IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ciarniello v. James,*
2016 BCSC 1699

Date: 20160915
Docket: S146155
Registry: Vancouver

Between:

Marianna Ciarniello

Plaintiff

And

Maria Louise James and David F. Sky as executors of the will of Dominic Ciarniello, deceased, Maria Louise James, Marco Carnello, Lana Ciarniello, Sonja Ciarniello, and Nicholas Ciarniello

Defendants

Before: The Honourable Mr. Justice J. Sigurdson

Reasons for Judgment

Counsel for the Plaintiff:	Amy D. Francis Andrea E. Frisby
Counsel for the Defendants Maria Louise James and David F. Sky as executors of the will of Dominic Ciarniello, deceased:	Suzan El-Khatib
Counsel for the Defendants Maria Louise James, Marco Carnello and Lana Ciarniello:	Wesley Mussio Anthony J. Eden
Counsel for the Defendants Sonja Ciarniello and Nicholas Ciarniello:	Kimberly-Anne M. Kuntz
Place and Dates of Hearing:	Vancouver, B.C. January 20 and March 15, 2016
Place and Date of Judgment:	Vancouver, B.C. September 15, 2016

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INTRODUCTION

[1] In this summary trial, the plaintiff, Marianna Ciarniello, the wife of the deceased testator Dr. Dominic Ciarniello, seeks a variation under the *Wills Variation Act*, R.S.B.C. 1996, c. 490, of her husband's will of May 3, 2012 (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 died on April 28, 2013 at the age of 80.

[3] The plaintiff is the second wife of the deceased. She is now 66 years old. Their relationship was lengthy and spanned 39 years. They were married for 28 years and spent 11 years prior to that in a marriage-like relationship. They had two children. The deceased had three children by his first marriage. All five of his children are adults.

[4] The will provided that after certain specific gifts the residue of the estate was to be divided equally among the five children of the deceased. The will also provided that the plaintiff was to be given any interest that the testator may have had in the family home on Selkirk Street in Vancouver where the plaintiff and the testator lived.

[5] The plaintiff's position is that under *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, a variation of her husband's will is justified based on her legal and moral claims arising from their 39-year relationship, supported by her entitlement to a property division under provincial family law legislation and her right to spousal support, all considered in light of her claim for unjust enrichment.

[6] The plaintiff initially applied for judgment by summary trial. The relevant assets, in general terms, include real property, RRSPs, and shares in companies holding real estate. The executors of the estate commissioned an expert valuation of two companies as at the date of the testator's death, and the plaintiff obtained an expert valuation on the shareholding in Dr. D. Ciarniello Inc. ("Dr. Inc.") and

the testator's minority interest in a company called Nicoson Investments Corp. ("Nicoson") owned largely by the plaintiff.

[7] After the original summary trial application, I decided, in reasons handed down on November 24, 2015 [2015 BCSC 2148], that because of the dispute over the value of certain assets I was unable to decide the case by summary trial at that time.

[8] The hearing continued on January 20 and March 15, 2016 when I received further evidence and argument.

[9] The plaintiff's position is that there should be a significant variation to the will. As I will explain, she initially sought a lump sum payment of $3.5 million but when the summary trial was reconvened she sought a 40% interest in the residue of the estate plus the transfer to her of the deceased's minority 10% interest in Nicoson.

[10] The three children of the first marriage oppose any variation to the will, say that it made adequate provision for the plaintiff, and say any variation would be unfair given the plaintiff's assets and the actual value of the estate. The two children of the second marriage support their mother's position provided the five children are treated equally under the will.

[11] I will explain the position of the parties more specifically after I have discussed the valuation issues.

FACTS

[12] The more detailed facts of this case are as follows.

[13] Dr. Ciarniello was successful both as a dentist and as a businessman.

[14] He and the plaintiff lived together for 39 years, having been married for 25 of those years, and had two children, Sonja Ciarniello and Nicholas Ciarniello. I will refer to those two children as the "Second Marriage Children".

[15] Prior to his second marriage, Dr. Ciarniello was married to Sandra Sammartino and together they had three children, the defendants Maria James, Marco Carnello and Lana Ciarniello. I will refer to those children as the "First Marriage Children". The first marriage ended in 1974 but after the divorce those three children had a meaningful relationship with their father, as did the Second Marriage Children.

[16] Dr. Ciarniello and the plaintiff owned their home on Selkirk Street in joint tenancy.

[17] Dr. Ciarniello had wealth in corporations holding real estate and in his professional dental corporation. He wholly owned Dr. Inc., Cinimod Enterprises Ltd. ("Cinimod"), and Mardom Investments Ltd. ("Mardom"). Dr. Ciarniello had a 10% interest in Nicoson.

[18] The plaintiff holds a 90% interest in Nicoson, a company which owns income-earning property located at 305 – 311 West 8th Avenue, Vancouver, and which until August 2015 owned a property located at 2820 28th Street in Vernon which was sold in 2015.

[19] The deceased provided gifts to all his children for down payments on houses, cars, jewellery and the like, but the *inter vivos* gifts provided to the Second Marriage Children were more generous. The deceased, for example, provided gifts in the range of $50,000 to $150,000 to Lana Ciarniello (First Family) to purchase property, but the Second Marriage Children were given gifts of greater value, including a down payment of $1,000,000 to purchase 4870 Hudson Street, Vancouver which is owned by Sonja Ciarniello and Nicholas Ciarniello (Second Family) as joint tenants.

[20] The evidence suggests that the plaintiff fulfilled a traditional role as a homemaker and generally stayed at home, was a contact person for some tenants in properties owned by Cinimod and Mardom, and in the latter years of Dr. Ciarniello's life, took care of him during his debilitating illness.

