but in our society, such a disparity has no legitimate context. It is bound to be unfair, and it runs afoul of the statute in this province.[31]

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30 *House of Commons Debate: Official Report*, 3rd Session, 28th Parliament: Vol. 8, 1971, page 8545.

31 *Prakash and Singh v. Singh,* 2006 BCSC 1545, at paras. 58 and 59 (*"Prakash*").

There is one recent case in British Columbia that comments on cultural traditions. To put that decision into context, we will first briefly discuss the decision in *Prakash v. Singh*.

***Prakash v. Singh,* 2006 BCSC 1545**

The basic facts in *Prakash* were as follows: the testator (Mrs. Singh) had made a will leaving $10,000 to each of her three daughters (which in percentage terms amounted to about 1.3% each) and the residue equally to her two sons (about $260,000 each, or about 48% each). The plaintiffs were the testator's two eldest daughters. All the testator's children were married with their own children, employed, and reasonably well-off financially. All the children were devoted to their parents and spent their time generously to help their parents. The parents loved and cherished the children equally.

Notably, it was common ground in *Prakash* that the main reason for the disparity under Mrs. Singh's will was her "belief in her native Indo-Fijian tradition that the sons should inherit all of their parents' estate to the exclusion of the daughters except for token amounts".[32] Several witnesses testified with respect to that tradition. Although there was no evidence as to how strictly the tradition was observed generally, the Court found that it was common ground that Mrs. Singh "viewed the tradition as binding upon her testamentary choices, or at least highly influential".[33]

The Court referred to the comments of the trial judge in *Chan v. Lee Estate*[34] (which was varied on appeal) wherein Hood J. commented at para. 39 that whether the testator's distribution scheme was based on cultural traditions (in that case Chinese traditions) was irrelevant and that, in any event, it was "not the way of this country".[35] The Court in *Prakash* recognized that the court will always wish to be most cautious not to rewrite a will, and most reluctant to disregard the testator's legitimate motives, especially where the claimants are independent adult children. The Court also noted that there was a rational and reasonable basis to favour the sons moderately, regardless of the Indo-Fijian cultural traditions. For example, the sons had helped financially with the mortgage on the family home both early on when their help was most needed and on an ongoing basis. Also, the testator had lived with the sons and their families for many years, which might have moved her to feel a moral obligation to give them more. The Court concluded that the gifts under the will to the plaintiff daughters needed to be increased substantially to eliminate the effect of the discrimination, but not to the level of an equal distribution. In the end, the Court varied the Will to provide 20% to each of the two plaintiff daughters (the third daughter had waived her claim to any more than the $10,000 provided to her under the will), and 30% to each of the two sons.

***Grewal v. Litt*, 2019 BCSC 1154 ("*Grewal*")**

Mr. and Mrs. Litt both died in 2016. At the date of trial, the net value of the combined estates was between approximately $9 million and $9.3 million. Mr. and Mrs. Litt had executed mirror

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32 *Prakash*, supra, at para. 14.

33 *Prakash*, supra, at paras. 40-41.

34 2002 BCSC 678, varied 2004 BCCA 644.

35 *Prakash*, supra, at para. 60.

wills in 1993 in which they left everything to the other spouse, and on the passing of both, the estate as to be divided among their six children with the four daughters each receiving $150,000 and the two sons sharing in the residue. Although both sons were named as executors under the wills, one of the sons, Kasar Litt, renounced due to a potential conflict of interest.

There were two separate court actions which were tried together:

- The executor (Terry Litt) commenced an action against his brother, Kasar Litt, seeking repayment of a $240,000 debt to the estate. In that action, Kasar Litt brought a counterclaim seeking compensation for unjust enrichment based on the assertion that his farming of one of the family farms unjustly enriched the parents, and also seeking damages for breach of an alleged agreement concerning that farm. During the trial, the estate's debt claim was settled. By the time of closing submissions, Kasar's claim for breach of the alleged agreement had been abandoned, leaving only his claim for unjust enrichment.
- The daughters commenced an action to vary the wills and to also seek compensation for unjust enrichment. Their position was that the wills should be varied so that the estate was divided equally among the siblings. During closing submissions, the daughters abandoned their unjust enrichment claim. There was no dispute among the siblings that the wills should be varied to provide more to the daughters than the $150,000 bequests. However, the sons did not agree to the equal distribution sought by the daughters.

The basic background facts were as follows:

- The Litt family had arrived in B.C. from India in 1964. At that time, the children ranged in age between about 3 and 14. As soon as the children were old enough, they were expected to work during the summers alongside their mother, picking fruit and vegetable crops.
- The family lived very frugally after arriving in BC, but over the years purchased numerous residential properties (sometimes for investment and rental income) and farm properties. Real estate became the parents' (and the estate's) most valuable asset. By the end of 1980, the parents (and their company, Litt Farms Ltd.) owned five farm properties covering 185 acres.
- All the siblings (whether son or daughter) were expected to do essentially the same kind of work on the farms and to work equally hard. Although the siblings were shown on T4 slips as receiving an income as employees of the family farm, until each sibling was married, the income went back into the farming operations, essentially as loans. Once a sibling was married, the sibling (with the exception of Kasar) was allowed to keep his or her earnings. The loans were repaid after the parents' deaths when the affairs of Litt Farm were wound up.
- There was some evidence of East Indian cultural traditions and the impact on the family life:
    - One daughter recalled that life at home was based on the parents' traditional East Indian cultural views, where "boys were a blessing and girls were a disappointment".

- The siblings recalled that in the early 1990's, their parents (and particularly their father) became more openly observant of Sikh religious customs.
- In the early 1990's, the father submitted applications for subdivision of two farm properties into equal parcels for each of his two sons. Both subdivision applications made reference to the East Indian custom of dividing properties equally among the sons. Neither application was approved.
- Three of the daughters, and Kasar, had arranged marriages. The other daughter, Amarjit, became pregnant and moved in with a Caucasian man, as a result of which the parents cut off all communications with her, effectively disowning her in about 1991. She had no contact with the parents until 2006.
- The father executed two separate wills in India in 1994 and 2006. The trial judge found that the statements in those wills were inconsistent with other reliable evidence. For example, although Amarjit had been estranged from the father since 1991, his 2006 will stated "my four daughters are married, I have given them their share in form of dowry at their weddings".