[21] Under the will, after certain specific gifts, the deceased divided the residue of his estate in equal shares among his five children. The only gift to the plaintiff under the will was any interest that Dr. Ciarniello had at his death in the matrimonial home located on Selkirk. The Selkirk home however was in joint tenancy and his interest passed to the plaintiff by right of survivorship.

[22] Under the will Dr. Ciarniello appointed the plaintiff Marianna, his daughter Maria from the first marriage, and David Sky, a lawyer, to be his executors and trustees.

[23] A grant of letters probate in their favour was issued by this Court on February 14, 2014.

[24] Just over six months later, the plaintiff resigned as co-executor of the will and co-trustee in order to pursue this wills variation claim which she commenced on April 30, 2015: the plaintiff alleged that the deceased did not make adequate, just and equitable provision for her.

[25] Since the date of the deceased's death, the plaintiff has drawn down her RIF considerably, indicated by a taxable income in 2013 of $130,000. Since April 2015 when executors of the estate refused to make further payments on the Hudson Street mortgage granted by Nicholas and Sonja Ciarniello, the plaintiff has made those payments and now has a debt secured on the Selkirk home of about $900,000. The Hudson Street mortgage is not a debt of the estate, but as I will show, part of the debt secured by the Selkirk mortgage is in fact an obligation of the estate.

First Summary Trial

[26] When the plaintiff's application came before me, I initially found that I could not resolve certain factual questions to decide this case on a summary trial. I referred to specific issues concerning a tax liability on the testator's death, the question of a long-term debt of $1,267,697 apparently owing by Nicoson, and

the market value at the date of the testator's death of the matrimonial home on Selkirk.

[27] I said as follows:

> [19] Some of the specific issues, on which I am unable to find the facts to justly determine now, may be described this way:
>
> (a) The evidence shows that the estate had a tax liability on the testator's death of about $3.6 million which liability has apparently been paid; the evidence is unclear precisely how that liability arose and whether it can be avoided. The plaintiff says that if the testator left his assets to her then his assets would flow to her on a tax-deferred basis and that the $3.6 million paid by the estate is the direct result of her being "disinherited by the deceased". It was suggested by the plaintiff that steps could have been or might still be taken to further defer that tax. However, the plaintiff suggests that is irrelevant in any event because the relevant time for valuation is just before the date of testator's death and a tax liability that arises subsequently is irrelevant.
>
> However, I find that the question of how this liability arose and whether it can be deferred is significant. The three children from the first marriage submit that there is no evidence that a successful award for the plaintiff in this case will lessen, defer or eliminate the tax liability and importantly that there is no expert evidence to that effect. I agree with that submission.
>
> (b) One of the plaintiff's assets is a 90% interest in a company called Nicoson Investments Corp. ("Nicoson"). A question that arises on the evidence that I find I cannot presently resolve on this summary trial is the effect of a long-term debt of $1,267,697 apparently owing by Nicoson, significantly to whom it is owed, and whether and how it should be taken into account in determining the value of the plaintiff's interest in Nicoson at the date of the testator's death.
>
> (c) The three children from the first marriage also say the market value of the plaintiff's property on Selkirk Street at the date of death is the relevant date for valuation but there is no evidence of the market value at that time.

Reconvened Summary Trial

[28] The parties filed further affidavit material that addressed, and allows me to now resolve, these questions. Further affidavit material about the Nicoson debt explained that it was owing to the estate, Cinimod and Dr. Inc. The executors and

those companies started an action in debt against Nicoson for $1,267,697 plus interest.

[29] I also received evidence of estate planning done by the deceased. As well, I received evidence of tax planning done subsequently by the executors in dealing with tax arising from the deemed disposition of shares to the children on his death.

[30] As to the deceased's estate planning, Mr. Sky, the co-executor and trustee, said that he had been involved in preparing the deceased's will since around 2006. Mr. Sky deposed that the testator made it clear his intention was to ensure the plaintiff received family assets outside the will through various purchases and dealings, and that his five children would share equally in his estate. Dr. Ciarniello expressed his intention to adequately provide for his wife by gifts of real estate and repayment of business loans and debts and by commercial properties in Vancouver and Vernon and his interest in the family home, in a statutory declaration of May 2012. Mr. Sky described the model as being one to transfer equity outside the will to the plaintiff and the remaining assets to all his children through the will.

[31] Mr. Sky said Dr. Ciarniello did not single out any one child or his spouse over other members of his family. He said that Dr. Ciarniello made it clear that he had provided for the plaintiff and established investments to ensure she was well provided for upon his passing. The deceased appears to have spoken to the family of his plan that his wife would be provided for outside of the will and each child would share equally.

[32] An important issue in this case concerns a tax liability of the estate that has now been paid of $3,641,600 and its significance to the plaintiff's application. The plaintiff says that this tax liability of the estate is irrelevant because, according to her counsel's submission, the gross value is the only relevant value and the tax liability could have been deferred if the testator had left his assets to his wife. The relevant valuation to determine whether the deceased made adequate provision for his wife, the plaintiff says, must be a pre-estate tax valuation. The plaintiff says the authorities show that the legal entitlement of a surviving spouse is measured by his

or her entitlement upon a notional separation immediately prior to the death of his or her spouse.

[33] On the death of Dr. Ciarniello, the estate incurred a tax liability which it paid in the amount of $3,641,600. The tax payment in fact followed other tax planning undertaken by the executors of the estate after the death of Dr. Ciarniello in order to avoid double taxation. This was explained in a December 10, 2015 letter of Kenneth Chong, a chartered professional accountant, under the heading "Tax Planning That Was Undertaken":

> Because Dominic bequeathed the shares of Mardom, Cinimod and DDCI to his 5 children, on his death on April 28, 2013, Dominic was deemed to have disposed of the shares of the Companies at their fair market value; which reflected the accrued gains on the Companies' underlying properties. As well, when Mardom and Cinimod sell their underlying properties, the Companies will also pay taxes on the accrued gains realized on sale again.
>
> As a result of this "double tax" exposure, it was decided that tax planning would be undertaken to avoid this. The tax planning undertaken involved triggering the accrued gains on Mardom's and Cinimod's properties by selling the beneficial interests in the properties to a newly incorporated company, Domciar Holdings Ltd. ("Domciar") on April 23, 2014, triggered capital gains taxes to the Companies. This also increased the cost of the properties to Domciar and reduced or will reduce the capital gains realized and the capital gains taxes that was or will be payable by Domciar on disposition or eventual disposition of the properties.
>
> Mardom and Cinimod then redeemed their shares held by the Estate of Dominic Ciarniello on April 26, 2014; which gave rise to significant deemed dividends to the Estate tor its taxation year ended April 28, 2014 and which triggered significant income taxes to the Estate. However, this also reduced the capital gains taxes to the Estate as a result of the deemed disposition of Dominic Ciarniello's shares of Cinimod and Mardom arising on his death on April 28, 2013 and that was reported on his 2013 personal income tax return filed with the Canada Revenue Agency.
>
> This ultimately results in the avoidance of double tax because the sale of the properties from Cinimod and Mardom to Domciar increases the cost of the properties to Domciar for Canadian income tax purposes and which ultimately reduced or will reduce the capital gains realized on disposition or eventual disposition of the properties by Domciar.
>
> The Estate also transferred the shares of Dr. D. Ciarniello Inc. to Domciar for fixed value preferred shares of Domciar on April 23, 2014.
>
> …
>
> Unfortunately, the transfer of the shares of Dr. D. Ciarniello Inc. to Domciar, the sale of Cinimod and Mardom's properties to Domciar and the redemption

> of the Companies shares held by the Estate which triggered some of the taxes cannot be reversed as these steps have already been legally undertaken, the gains and incomes realized, the amounts reported to the Canada Revenue Agency and the taxes and interest paid.

VALUE OF ESTATE AND THE PLAINTIFF

[34] An important issue is the value of the estate and the plaintiff's assets at the date of his death, including the significance of certain tax and other liabilities and costs of the estate.

The Plaintiff's Position

[35] The assets and liabilities appear in a chart prepared by the plaintiff's counsel. They set out her position on the net value of the assets of the plaintiff and of the deceased at the date of Dr. Ciarniello's death. It is a convenient way to review the evidence. This chart was prepared for the second hearing and takes into account the issues that I noted I was unable to resolve at the initial summary trial. I will explain the chart below. I am now able to resolve those issues and am able to decide this case on a summary trial.

[36] The plaintiff's view of the value of the estate and her assets at the date of Dr. Ciarniello's death based on the most recent evidence is as follows. First plaintiff's counsel says that the net value of the deceased's estate at the date of his death was $11,434,597 (or $11,250,597 if a minority discount is applied to Dr. Ciarniello's shares in Nicoson) and that calculation is described in the chart below. (I include the evidentiary references and where they appear in the record, as well as some relevant comments by plaintiff's counsel). The plaintiff's position is that her net worth at the time of the death of the deceased was $7,102,980**.**

[37] Accordingly the plaintiff's position is that the value of the estate at the date of death is $11,434,597 and the net value of her assets was $7,102,980.

Dr. Ciarniello's Assets at Date of Death

Asset	Value	Source/Notes
Shares in Cinimod Enterprises Ltd.	$6,161,000	Mowbrey Gil Valuation, Affidavit #3 of Penny Campbell, Exhibit "G", Application Record (Volume 2), Tab G, page 405
Shares in Mardom Investments Ltd.	$1,013,000	Mowbrey Gil Valuation, Affidavit #3 of Penny Campbell, Application Record (Volume 2), Tab G, page 404
Shares in Dr. D. Ciarniello Inc.	$3,534,000	Mynett Report, Affidavit #3 of Penny Campbell, Application Record (Volume 2), Tab N, page 846
Shares in Nicoson Enterprises Ltd.	$234,000	Affidavit #3 of Penny Campbell, Application Record (Volume 2), Tab N, page 846 and Affidavit #1 of Nicole Eisel, Exhibit "F", Application Record, Tab 20, page 77-78. Note that value of estate's interest in Nicoson is in issue. If minority discount is not applied, it is $234,000. If minority discount is applicable it is $50,000. Mr. Mynett's view is that the minority discount is applicable, Mr. Hooge's view is that it is not.
Loan to Nicoson	$407,483	Notice of Civil Claim filed by, inter alia, the executors of the will of Dominic Ciarniello against Nicoson Enterprises Ltd. Affidavit #9 of Penny Campbell, Exhibit "C", Supplemental Application Record, Tab 9
RRSP	$713,320	Affidavit #1 of Sonja Ciarniello, paragraph 23
Cars & Bank Accounts	$150,000	As declared on sworn probate affidavit, Affidavit #2 of David Sky, Application Record, Tab 2, page 36
TOTAL	**$12,212,803**	Amount is $12,028,803 if the minority discount applies

Dr. Ciarniello's Liabilities at Date of Death

Liability	Value	Source Notes
Selkirk Mortgage	$691,491	On March 7, 2016 the executors' counsel wrote to the parties and admitted this was an estate liability. To date the estate has refused to discharge this mortgage from Marianna's home, despite demand. For the purposes of these calculations it is being treated as an estate liability.