- By 1992, the sole remaining farm property was an 80 farm on Cambie Road in Richmond (the "Cambie Farm"). Starting in 1996, Kasar farmed about half of the Cambie Farm on his own account. Other than making a contribution towards property taxes, Kasar did not pay any rent to Litt Farms, and kept the income from the operations as his own. Starting in 2006, Cambie Farms starting earning rental income on the other half of the farm. Terry received that rental income from 2008 until 2016.
- In 2006, the mother suffered a heart attack, following which a reconciliation began between her and Amarjit. Amarjit subsequently reconciled with her father starting in about 2014.
- After the mother's heart attack, Terry (the son who was the executor named in the wills, and who also knew the contents of the wills during his parents' lifetimes) tried to persuade his parents to change their wills. He told them that he thought the wills were unfair, that they would divide the family, and that everyone would end up in court. His father was open to the idea of changing his will, but his mother was not.

With respect to the daughters' wills variation claim, the Court followed the "helpful framework" set out by Ballance J. in *Dunsdon v. Dunsdon*[36] for considering a testator's moral duty to independent adult children:

a) Gifts and benefits outside the wills: The court found that the two sons had received significantly more than the daughters during the parents' lifetimes. The court concluded that the gifts to the two sons significantly intensified the moral duty owed by the parents to the daughters (but did not extinguish the moral duty owed to the sons).

b) The Parents' reasons: The daughters relied on *Prakash*. The daughters argued that although the wills were silent as to the parents' underlying intentions, the court ought

36 2012 BCSC 1274.

to infer that the parents' testamentary intentions were based on traditional East Indian customs and practices. The Court noted that in *Prakash*, it was common ground that the testator viewed the Indo-Fijian traditions (the sons should inherit all of their parents' estate to the exclusion of the daughters except for token amount) as binding upon her testamentary choices, or at least highly influential. To the contrary, in *Grewal,* the Court was not persuaded that the parents considered themselves "bound" by East Indian cultural traditions, and expressly rejected the daughters' argument that the parents' reasons were driven solely by adherence to those traditions.[37] The the fact that the parents made a gift to Amarjit, who had been effectively disowned at the time the wills were made, showed that the parents did not consider themselves bound by such traditions. Also, the evidence that the father had been open to the idea of changing his will, coupled with the suggestion of the executor's counsel that a cash gift of $150,000 likely seemed a substantial sum to the mother in particular, was incompatible with the conclusion that the parents felt themselves bound by culture to divide the estate in a way that effectively disinherited the daughters. The Court concluded that the traditional cultural values had "some influence" in how the parents treated the siblings, both when they were alive and in their wills.[38]

c) Reasonably held Expectations: The Court concluded that although it was reasonable for the daughters to hope they would get more than was provided to them under the wills, there was no reasonable expectation that they would each receive 1/6 of the estate.

d) Contributions: The daughters submitted that their contributions formed the essence of their claims, and that their significant contributions weighed in favour of the parents' enhanced moral obligation to them. The Court recognized that all of the siblings worked hard on the farm, and that the non-married siblings were expected to make their wages available for the farm operations, with no distinction made between a son and a daughter in that regard. However, the Court also noted that when looking at the contributions of the creation of the estate, one could not ignore one important factor: the immense rise in property values in the Lower Mainland. The rise in property values had nothing to do with any of the parties' efforts or labour. The court ultimately concluded that the siblings' contributions (including Kasar's) to be a largely neutral factor.

e) Relationships with the Parents and Contributions to Care: The Court found that the mother had treated her daughters (and particularly the two eldest) very cruelly during her lifetime. In the parents' later and last years, the two eldest daughters cared were heavily involved in looking after both parents and did their best to make sure that the parents continued to be cared for in their own home. Furthermore, in the last years, the daughters, especially the eldest two, took on most of the daily care and assistance the parents required with meal preparation, personal care and household chores. The court noted that although Kasar lived next door to the parents, he was much less involved than his siblings in providing care for the parents in the years before their

37 *Grewal,* supra, at para. 154.

38 *Grewal,* supra, at para. 155.

deaths. The Court concluded that due to the amount of care provided by the daughters to the parents during the parents' last years, there was an enhanced moral obligation owed by the parents to the daughters.

f) Personal circumstances: All the siblings owned property and were financially independent. However, there were clear disparities among the siblings, with Terry being the most well-off financially by a significant margin.

Assuming a net value to the estate of $9 million, under the wills the daughters received collectively about 6.6% ($600,000), and the sons collectively received 93.4% ($4.2 million). The daughters submitted that the estate should be divided equally among the siblings. Terry proposed a different approach, namely by looking at the value of the estate in 1993 when the wills were executed. At that time, the assets were worth far less, likely between $2.5 million and $3.5 million. Based on an estimated value in 1993 of $3 million, the cash legacies to the daughters would have amounted to about 20% of the estate, and the sons would each have received about 40% each. Terry proposed that the starting point for the daughters should be 20% of the estate value (i.e. 20% of $9 million being $1.9 million), which would then be divided four ways (i.e. $475,000). Terry submitted that the proper approach was to start with that minimal amount for each daughter and then go upwards until an amount was reached that could be considered in the range of what might be fair and reasonable for each daughter. Although the Court noted that Terry's approach had some initial appeal, the Court ultimately rejected such an individualized approach under the circumstances. Most importantly, it did not respect the principle of testamentary autonomy, namely that the sons be treated equally, and that the daughters be treated equally.

Based on all the factors, the Court concluded that there needed to be a substantial increase in the gifts to the daughters. The Court varied the Will to divide the estate 60% in favour of the daughters (i.e 15% each), and 40% in favour of the sons (i.e. 20% each).

Notably, although the Court expressly found that the parents' reasons for dividing the estate in the way reflected in the wills were not driven solely by East Indian cultural traditions (thus distinguishing *Prakash*), the end result was remarkably similar to the result in *Prakash* (i.e. 40% collectively to the plaintiff daughters, and 60% collectively to the plaintiff sons).

B. Spousal Claims

Gibbons v. Livingston, 2018 BCCA 443

In *Gibbons v. Livingston,*[39] the Court of Appeal had an opportunity to consider the intersection between the *Family Law Act* (*"FLA*"),[40] and the *WESA,* and also whether a mediated settlement ought to be set aside due to the vulnerability of the plaintiff.