		Affidavit #1 of Justine Beveridge, Exhibit ”A”, Supplemental Application Record, Tab 8
Credit Card Debt and funeral expenses	$86,716	As declared on sworn probate affidavit, Affidavit #2 of David Sky, Application Record, Tab 2, page 39
Other lines of credit and mortgages as at date of death	0	The probate documents list a number of lines of credit and mortgages, such as the Hudson Street mortgage, that are not and have never been liabilities of the estate as other parties have accepted responsibility for them

NET ESTATE AT DATE OF DEATH	**$11,434,597**	Amount is **$11,434,597** if the minority discount does not apply and **$11,250,597** if the minority discount applies

Plaintiff's Assets at Date of Death

Asset	Value	Source/Notes
Selkirk Property	$4,435,000	Appraised value at death is $4,435,000 as per Niemi Laporte & Dowle appraisal, Affidavit #5 of Penny Campbell Exhibit “A” Date of death value of mortgage is $227,240.95 and line of credit is $464,249.68 = $691,490.63 in secured debt on the Selkirk Property at date of death Executors have indicated intention to pay off mortgages but have not done so to date, despite demand. If executors resile on paying of Selkirk mortgage, Marianna's date of death interest in Selkirk is $3,743,509
RRSP	$561,980	Affidavit #1 of Mariana Ciarniello, Exhibit “W”, Application Record, Tab 8, page 94
Nicoson	$2,106,000	Mynett Report, Affidavit #3 of Penny Campbell, Application Record (Volume 2), Tab N, page 893 *note: FMV of Marianna's 90% interest is worth either **$2,106,000** (if no minority discount on estate's 10%) or **$2,290,000** (if minority discount on estate's 10%)

TOTAL	**$7,102,980**	If estate does not pay mortgages on Selkirk, total date of death assets of Marianna are $6,411,489.

The Position of the First Marriage Children

[38] The children from the deceased's first marriage disagree with both valuations but largely with the value of the estate.

[39] These defendants say that the net value of the estate is more correctly the sum of $7,255,864 which they say is the amount available for distribution and takes into consideration, as they say I should, the Nicoson debt and the paid tax obligation of the estate, as well as probate, executor and legal fees.

[40] These defendants say that excluding the executor fees, probate fees and legal costs, which they say are relevant, the estate value is $8,855,054 according to the affidavit of Mr. Sky dated August 31, 2015, and that the better number for the estate value according to the further affidavit of Mr. Sky is, as at March 1, 2016, $7,255,864, which takes into account the Nicoson debt, tax obligations as a result of the deemed disposition on death, probate fees and legal fees, but not the Hudson Street mortgage, which is the responsibility of the Second Family Children.

[41] During the course of these reasons, I will make findings on the value of the deceased's assets on death, the plaintiff's net worth at that time and the impact of tax liability on the estate and its significance, if any, to this application.

PARTIES' POSITIONS AT TRIAL

Position of the Plaintiff

[42] The plaintiff says that the deceased failed to make adequate, just and equitable provision for her in the will and seeks a declaration to that effect. In the initial summary trial hearing she sought a variation of his will to satisfy what she argues is his legal and primary moral obligation to her. The plaintiff's position is that the maintenance and property allocations that would be made to the plaintiff under provincial family law, support legislation and the doctrine of unjust enrichment inform whether the testator discharged his legal and moral duty to her. The plaintiff says

that the legal duty of the testator is to be determined as if the parties had separated immediately before his death. In the circumstances the plaintiff says she was entitled to roughly 50% of the family property.

[43] The plaintiff says in addition the testator had a moral duty to the plaintiff grounded in society's reasonable expectations of what a judicious spouse would do in the circumstances. The plaintiff says that a testator's legal duty takes precedence and his moral duty to his spouse also takes precedence over the moral claims of adult independent children.

[44] Given that the marriage was a long and traditional one, the plaintiff argues that she reasonably expected to be provided for by the testator for the rest of her life. The plaintiff says the legal obligation of the testator to her, determined by a notional pre-death division of assets, is the absolute minimum amount owed to her, and, once the legal obligation is determined, the additional moral obligation must also be quantified.

[45] The plaintiff initially sought a payment of $3.5 million, or what she asserted at the initial hearing was one-third of the value of the estate.

[46] Given the issues concerning valuation that were raised in the hearing, the plaintiff's counsel now says that a fairer approach would be a variation of the will so that the plaintiff receives 40% of the residue of the estate and as well the estate's 10% share in Nicoson.

[47] The plaintiff says that this is appropriate because the baseline legal obligation to the plaintiff is in the range of $2.1 to $2.3 million and in addition the deceased had a moral obligation to the plaintiff. The plaintiff's counsel, Ms. Francis, argues the plaintiff must have sufficient funds to satisfy the debt owed by Nicoson in the lawsuit started by Cinimod, the estate and Dr. Inc.

[48] In determining the extent of the legal duty owed by the testator, the plaintiff says that the tax liability the estate incurred of approximately $3.6 million is irrelevant as tax planning could have been undertaken by the deceased to avoid tax. In the

plaintiff's submission the tax liability arose essentially because the deceased left the plaintiff out of his will.

[49] As there may be tax considerations in dealing with the debt to Nicoson, the plaintiff seeks leave to make further submissions if the parties are unable to agree on the most tax efficient manner of dealing with that debt.

Position of the Defendant First Marriage Children

[50] Maria Louise James, Marco Carnello and Lana Ciarniello, the three children of the deceased's first marriage, say that the claim should be dismissed.

[51] They say that in determining the actual value of the estate, the plaintiff's analysis fails to take into account important matters such as a significant tax liability that has now been paid by the estate and probate, legal and executor fees.

[52] These defendants say that the plaintiff already received at least 50% of the family wealth. These defendants say that even using a current value for her assets at the testator's date of death of $7,102,980, that is still roughly the same as the amount of the estate of $7,255,864 as of March 1, 2016.

[53] These three defendants say that the main aim of the *Wills Variation Act*, R.S.B.C. 1996, c. 490, is the adequate, just and equitable provision for spouses and children but that the other significant interest protected in the legislation is testamentary autonomy. These defendants say that in this case the testator carefully planned and provided for his wife by way of gifts and payment of business loans during their marriage, including the transfer of commercial properties and the deceased's interest in the family home. These defendants say that as long as the testator has provided an option that amounts to a division of assets that is adequate, just and equitable, as they say has happened here, the court should respect that decision.

[54] They say that the declaration and award sought by the plaintiff will result in gross unfairness. Mr. Mussio, for these three defendants, describes this position in

a number of ways. He says that if the plaintiff obtains 40% of the residue of the estate on this application (assuming her valuation of $7,255,864) plus the remaining 10% of the shares of Nicoson, that means she would get, in addition to her own assets, 43.7% of the entire net value of the estate. Put another way, Mr. Mussio argues that if you take her estate to be worth $7,102,980, if she gets $10,280,325 of the family assets, that amounts to 71.6% of the family worth and each of the five children would only get 5.9% of the entire family worth.

Position of the Defendant Second Marriage Children

[55] Sonja Ciarniello and Nicholas Ciarniello, the two children of the second marriage, agree with the variation sought by the plaintiff provided that in the result the five children of Dr. Ciarniello are treated equally.

BASIC GOVERNING LEGAL PRINCIPLES

[56] This case falls to be determined under the *Wills Variation Act* as Dr. Ciarniello died while that Act was still in force. Section 186 provides that a new statute, the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13, applies to a will whenever 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 Dr. Ciarniello died almost a year earlier on April 28, 2013 and hence the *Wills Variation Act* applies.

[57] The relevant provision is s. 2:

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

[58] Under s. 2 of the *Wills Variation Act*, the court may ask whether the will makes adequate provision for a spouse or child, and order what is adequate, just and equitable where it does not.

[59] Section 2 of the *Wills Variation Act* involves a two-stage process described in *Landy v. Landy Estate*, (1991) 60 B.C.L.R (2d) 282. First, was adequate provision made for the proper maintenance and support of the applicant? If the court finds adequate provision was made, the inquiry goes no further. If, however, adequate provision has not been made, the court must consider what provision would be adequate, just and equitable in the circumstances: *Eckford v. Vanderwood*, 2014 BCCA 261 at para. 49.

[60] The leading authority is *Tataryn*, where the Supreme Court of Canada identified two fundamental interests the *Wills Variation Act* protects: the first and main statutory objective is the adequate, just and equitable provision for a will-maker's spouse and children, and the second statutory objective is the will-maker's testamentary autonomy.

[61] Madam Justice Ballance in *Heathfeld v. St. Jacques*, 2015 BCSC 505, said at para. 49:

> The conceptual essence of the statute is to permit judicial interference with testamentary freedom where adequate provision has not been made in respect of a narrow protected class. Testamentary freedom is, therefore, subordinate to the main objective of the *WVA* and must yield, to the extent required, to achieve adequate, just and equitable provision for the applicant spouse and/or children. That said, the judicial approach is not to start with a "blank slate and write a will designed to right all the perceived wrongs of the past, nor interfere only to improve upon the degree of fairness of a will if the testator has met his obligations under the [*WVA*]": *Chan v. Lee (Estate)*, 2004 BCCA 644 at para. 43.

[62] Whether or not adequate, just and equitable provision has been made is viewed in light of two types of current social norms: legal and moral. The first consideration is the testator's legal obligations which are obligations that the law "would impose on a person during his or her life were the question of provision for the claimant to arise": *Tataryn* at 820. The Court in *Tataryn* provided guidance on the proper approach to determining a testator's legal obligations which reflect a social expectation expressed through society's elected representatives and courts:

> ... 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. ...

[63] Moral obligations are informed by "society's reasonable expectations of what a judicious person would do in the circumstances": *Tataryn* at 821. Where permissible by virtue of the estate size, all conflicting claims should be met. Legal claims take precedence over moral claims. Some moral claims may be stronger than others. Moral duties should be assessed in light of the testator's legitimate concerns.

[64] Let me turn to the testator's obligations in the case at bar.

[65] The proper approach to the determination of the adequacy of the provisions made by the testator was explained in *Tataryn* at 820:

> If the phrase "adequate, just and equitable" is viewed in light of current societal norms, much of the uncertainty disappears. Furthermore, two sorts of norms are available and both must be addressed. The first are the obligations which the law would impose on a person during his or her life were the question of provision for the claimant to arise. These might be described as legal obligations. The second type of norms are found in society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards. These might be called moral obligations, following the language traditionally used by the courts. Together, these two norms provide a guide to what is "adequate, just and equitable" in the circumstances of the case.

[66] There is no doubt that the legal duty owed to the plaintiff was high. She was his long-term partner, with him for 39 years, married to him for 28, mother of two of his children, caregiver for them and for him in his declining period, and participant in his commercial ventures. Although the plaintiff asserts a claim in unjust enrichment, her essential reliance for the legal and moral duty owed by the testator is the circumstances of their long marriage in which the plaintiff was a loyal and supportive partner. As such it is not necessary to resolve the extent of the possible unjust enrichment claim where some of the facts are contested, particularly as all counsel now agree that I am able to resolve this case by way of summary trial.

[67] The moral obligations are owed in this case to the plaintiff and to the children of both marriages, all adults. There is no legal obligation to the children. They are all adults and not dependent.