The plaintiff (common-law spouse) commenced a claim to vary the testator's will. The defendant was the son of the testator. The estate was not large, and its principal asset was a house in Campbell River. Although the plaintiff received nothing under the deceased's will, she was the beneficiary of the deceased's life insurance policy and his employment pension. The parties were

39 2018 BCCA 443, affirming 2018 BCSC 1452.

40 S.B.C. 2011, c. 25.

both represented by counsel and settled the dispute following a mediation. After retaining new counsel, the plaintiff filed an amended notice of civil claim pleading that the settlement agreement was unjust, unfair and inequitable, and asserting a family property claim under the *Family Law Act*.[41] The defendant brought an application to stay the proceeding and to enforce the settlement agreement. The chambers judge granted the orders sought by the defendant. The appeal was dismissed.

The spouse argued that death may be considered to be "separation" such as to give rise to a claim by a surviving spouse under the *FLA* against the estate of a deceased spouse. The Court of Appeal held that the word "separation" in the *FLA* does not include death.[42] The Court noted that where a spouse dies after separation but before the settlement of their rights and obligations under the *FLA,* the surviving spouse can commence an action against the estate of the deceased. However, where spouses have not separated, the division of family property upon death is addressed in the *WESA*. Although the notional claim that might have been made out pursuant to the *FLA* is a reference point in assessing the adequacy of the provision made for the surviving spouse under the will, it is clear that the surviving spouse's claim is not asserted directly through the *FLA*. The Court concluded that there was no independent *FLA* claim available to the surviving spouse. Thus, it was not necessary to address the respondents' assertion that the appellant had commenced her *FLA* claim after the statutory limitation period set out in s. 198 of the *FLA*.

In separate concurring reasons, Fenlon J.A commented on a troubling aspect of the appeal: the testator had made his will at a time when he was single and bequeathed his estate to his adult son. He made no changes to his will during his marriage-like relationship with the plaintiff, who, at the time of the testator's death was in her mid-fifties and suffered from mild autism, depression and anxiety. The plaintiff had also contributed funds to the relationship that she received from a motor vehicle accident claim and from two inheritances. Upon the testator's death, the plaintiff lost her interest in the family property. Fenlon J.A. agreed with Willcock J.A. that the word "separation" in the *FLA* does not include death, and that that determination effectively ended the plaintiff's appeal for a share of the family property under the legislative scheme in British Columbia. However, she also noted that the *FLA* differs from comparable legislation in other Canadian jurisdictions where a surviving spouse can bring a division of family property claim upon the death of their spouse, even in the absence of any "separation".[43] Fenlon J.A. noted that allowing a division of family property claim after the death of a spouse gives the surviving spouse an opportunity to claim their share of the family property before calculating the value of the estate. If British Columbia had such legislation, the plaintiff would have had the option of pursuing a claim for half of the net family property upon the testator's death. However,

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41 S.B.C. 2011, s. 25.

42 *Gibbons*, supra, at para. 24.

43 *Gibbons,* supra, at para. 76. For example, in Manitoba: *The Family Property Act*, C.C.S.M., c. F25, s. 28; in Ontario: *Family Law Act*, R.S.O. 1990, c. F.3, s. 5(2) (which only applies to married couples); in Nova Scotia: *Matrimonial Property Act*, R.S.N.S. 1989 c. 275, s. 12(1)(d); in New Brunswick: *Marital Property Act*, R.S.N.B. 2012, c. 107, s. 4 (which applies only to married couples); in Newfoundland and Labrador: *Family Law Act*, R.S.N.L. 1990, c. F-2, s. 21(1)(d) (which applies only to married couples).

without a legislative change, the rights of a surviving spouse remain subject to the *WESA,* and the test in *Tataryn* as applied in British Columbia.

Regarding the second issue, the appellant argued that her claim to set aside the settlement should have been weighed in light of the criteria set out by the Supreme Court of Canada in *Rick v. Brandsema*[44]. In *Brandsema,* the Court confirmed its earlier decision in *Miglin v. Miglin*[45] regarding unconscionability and matrimonial agreements. Abella J., writing for the Court stated as follows:

> [43] *Miglin* represented a reformulation and tailoring of the common law test for unconscionability to reflect the uniqueness of matrimonial bargains:
>
> > [W]e are not suggesting that court must necessarily look for "unconscionability" as it is understood in the common law of contract. There is a danger in borrowing terminology rooted in other branches of the law and transposing it into what all agree is a unique legal context. There may be persuasive evidence brought before the court that one party took advantage of the vulnerability of the other party in separation or divorce negotiations that would fall short of evidence of the power imbalance necessary to demonstrate unconscionability in a commercial context between, say, a consumer and a large financial institution. [para. 82].[46]

As noted by the Court in *Brandsema*, whether a court will intervene depends on the circumstances, including whether there has been defective disclosure and the extent to which the negotiated terms are at variance from the goals of the legislation[47]. Whether the parties were represented by counsel in the negotiations is important but not determinative.

In *Gibbons*, the Court of Appeal imported the *Brandsema* analysis into a situation which did not involve a matrimonial settlement, but rather the settlement of a surviving spouse's wills variation claim. As in *Brandsema,* the negotiations had taken place in a difficult context. Under the circumstances, it was insufficient to assess the plaintiff's claim that the agreement was unjust, unfair, and inequitable simply by determining whether the plaintiff had understood the consequences of what occurred at the mediation and what she signed, as the chambers judge had been asked to do. The Court of Appeal held that the court should have been asked to assess the "procedural and substantive integrity of the agreement by considering evidence of the nature and extent of the appellant's vulnerability, whether she suffered from informational deficits and, if so, whether they were of the respondent's making, and whether the agreement effected a distribution of family property that deviated from the appellant's statutory entitlement".[48] In applying the *Brandsema* analysis, the Court held as follows:

a) *Vulnerability*: There was no doubt that the plaintiff was in a vulnerable position at the time of the mediated settlement. She suffered from mild autism, depression and

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44 2009 SCC 10 (*"Brandsema*).

45 2003 SCC 24 (*"Miglin*).

46 *Brandsema,* supra, at para. 43.

47 *Brandsema,* supra, at para. 49, cited in *Gibbons* at para. 41.