[68] How are the legal and moral claims to be assessed? Guidance for this appears in *Tataryn* at 822-3:

> [30] The legal obligations on a testator during his or her lifetime reflect a clear and unequivocal social expectation, expressed through society's elected representatives and the judicial doctrine of its courts. 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: Pettkus v. Becker, [1980] 2 S.C.R. 834; Sorochan v. Sorochan, [1986] 2 S.C.R. 38; Peter v. Beblow, [1993] 1 S.C.R. 980. 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. As L'Heureux-Dubé J. wrote in Moge v. Moge, [1992] 3 S.C.R. 813, at p. 849:
>
> > ... marriage is, among other things, an economic unit which generates financial benefits .... The [Divorce] Act reflects the fact that in today's marital relationships, partners should expect and are entitled to share those financial benefits.
>
> The legal obligation of a testator may also extend to dependent children. And in some cases, the principles of unjust enrichment may indicate a legal duty toward a grown, independent child by reason of the child's contribution to the estate. The legal obligations which society imposes on a testator during his lifetime are an important indication of the content of the legal obligation to provide "adequate, just and equitable" maintenance and support which is enforced after death.
>
> [31] For further guidance in determining what is "adequate, just and equitable", the court should next turn to the testator's moral duties toward spouse and children. It is to the determination of these moral duties that the concerns about uncertainty are usually addressed. There being no clear legal standard by which to judge moral duties, these obligations are admittedly more susceptible of being viewed differently by different people. Nevertheless, the uncertainty, even in this area, may not be so great as has been sometimes thought. For example, most people would agree that although the law may not require a supporting spouse to make provision for a dependent spouse after his death, a strong moral obligation to do so exists if the size of the estate permits. Similarly, most people would agree that an adult dependent child is entitled to such consideration as the size of the estate and the testator's other obligations may allow. While the moral claim of independent adult children may be more tenuous, a large body of case law exists suggesting that, if the size of the estate permits and in the absence of

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

[69] In *Tataryn* at 823, the Court then discussed how competing legal and moral claims may be addressed:

> [32] How are conflicting claims to be balanced against each other? Where the estate permits, all should be met. Where priorities must be considered, it seems to me that claims which would have been recognized during the testator's life -- i.e., claims based upon not only moral obligation but legal obligations -- should generally take precedence over moral claims. As between moral claims, some may be stronger than others. It falls to the court to weigh the strength of each claim and assign to each its proper priority. In doing this, one should take into account the important changes consequent upon the death of the testator. There is no longer any need to provide for the deceased and reasonable expectations following upon death may not be the same as in the event of a separation during lifetime. A will may provide a framework for the protection of the beneficiaries and future generations and the carrying out of legitimate social purposes. Any moral duty should be assessed in the light of the deceased's legitimate concerns which, where the assets of the estate permit, may go beyond providing for the surviving spouse and children.

Relevant Time to Determine Legal and Moral Claim of the Spouse and Children

[70] I think the plaintiff is correct that the approach in British Columbia following *Tataryn* has been to determine the legal obligations to a spouse by considering the spouse's entitlement in a notional separation immediately prior to the testator's death. See for example: *Wong v. Soo*, 2015 BCSC 1741 at paras. 70, 73-75, 114-115; *Saugestad v. Saugestad*, 2006 BCSC 1839 (varied but not on this point, 2008 BCCA 38); *Glanville v. Glanville* (1998), 58 B.C.L.R. (3d) 240, at paras. 14 and 50; *Erlichman v. Erlichman Estate*, 2002 BCCA 160 at para. 49; *Bridger v. Bridger Estate*, 2006 BCCA 230 at para. 19.

[71] In *Saugestad*, Justice Russell referred to these authorities for the proposition that this notional separation defines the minimum acceptable level of what is

adequate, just and equitable. She added at para. 73 that "consistent with the family law decisions that establish the legal obligations of the testator, the length of the relationship and the contribution of the claimant spouse are relevant factors to a determination of what share of the estate a spouse will be entitled to."

[72] As Mackenzie J.A. said in *Bridger v. Bridger Estate* at para. 20:

> [20] *Tataryn* followed *Walker v. McDermott*, [1931] S.C.R. 94, and confirmed the rejection of a purely need-maintenance approach to entitlement under the *Act*. Moral claims against the estate by spouses and children of the testator are entitled to recognition. McLachlin J. (at para. 28) described moral claims as "found in society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards." Here the court is required to balance the competing moral claims on the estate of Mrs. Bridger and the daughters after the notional legal claim of Mrs. Bridger to a half share of family assets has been recognized. The will recognizes the moral claims of the appellant daughters but ignores any moral claim of Mrs. Bridger. *Tataryn* recognizes that there is no clear legal standard to judge moral claims and the test is more nebulous where the surviving spouse is not strictly speaking a dependent spouse and the children are all financially independent adults. While, as McLachlin J. observes in *Tataryn*, there may be a number of options for dividing assets by a testator which are adequate, just and equitable, I do not think they include a disposition that entirely prefers the moral claims of adult independent children to those of a loyal spouse who provided care for the testator over years of debilitating decline. I am satisfied that the trial judge was right to recognize unfulfilled legal and moral obligations of the testator to Mrs. Bridger, as those terms are understood in a wills variation context. The legal obligation can be quantified as above. The question then becomes the measure of the outstanding moral obligation.

[73] The legal entitlement of the spouse immediately before the death of the testator is the relevant time, that is, the time of the notional separation, to determine the extent of the testator's legal duty.

[74] As Dr. Ciarniello died on April 28, 2013, the *Family Law Act*, S.B.C. 2011, c. 25, should govern the analysis. Given the provision of the *Divorce Act* and the *Family Law Act*, I think that the plaintiff at a time just prior to the death of the testator would likely be entitled to an equal division of family property. While I doubt that a family law analysis would have resulted in an order for spousal support, given the condition of the testator at that time, the deceased's legal obligation would be to provide 50% of the family property.

[75] Assuming a notional separation of the parties immediately before death, I find the relevant values at that time for the net assets of the plaintiff were $7,194,980 and for Dr. Ciarniello's holdings $11,342,597. I have accepted the valuations in the plaintiff's chart I set out above. I have considered the minority interest in Nicoson at the mid-point between the two valuations.