48 *Gibbons,* supra, at para. 47.

anxiety. She was prescribed significant mediation that she had stopped taking around the time of the mediation, which made her confused, disoriented and euphoric.

b) *Oppression or Advantage*: Although the plaintiff argued that the defendant had ailed to provide full financial disclosure before the mediation and afterwards, the court noted that the plaintiff had abandoned an application to obtain further discovery of documents before the summary trial. There was no other specific allegation of oppressive conduct on the defendant's part.

c) *Deviation from the statutory entitlement*: The Court held that in assessing the plaintiff's *WESA* claim, the value of the nominal *FLA* claim that might have been made out under the *FLA* "may be approximated".[49] Although the testator had not made any provision for the plaintiff under his will, he did make her the beneficiary of a life insurance policy and the beneficiary of his pension, which the court found had a combined value that was greater than the plaintiff's half of the family property. Thus, walking into the mediation, she already had received more than half of the family property. At the mediation, the defendant had agreed to give the plaintiff an additional $50,000, and full title to a boat valued at $32,500. The Court of Appeal concluded that it was appropriate to look at the value of all the property that came into the hands of the plaintiff upon the testator's death, and not simply what was transferred through the will, to determine whether adequate provisions had been made under s. 60 of the *WESA*. Considering those assets, the mediated settlement did not appear to be a significant deviation from the plaintiff's statutory entitlement.

The Court concluded that there were no concerns with the procedural or substantive integrity of the settlement or the circumstances of the mediation, and that the chambers judge did not err in dismissing the plaintiff's claim.

***Klotz v. Funk,* 2019 BCSC 817**

In *Klotz v. Funk*[50], the plaintiff was the 78 year-old widower of the testator. Both the plaintiff and testator had previously been married. The main dispute concerned the testator's severance of the joint tenancy in the matrimonial home after she was diagnosed with terminal cancer. At the same time the joint tenancy was severed, the testator and plaintiff both had wills prepared. The testator's will provided that if her spouse was alive at her death, he was entitled to a life estate of her interest in the matrimonial home (as long as he paid all operating expenses). If her spouse consented to sell the home, failed to pay the operative expenses, or passed away, then the trustees were required to sell the home and distribute the proceeds to her and her spouse's respective shares as tenants in common (with the residue of her estate going to her children). The plaintiff had made a mirror will.

The Court referred to the decision of the Court of Appeal in *Gibbons v. Livingston* with respect to the approach to be taken in applying s. 60 of the *WESA*. The Court also referred to the recent

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49 *Gibbons,* supra, at para. 58.

50 *Klotz v. Funk*, 2019 BCSC 817 ("*Klotz"*).

decision of the Court of Appeal in *Khan v. Gilbert*[51] (a case dealing with the division of family property under the *FLA*) where Justice Fenlon noted that in most marriages, one spouse will earn than the other and therefore contribute more to the family finance, and that "allowing relative contribution to become a regular consideration in the context of s. 95 [of the *FLA*] would create uncertainty and complexity, contrary to the legislative objectives underling the [*FLA*] division of property regime".[52]

In analyzing the legal obligation owed by the testator to the plaintiff, the court used a notional separation date that was earlier than the date of death. In particular, due to the testator's distribution of assets and expenditures following her diagnosis of terminal cancer, the Court used the date of diagnosis as the notional separation date. The court was satisfied that the equal division of the matrimonial property was appropriate. The Court was also satisfied that when the property was initially placed in joint tenancy, the couple was advised as to the nature of a joint tenancy. The Court noted that the explanation as to the legal nature of a joint tenancy and the possibility of severance is "well-known common advice" given by lawyers and notaries in British Columbia, and that there was no basis to presume that professionally competent advice was not given to the couple at that time.[53] The Court concluded that the plaintiff could have protected himself from severance of the joint tenancy by entering into a marriage agreement, and that such marriage agreements are common and encouraged by our Legislature (citing s. 92 of the *FLA*).

In analyzing the moral obligation to the plaintiff, the Court was satisfied that the provisions of the will were well within society's reasonable expectations of what a judicious person would do in the circumstances. Notably, with the life interest, there was very little risk that the plaintiff would ever lose the "roof over his head". Secondly, if the plaintiff chose not to continue living in the property, he would receive his one-half entitlement to the net sale proceeds following the mandatory sale of the property. The Court found that the interests of the deceased's children were effectively postponed and made secondary to the testator's wishes for the well-being of the plaintiff. The plaintiff's action was dismissed.

C. Testator's Reasons

The test for considering the testator's reasons for disinheritance (commonly referred to as the "valid and rational reasons" test) was described by the Court of Appeal in *Kelly v. Baker* as follows:

> In deciding a claim under s. 2(1) of the Act [now s. 60 of the *WESA*], the task of the court is to decide whether, at the testator's death, her will was consistent with the discharge by a good parent of her duties to her family [citations omitted]. 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.[54]

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51 2019 BCCA 80.

52 *Khan v. Gilbert,* supra, at para. 36; cited in *Klotz* at para. 47.

53 *Klotz,* supra, at para. 56.

54 *Kelly v. Baker* (1996), 82 B.C.A.C. 150, at para. 58.

Since *Kelly v. Baker,* Courts in British Columbia have grappled, and often struggled, with the application of the "valid and rational reasons" test. Although the Court of Appeal appears to have provided clear indication that the expressed reasons for disinheritance need not be "justifiable", it has not escaped the judges of our trial courts that such an analysis cannot always be reconciled with the Court's duty under s. 60 of the *WESA,* and the "fundamental precepts of *Tataryn* and the search for contemporary justice in the circumstances".[55] The authors of the 2018 Wills Variation Update noted a trend in the recent cases (notably, two cases in 2018 alone[56]) signaling a departure from the "valid and rational reasons" test, and a movement towards requiring that the reasons for disinheritance also be "justifiable".[57] In this update, we will consider the genesis of the "valid and rational reasons" test, namely the judicial interpretation of what is now s. 62 of the *WESA*. We will then suggest an alternative approach to reconciling the legislative provisions with the fundamental precepts of *Tataryn*.

The "valid and rational reasons" test stems from the pre-*Tataryn* comments of Goldie J.A. in *Bell v. Roy Estate*.[58] The appeal turned on whether the following finding by the trial judge could be maintained: "In the circumstances, if the facts were as she [the testatrix] believed them to be, I am satisfied she was entitled to draw the will in the way in which it was drawn". In determining the answer to that question, Goldie J.A. looked to the 1971 amendment to the *WVA* which empowered a judge to "look beyond the four corners of the will".[59] The amendment in question was the addition of subsections 2(3) and (4) of the *WVA*, which are nearly identical to what is now s. 62 of the *WESA*:

> Evidence
>
> 62.(1) In a proceeding under section 60, the court may accept the evidence it considers proper respecting the will-maker's reasons, so far as may be determined,
>
> (a) for making the gifts made in the will, or
>
> (b) for not making adequate provision for the will-maker's spouse or children,
>
> including any written statement signed by the will-maker.
>
> (2) In estimating the weight to be given to a statement referred to in subsection (1), the court must have regard to all the circumstances from which an inference may reasonably be drawn about the accuracy or otherwise of the statement. [emphasis added]

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55 *McBride v. McBride Estate*, 2010 BCSC 443, at para. 141 (Ballance J.) ("*McBride*"); see also *J.R. v. J.D.M.*, 2016 BCSC 2265, at paras. 109 to 112 (Dardi J.).

56 *Enns v. Gordon,* 2018 BCSC 705; and *Williams v. Williams Estate*, 2018 BCSC 711.

57 See *Geluch v. Geluch Estate*, 2019 BCSC 2203 at para. 172 where Francis J. noted and cited the considerable commentary in the case law about the extent to which reasons for disinheritance must be justifiable, as well as valid and rational: *Hancock v. Hancock Estate*, 2014 BCSC 2398 at paras. 53-56; *R.(J.) v. M. (J.D.*), 2016 BCSC 2265, at para. 110; *Brown v. Wisted Estate*, 2010 BCSC 1890 at para. 115; *LeVierge v. Whieldon Estate*, 2010 BCSC 1462 at para. 61; *Kong v. Kong*, 2015 BCSC 1669 at para. 79.

58 *Bell v. Roy* (1993), 23 B.C.A.C. 146, 75 B.C.L.R. (3d) 213).

59 *Bell v. Roy,* supra, at para. 34.

As noted by Goldie J.A., "[i]t 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".[60] However, Goldie J.A. went on to describe the duty of the trial judge as follows: "the first duty of a trial judge where no adequate provision has been made for a dependant […] is to consider all the evidence of intention permitted under s. 2(3) of the Act to determine whether the reasons so disclosed are rational and valid. Where the answer to this inquiry supports the scheme of the will a court ought to favour those intentions".[61] What does it mean to consider whether the answer to the inquiry "supports the scheme of the will"? Could this be interpreted to mean that the testator's "valid and rational reasons" must justifiably support the scheme of the will?

It must be remembered that the Court of Appeal's decision in *Bell v. Roy* predates the Supreme Court of Canada's decision in *Tataryn*.[62] Under s. 60 of the *WESA*, the Court is tasked with the duty to form an opinion based on all the circumstances, including evidence that would otherwise be inadmissible but for s. 62, as to whether adequate provision has been provided to the testator's spouse and/or children. The duty of the court is circumscribed by the language of the legislation. The genesis of what has become known as the "valid and rational test" is the 1971 amendment to the statute permitting courts to consider otherwise inadmissible evidence. The language in the evidentiary provision is permissive, and not mandatory. Nowhere in the legislation does it state that the testator's reasons (if factually true and rationally connected to the act of disinheritance) are determinative. The legislation simply provides that such evidence is to be "accepted" by the court, and that the court needs to assess the weight to be given to such evidence. However, the evidence, once admitted, is simply evidence of the testator's intention. Such evidence permits the court to include a subjective element into its analysis (i.e. why the testator made the provision he or she made in the will) rather than considering the matter from the purely objective perspective of the "reasonable testator". Notably, wills variation rights are a creation of statute; they do not stem from the common law or courts of equity.

The trend in the cases (as noted by the authors in the 2018 Wills Variation Update) is "a movement towards an analysis that requires the reasons for disinheritance to be not just valid and rational but also justifiable".[63] Where there is evidence of the testator's "reasons", it is difficult to imagine how a court could form an opinion as to whether "adequate provision" has been made for the proper maintenance and support of the testator's spouse or children without considering whether the testator's reasons (if valid and rational") are justifiable in the circumstances, judged by contemporary standards. The court is tasked with the duty to form an opinion based on a consideration of all the relevant circumstances, and not to simply defer to testamentary autonomy. As noted by McLachlin J. in *Tataryn*, "the main aim of the legislation is adequate, just and equitable provision for the spouses and children of testators".[64] While

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60 *Bell v. Roy,* supra, at para. 37.

61 *Bell v. Roy,* supra, at para. 39.

62 As noted, for example, by Ballance J. in *McBride* at para. 141, McLachlin J., in *Tataryn*, made passing mention of *Bell* as an example of a case where a testator's moral duty was seen to be negated, but did not comment on Goldie J.A.'s analysis regarding the effect of a testator's "rational and valid" reasons.

63 2018 Wills Variation Update, supra, at p. 2.1.5.

64 *Tataryn*, supra, at para. 16.

testamentary autonomy is also protected by the legislation, that right has been limited and is no longer absolute.

As noted in the *obiter* comments of Madam Justice Newbury in *Scott-Polson v. Lupkoski Estate*[65], whether the explanation given by a testator is in law "determinative of what a fair and judicious parent would have thought appropriate…must await another day".