[76] Accordingly, looking at the value of Dr. Ciarniello's net assets immediately before death and the net assets of the plaintiff, the plaintiff on that analysis clearly did not receive one-half of the family property. There is a strong argument that the testator did not discharge his legal duty to his spouse and a strong argument that he did not satisfy his moral obligation which was significant given the length of their relationship.

Reasonably Foreseeable Circumstances

[77] In determining whether the testator discharged his legal duty in leaving his spouse what is adequate, just and equitable, does one take into account foreseeable circumstances concerning the value of the estate?

[78] Mr. Mussio says that it is obvious that one does and as taxes were payable given the deemed dispositions on death, to ignore the tax consequences to the estate, which were minimized in any event by further planning, ignores the real value of the assets left to the children. Although Mr. Mussio could not point to a case that directly discussed this issue, he argued that was only because the point was obvious.

[79] The plaintiff disagrees and says that taking the tax arising from a deemed disposition into consideration, as the First Marriage Children suggest, is a flawed and incomplete analysis because it fails to consider the taxes that are deferred but payable by the plaintiff from the disposition of some of her assets in due course.

[80] The plaintiff also says that Mr. Mussio's analysis is flawed and not only is the valuation that is relevant the pre-death notional separation valuation, but this is particularly so given that taxes payable on death could have been avoided or

deferred if Dr. Ciarniello had discharged his legal duty and had left his assets to the plaintiff. In these circumstances, the assets would flow under the *Income Tax Act* on the tax-deferred basis to her as surviving spouse. As Ms. Francis puts it, the $3.6 million tax bill is the direct result of Dr. Ciarniello's disinheritance of his wife.

[81] The plaintiff argues that the valuation done at the date of death without looking at tax is what is required and what is fair. The legal and moral obligations are owed at the date of the testator's death and are not subsequently diminished by virtue of irreversible tax planning. Had adequate provision been made or had the executors preserved the opportunity to employ the spousal rollover, according to the report of Kay Gray, a chartered professional accountant, the estate could have saved over $3 million. The plaintiff's submission is that the expert report of Ms. Gray demonstrates that significant tax savings could have been achieved had proper and timely provision been made for the surviving spouse. Ms. Gray's analysis is important, the plaintiff says, because it demonstrates the tax savings that could have been achieved by the estate had Dr. Ciarniello made adequate, just and equitable provision for his wife. It also demonstrates tax savings that would have been open to the estate to achieve had they preserved the opportunity to do proper tax planning involving the spousal rollover after Dr. Ciarniello died. Ms. Gray analysed two ramifications of common estate planning scenarios in blended family situations:

(a) the disposition of the entire residue of the estate to a spousal trust for the plaintiff, which would provide her with a life interest in the income and capital of the estate with a gift over to the five children on her death;

(b) the disposition of 50% of the residue of the estate to the plaintiff with the remainder being divided in equal shares.

[82] According to Ms. Gray, under the first scenario in which the plaintiff received a life interest in a spousal trust, the tax, interest and penalties that would have been saved were $3.2 million. Under the second scenario, in which the estate would be

distributed 50% to the plaintiff on the testator's death, the estimated tax, interest and penalties saved would be about $2.27 million.

[83] As I noted earlier, there is a two-stage approach in wills variation proceedings as per *Landy v. Landy Estate*: first, whether a testator has made adequate provision for a spouse and children, and only if the provision is deemed inadequate, does the court go on to consider and determine a provision that it thinks adequate, just and equitable in the circumstances. As *Landy* indicates, in determining whether adequate provision has been made, the relevant date is the date of death of the testator and a court should also consider the circumstances that were both existing and reasonably foreseeable to the testator at that date. The particular circumstances in *Landy* were that the testator was aware his elderly spouse was ill and had been for several years and was in the hospital at the time of his death. It was reasonably foreseeable that his estate would pass to her beneficiaries and she would not make provision for the appellant, the testator's son with his first wife. The Court of Appeal found that the testator did not make adequate provision for the proper maintenance and support of his son.

[84] Another case considering medical circumstances of the claimant is *Eckford v. Vanderwood.* There the appellant and the testator lived in a marriage-like relationship. The appellant was left out of the will but she received his half-interest in the matrimonial home through survivorship. In that case, there was nothing in the evidence that suggested the testator should have reasonably foreseen the rapid decline in Ms. Eckford's health within a short time of his death.

[85] I have not found any case directly on point (and none was brought to my attention) that has dealt with the issue of tax liability in these circumstances and valuation of the estate in a wills variation case. Although not directly on point, *Waldman v. Blumes*, 2009 BCSC 1012, is a case where the daughter of a testator who remarried and had dependent children from that second marriage sought a variation of the will in her favour. In considering whether the will should be varied, Gerow J. held that the net value of the estate less capital gains, probate fees and

income tax liability was appropriate in considering whether adequate, just and equitable provision was made. She said at paras. 31-32:

> [31] Before taxes, capital gains, and professional fees, and excluding any claim of Esther Blumes for a beneficial interest in the estate, the gross value of the estate at the time of the death was $1,868,362.
>
> [32] If there is a variation of the will, some or all of the assets may have to be sold. If assets have to be sold, there will be additional taxes and capital gains to be paid. Ms. Waldman argued that the gross value should be used when considering whether the will made adequate, just and equitable provision for the claimants. However, it is my view that the potential of capital gains, probate fees, income tax liability, and professional fees should be considered in determining the value of the estate. Taking those factors into consideration, the evidence is that the potential value of the estate if the assets were sold was approximately $1,266,042 at the time of Dr. Blumes' death.

[86] I have concluded that in general terms, reasonably foreseeable circumstances may be considered in determining whether the testator made adequate provision.