Recent Cases re: Testator's "Reasons"

In the interim, we will briefly refer to the recent cases (since the 2018 Wills Variation Update) where the courts considered the testator's "reasons" for making the dispositions in the will:

- ***Lamperstorfer v. Plett*, 2018 BCSC 89:** Although there was no statement in the will or any other writings by the testator that explained why he made the dispositions he did, the Court found that there was a large body of reliable evidence from which to draw certain inferences and reach certain conclusions about what motivated and influenced the testator's decision-making. The court found that the testator's unique world view, reclusive lifestyle, personality and severe mental health challenges worked together to skew his ability to appreciate the extent of the moral duty he owed to each of them, and that his judgment was hampered at the time he made his testamentary dispositions. On that basis, the court concluded that there was no valid or rational reason for the testator's choice to disinherit his sons.[66]
- ***Webber v. Sullivan*, 2019 BCSC 1522 ("*Webber*"):** The testator's reasons for disinheriting the plaintiffs was that that one "has never been involved" and that the other "has not been involved". The Court found that the stated reasons were "not entirely valid and rational", although there was some truth to those reasons. The Court noted that in drafting her will, the testator seemed primarily motivated to justify leaving the entire residue of her estate to one child to the exclusion of her other children, and that her desire to justify that disposition led to a lack of precision in her articulated reasons for doing so. The Court concluded that the testator's stated reasons did not, on their own, justify the negation of her moral duty to the plaintiffs.[67]
- ***Geluch v. Geluch*, 2019 BCSC 2203:** The plaintiff, the only daughter of the testator, was a disabled adult, who was represented in the action by her litigation guardian, the Public Guardian and Trustee of British Columbia. Two separate actions were tried together: one dealt with the validity of the two wills in question and an *inter vivos* trust, and the other was a wills variation claim. As a result of the court's conclusions in the validity action, the plaintiff would receive over half the value of the estate as the sole intestate heir.[68] In the court's view, that disposition provided adequate, just and equitable provision for the plaintiff's maintenance and support and discharged any moral

65 *Scott-Polson v. Lupkoski Estate*, 2013 BCCA 428, at para. 43.

66 *Lamperstorfer v. Plett*, 2018 BCSC 89, at paras. 183 to 190.

67 *Webber v. Sullivan,* 2019 BCSC 1522, at paras. 164 to 170.

68 The court found that the testator did not know or approve of the residue clause in the January 12, 2016 will, and that the residue clause was invalid. As a consequence, the residue passed on an intestacy to the plaintiff as the sole intestate heir.

obligations that the testator had to her daughter. However (in the event that her analysis of the validity clause was incorrect) Francis J. proceeded to analyze the plaintiff's wills variation claim as if the entirety of the will was valid, and the plaintiff's provision from the estate was limited to the $15,000 gift in trust contained in the will. Francis J. noted that wills variation claims brought by disabled adult children most often arise where a will-maker erroneously believes that their moral obligation is vitiated by the financial assistance the child receives from the estate. In this case, there was evidence that the testator was concerned that if her daughter received a larger bequest, her caregivers would exploit her by using the funds to take her daughter on trips. The decision for a small bequest was to ensure that her daughter would not be able to use her bequest for the purposes of travel. The Court found that as a developmentally disabled adult with multiple health complications, the plaintiff could only travel with a paid companion. The Court also found that travel was one of the things in life that brought the plaintiff great joy. As a result, Francis J. commented that to the extent that the very small bequest was to ensure that the plaintiff could not engage in travel, the bequest "borders on being cruel". The court declined to find that there were valid or rational reasons for the extremely small bequest.

- ***Scurek v. Scurek*, 2020 BCSC 450:** The plaintiff was the adult daughter of the deceased. Under the will, the residue was divided 50% to the testator's son, and the other 50% was divided into three equal shares for the plaintiff and her two children. The court found that on the evidence overall, the reasons for providing the plaintiff with a relatively small share of the estate were essentially speculative (i.e. that she would "waste" the money and nothing would be left for her sons). The court also noted that if that was the reason, then it was unfair and deserved little weight, since the plaintiff had always been a hard worker who largely provided for herself. Finally, the Court rejected the defendant's argument that the will reflects a sort of equality (i.e. if the shares given to the two grandsons are thought of as falling within the plaintiff's share, then her share would be equal to her brother's). In the court's view, a testator cannot discharge his moral obligation to his child by benefiting her children at her expense.[69]

D. Estrangement, Neglect and Abandonment

Considerations of abandonment, neglect and estrangement, where applicable, continue to be a significant focus of evidence in wills variation claims involving adult children. The inquiry delves into the reason for the estrangement, and in particular, whether the testator or the child is to be blamed for the estrangement. If the child is the culpable party, the court is more likely to view the estrangement as a valid and rational basis for disinheriting (or providing a lesser share to) the estranged child.

For example, in *Hall v. Hall Estate*,[70] the Court of Appeal agreed with the trial judge's conclusion that the son was solely responsible for the estrangement. The court held that the final estrangement "tipped the balance" and provided a valid and rational basis for the testator to

69 *Scurek v. Scurek*, 2020 BCSC 450 at paras. 120-124 and 146-149.

70 2011 BCCA 354.

disinherit the son. Conversely, where the parent is responsible for the estrangement, the court is less likely to view the child's disinheritance favorably. For example, in *Gray v. Nantel*,[71] the father disinherited his son from his estate. The father was an absentee father for the first 18 years of his son's life and then he treated the son shabbily during a brief reconciliation. The court stated that the onus to seek further reconciliation was on the father's shoulders (the inference being that the father was responsible for the estrangement). The court agreed with the son's position that a testator cannot avoid his moral obligation to a child by unilaterally withdrawing from the parent/child relationship. The court re-apportioned the estate so the son received 30%.

Over the past two years, the court has continued to consider the assignment of blameworthiness in estrangement situations. In *Enns v. Gordon Estate* ("*Enns*"),[72] the testator gave each daughter a $10,000 bequest from an estate valued at over $1 million dollars (the majority of the balance of the estate went to charities). There was a two-year estrangement between the older daughter and the testator due to a dispute regarding the ownership of a townhouse. The court concluded that the fault for the estrangement was, in part, attributable to both parties, and in part due to a "non-fault" misunderstanding between them. The court ultimately varied the will so that the older daughter received 40% of the residue of the estate. In contrast, the court declined to increase the younger daughter's interest in the estate for the following reasons: a 15-year estrangement, the "late in life" reconciliation with the testator which was initiated by others, and the depth and the effectiveness of the reconciliation which had been constricted due to the younger daughter's health problems. Notably, however, the younger daughter had died before the trial and the older daughter was the executor and sole beneficiary of her estate. Therefore, effectively, any award to the younger daughter would benefit the older daughter, who would already be receiving 40% of the residue. The court did not expressly consider this in the analysis. However, at the outset of the reasons for judgment, the court did note that although death does not disentitle an estate to relief, it is a circumstance that may be considered in determining what is just and equitable.

In *Webber*, the relationship between the testator and her two disinherited daughters was influenced by sexual abuse allegations advanced by a toddler granddaughter against the testator. The court concluded, to the extent it was relevant to consider the fault of the estrangement, that it was impossible to attribute fault because the one daughter understandably wished to protect her own daughter and the other daughter wished to support her sister. The court considered the testator's reaction of being accused of such an egregious act to also be understandable. Nonetheless, the court looked favourably on the fact that the daughters still tried to maintain a relationship with the testator, despite difficult family circumstances, and considered their actions as strengthening the testator's moral duty to them. The court varied the will so that the daughters received 5% and 10% of the residue of the estate, respectively.

E. Size of the Estate

While considering the size of the estate, the court will also weigh the financial circumstances of competing beneficiaries and the trial judge's assessment of other claims. For example, in *Williams*

71 2002 BCCA 94.

72 2018 BCSC 705 (*"Enns"*).

v. Williams Estate,[73] the estate's value was only $5,000 because the court upheld the *inter vivos* transfers of most of the testator's assets to one of his sons. The court viewed the value of the estate as insignificant, particularly in light of the plaintiff's own assets (which totaled approximately $2 million). The court declined to redistribute the estate equally between the sons.

In *Webber* the daughters argued that the $434,000 estate was sufficient to permit an adequate provision to them. The court did not consider the size of estate in isolation and held that the defendant brother's personal and financial circumstances (which were much more restrictive than the daughters) must be considered in the balance of making such an assessment because any provision to them was at his expense. As stated above, the court ultimately varied the will to distribute 5% and 10% of the residue to each daughter respectively.

In *Enns* the court held that the estate valued in excess of $1 million could be redistributed without depriving the existing charity beneficiaries of a healthy residual sum. It was unnecessary for the court to consider the financial circumstances of the existing charity beneficiaries because they had no moral or legal claim to the estate and thus were not competing beneficiaries. Regarding the size of the estate, the court held that society would not reasonably expect the adult daughter to be provided with less than 1% of a $1.1 million estate (i.e. a $10,000 bequest) where that daughter had gracefully fulfilled all her duties to her mother for 36 out of her 38 adult years. As set out above, the court ordered that the daughter receive 40% of the residue of the estate with the balance going to the charities.

Notably, with the disparity in economic conditions in different areas of the Province, the analysis relating to the size of the estate could arguably be broadened to consider other factors, including the cost of living. For example, in *Sawchuk v. MacKenzie Estate*,[74] the Court of Appeal considered the geographic context under the standard of living analysis regarding the testator and the claimant daughter:

> [17] . . . Is $500,000 adequate to provide the appropriate standard? Perhaps in many parts of Canada and, indeed, in other areas of British Columbia, that amount would be ample. In Vancouver, however, where the testatrix resided, it is doubtful if $500,000 would cover the cost of a single-family home or even a reasonably spacious condominium in a desirable neighbourhood. The testatrix's own residence was valued at nearly $2 million. I think that a judicious parent would make a provision sufficient to allow the appellant to live in her own residence in an area of greater Vancouver generally similar to the that of the testatrix. Apart from provision for a reasonable residence, I think that a judicious parent would make generous provision for other amenities of life. The amount that a judicious parent would allow cannot be measured with precision but I think that the amount awarded by the trial judge was too low to provide a reasonably generous standard of living in an affluent part of Vancouver. With respect I do not think that it was an adequate, just and equitable provision in the circumstances. Keeping in mind that this Court is directed to exercise an independent discretion in the matter, I would vary the provision from that awarded by the trial judge to $1 million.

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73 2018 BCSC 711.

74 2000 BCCA 10.

Similar considerations may also be useful when considering the size of the estate.

F. Costs

Although not in the wills variation context, *Chalmers v. Chalmers Alter Ego Trust* ("*Chalmers*")[75] is still relevant because it summarizes the "modern approach" to awarding costs in estate litigation generally. The court in *Chalmers* summarized the modern approach as follows:

> [9] The Court of Appeal in this province recently endorsed the modern approach to awarding costs in estate litigation in *Hollander v. Mooney*, 2017 BCCA 238, stating as follows at para. 112:
>
> > [112] … I would emphasize the wisdom of the modern approach to awarding costs in estate litigation, described by Gillese J.A. in *McDougald Estate* at para. 85, that recognizes the need to "restrict unwarranted litigation and protect estates from being depleted by litigation".
> >
> > [10] The modern approach, set out in *McDougald Estate v. Gooderham* (2005), 2005 CanLII 21091 (ONCA), 255 D.L.R. (4th) 435 (Ont. C.A.) at para. 80, "is to carefully scrutinize the litigation and, unless the court finds that one or more of the public policy considerations… applies, to follow the costs rules that apply in civil litigation." The three public policy considerations that underlie this approach are set out in *McDougald Estate* at para. 78 as follows:
> >
> > 1. the importance of giving effect to valid wills that reflect the intention of competent testators;
> >
> > 2. the appropriateness of the testator, through his or her estate, bearing the costs of the litigation where the difficulties or ambiguities that gave rise to the litigation were caused, in whole or in part, by the testator; and
> >
> > 3. the public interest in resolving questions concerning the validity of wills without cost to those questioning the will's validity where there are reasonable grounds upon which to question the execution of the will or the testator's capacity in making the will.

We have highlighted the following decisions because they discuss costs scenarios other than party-on-party costs:

***Lamperstorfer v. Plett,* 2018 BCSC 89**

- Costs award sought: the plaintiff sought double costs pursuant to Rule 9-1 following his formal offer to settle. In his formal offer the plaintiff agreed to settle for 40% of the residue of the estate. The plaintiff beat his formal offer because, at trial, he was awarded 41% of the residue of the estate.

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[75] 2018 BCSC 336.

- Costs award ordered: the court declined to order double costs and ordered Scale B costs of the proceeding against the competing beneficiaries paid out of their portion of the estate. In declining to order double costs, the court considered the fact that, through no fault of their own, the competing beneficiaries were unfortunately placed in a situation where the testator did not adequately address his moral obligations to his two adult sons. While the court acknowledged that it does not mean double costs cannot be awarded in this context it was still an important factor to consider, especially because the competing beneficiaries did not advance a frivolous defence. Moreover, to the competing beneficiaries' credit (and the credit of all parties), the issues at trial were streamlined and synthesized into a three-day summary trial which resulted in significant cost-savings for the parties.

***Peterson v. Welwood*, 2019 BCSC 838**

- Costs award sought: the executor sought costs against the plaintiff on a party to party basis and the remainder of his legal expenses indemnified by the estate. The plaintiff disputed that he should be required to pay any party -and-party costs to the executor and argued that the general rule in estate litigation is that the executor is entitled to recover his full legal costs from the estate and there is no reason in this case to depart from such rule.
- Costs award ordered: the court ordered the plaintiff to pay the executor's Scale B costs for all steps in the litigation and any shortfall ordered to be indemnified by the estate in the usual manner. The court reviewed the rational for having the legal costs paid for the estate – i.e. the executor is a mandatory party in wills variation litigation, his/her role is neutral and generally limited to providing necessary background with respect to the assets and administration. It is largely for this reason that the standard costs order in such cases is for the executor's legal costs to be paid from the estate. However, the court distinguished the case because the plaintiff not only made claims that were adverse to the other beneficiaries of the estate, but that also directly challenged the role played by the executor because he was also the lawyer who drafted the will and was therefore a key witness. The court concluded that such litigation was clearly adversarial in nature and pursuant to the "modern approach" discussed in *Chalmers* the plaintiff was correctly exposed to the general rule – i.e. costs follow the event and "must be awarded to the successful party".

***Scurek v. Scurek*, 2020 BCSC 821**

- Costs award sought: the testator left his estate 50% to his son and 50% divided into three equal shares: one to the plaintiff and one each to her two sons. At trial, the court increased the plaintiff's interest in the estate to 3/6 by reducing 1/6 each from her brother and two sons' interest in the estate (even though, at trial, the daughter only sought to reduce the interest of her brother and not her two sons). The plaintiff sought costs payable from her brother only.
- Costs award ordered: the court ordered that the brother pay 50% of the plaintiff's Scale B costs from his interest in the estate. The court held that the brother's liability for costs should not be increased as a result of plaintiff's generous or benevolent position in

relation to her sons. But for the plaintiff's decision to not pursue the costs against her sons, costs would be ordered payable severally by her brother and her two sons.

G. Practice Points noted in Recent Cases

The following are a few practice points and procedural issues noted in the recent cases:

1. Bringing a summary trial application on discrete issues: In *Weaver v. Weaver*, 2019 BCSC 132, the defendant brought a summary trial application with respect to the plaintiffs' resulting trust claim. The summary trial was heard approximately a month and a half before the scheduled date for the full trial (which would deal with the remaining claims, namely wills variation and unjust enrichment claims). The parties all agreed that the resulting trust claim was a discrete issue that should be resolved on a summary trial. The court expressed some concern that much of the argument and evidence would be directed at issues that will not be resolved by the summary trial, including the unjust enrichment claim. The court accepted the assurances by counsel that the ruling on the resulting trust issue would narrow the issues at trial, and "improve settlement prospects".[76]

2. Wills variation claim coupled with seeking proof in solemn form?

    a. In *Naidu v. Yankanna Estate,* 2018 BCSC 878, the court cited *Johnston Estate v. Johnston,* 2016 BCSC 1388 ("*Johnston Estate*") and *Clark v. Nash*, [1986] B.C.J. No. 1655 (S.C.) aff'd [1987] B.C.J. No. 304, and noted that a beneficiary or party seeking variation of a will must first show the will is valid before varying it. Here, the plaintiffs had not done so, and in fact were seeking a declaration that the will was not valid. On the application under Rule 9-5, the court struck the portion of the claim seeking proof in solemn form (on the basis that the plaintiffs should have proceeded by way of petition) and the portion of the claim seeking a declaration that certain property was held in trust for the beneficiaries of the estate (on the basis that the plaintiffs had not obtained leave of the court under s. 151 of the *WESA*).

    b. On the other hand, in *A.P. v. A.F.*, 2020 BCSC 746, the Court (after also citing *Johnston Estate*) noted that although it is generally improper to include a wills variation claim in an action for proof of a will in solemn form (because a valid will is necessary for a variation claim), such claims are occasionally heard together rather than severed. The court found that given the length and expense of the proceedings, and the information already before the court, it was in the interests of justice to decide the wills variation claim.[77]

3. Plaintiff should not bring a wills variation action while also acting as personal representative: In *Mayer v. Mayer Estate*, 2018 BCSC 2225, the Court paused to note that the plaintiff should not have brought a wills variation actin while she was also acting as a personal representative. Also, with respect to the "estate" having been named as

76 2019 BCSC 132 at paras. 55-56.

77 2020 BCSC 746 at para. 155.

a defendant, the court noted that the estate is not a legal entity capable of being sued, and that the proper defendant in relation to a wills variation action was the personal representative.[78]

4. Trial conducted in an efficient and exemplary manner: In *Scurek v. Scurek*, 2020 BCSC 450, the Court noted that the trial was conducted over only four days in an exemplary manner, very efficiently, and with appropriate civility throughout. There was a document agreement, a common book of documents that organized a significant volume of documents very clearly, detailed chronologies of facts with pinpoint references to the evidence, etc. The court also noted that counsel for the estate had provided an estate summary together with supporting documents, which was entered into evidence as an agreed statement of facts.

V. Conclusion

After 100 years of wills variation legislation in British Columbia, the jurisprudence in the area has evolved alongside changes to societal norms and expectations. However, the law is far from settled as the courts continue to grapple with moral obligations and testamentary autonomy in the context of the legislation, the precepts in *Tataryn,* contemporary societal expectations, and more recently the concepts of "public morality" vs "fundamental conceptions of morality". Although a needs based approach was rejected early on by the Supreme Court of Canada in *Walker v. McDermott*[79], and again by the legislature when the *Wills Variation Act* was repealed and the *WESA* enacted, is it possible that the pendulum might effectively swing the other way following a charter challenge in British Columbia? How will courts deal with testamentary autonomy and a testator's "reasons" where those reasons are not, in the opinion of the court, justifiable? The evolution of the jurisprudence on those issues, and others, will no doubt continue. Perhaps there will be further clarity by the next wills variation update. Stay tuned.

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78 2018 BCSC 2225 at paras. 176-177.

79 [1931] S.C.R. 94.