Range of Reasonable Options

[87] As noted in *Tataryn* the court should look at a range of reasonable options in deciding whether the provision by the testator was adequate, just and equitable. *Tataryn* at 823-4 adds this:

> … In many cases, there will be a number of ways of dividing the assets which are adequate, just and equitable. In other words, there will be a wide range of options, any of which might be considered appropriate in the circumstances. Provided that the testator has chosen an option within this range, the will should not be disturbed. Only where the testator has chosen an option which falls below his or her obligations as defined by reference to legal and moral norms, should the court make an order which achieves the justice the testator failed to achieve. In the absence of other evidence a will should be seen as reflecting the means chosen by the testator to meet his legitimate concerns and provide for an ordered administration and distribution of his estate in the best interests of the persons and institutions closest to him. It is the exercise by the testator of his freedom to dispose of his property and is to be interfered with not lightly but only in so far as the statute requires.

[88] The First Marriage Children point to the fact that the testator was careful in his planning and in doing so satisfied his legal duty to the plaintiff and his moral duty to her and to the adult children. In making this point, Mr. Mussio refers to the

comments of Bracken J. in *Tippett v. Tippett Estate*, 2015 BCSC 291 at para. 43 that:

> ... in deciding whether to vary the testator's will, the court should consider the various options, including what might happen on an intestacy or upon the separation of spouses, but the primary guidance is to be found in the words of the *Wills Variation Act* as applied to the facts and circumstances of the case under consideration.

[89] While the First Marriage Children say that the testator's intention should not be interfered with, I think that is only correct to the extent that the testator has done something that could be said to be within a series of options that satisfy his legal and moral duties.

DISCUSSION

[90] The initial question is whether, considering the legal and moral duty the testator had to the plaintiff, he made adequate provision for the plaintiff in his will. The legal duty of Dr. Ciarniello must be assessed as if he notionally separated from the plaintiff immediately before his death. The authorities indicate that is the point in time to assess whether the testator discharged his legal duty.

[91] If I look at the net value of Dr. Ciarniello's assets and the net value of the plaintiff's assets immediately before the date of Dr. Ciarniello's death, I would find that the testator clearly did not satisfy his legal duty. On that analysis the plaintiff clearly got less than half of the family property at the time. I think that is the appropriate starting point for the first part of the *Landy* test. I have taken into consideration that the tax liability incurred by the estate was not inevitable, had Dr. Ciarniello made his will differently.

[92] Accordingly, I have concluded that the testator did not discharge his legal and moral duty to his spouse and in essence preferred his moral duty to his adult children. While deciding whether the testator's duty was met I recognize he is entitled to autonomy provided his allocation of assets falls within a range of options, any of which might be acceptable. However, I find that the option the testator chose was short on his legal and moral duty to the plaintiff.

[93] Although the evidence suggests that the testator undertook clear and deliberate estate and tax planning, and was apparently an astute businessman, I think in providing for his spouse his will was outside the range of reasonable options. It was not an adequate, just and equitable provision for her.

[94] The evidence shows that although the plaintiff was left with a valuable home, she has not had sufficient income to meet her expenses and has drawn down considerably on her RRIF which had a date of death value of $560,000 and has no other savings. Although Nicoson had one income-earning property, the other recently sold, and it appears the plaintiff was not left with significant cash to meet her ongoing living expenses. Although the First Marriage Children say that the plaintiff received various assets during the testator's life, the company she owns, Nicoson, is still subject to and will be subject to a substantial debt in favour of the companies held by the estate and the estate itself.

[95] In determining whether the plaintiff made adequate provision for his spouse and children I must also consider their moral claims. I place the moral claim of the plaintiff higher and I think that any moral claim that the children had was satisfied by the terms of the will. I recognize that the Second Marriage Children have received more lavish gifts but it appears gifts for homes and cars have been provided during the testator's life in varying degrees to all of his children.

[96] Considering the legal and moral obligations of the testator, as described in *Tataryn*, and considering the size of the estate, the size of the plaintiff's assets and the length of the plaintiff's relationship with the deceased, I have concluded that the testator did not make adequate provision for his wife in his will. In reaching that conclusion I rely largely on what I find to be her minimum entitlement, which is 50% of the family property immediately before his death. I also rely on his moral obligation which, given all the evidence, was of a high order. The evidence shows that the plaintiff and the testator had a long-term relationship in which she was a loyal participant that persisted until the death of the testator. I find she had a strong moral claim. Although there was some dispute between the plaintiff and the First

Marriage Children about work that the plaintiff did on the properties, I need not resolve that conflict as the unjust enrichment claim is only background to this claim. The testator, I find, failed to discharge his legal and moral duty in the circumstances.

[97] Accordingly I would vary the will.

[98] What, then, is the appropriate disposition of this claim in the circumstances? Turning to that question, I have to address what the relevant circumstances are.

[99] The Testator owed a legal duty to the plaintiff who was his wife and partner in a long-term relationship spanning 39 years. I find that the moral duty he owed to his spouse given society's reasonable expectations of what a judicious spouse would do in the circumstances was significant. I find that the plaintiff reasonably expected that the testator would ensure that she was adequately provided for during the rest of her life.

[100] Although Dr. Ciarniello owed no legal duty to his five adult children, he had a moral duty to them as he did to his surviving spouse, but I place the moral duty to his spouse higher. I have to balance the legal and moral claims of the plaintiff and the children.

[101] I think that in determining what is an adequate, just and equitable order in the circumstances, I have to take into account the size of the estate, which is significant, the fact that the disposition that the testator directed had significant tax consequences and even with subsequent tax planning resulted in substantial tax obligations reducing the net estate for the benefit of the residuary beneficiaries. It would be unrealistic and unjust in making an award to ignore the actual tax consequences, because even if they could be minimized the plaintiff as co-executor participated in the tax planning that did take place and is now irreversible. In my view, it is at this stage of the analysis that the particular tax consequences arising from the testator's dispositions should be taken into account.

[102] Initially the plaintiff sought a lump sum, but in her subsequent submissions, suggested a percentage of the residue given uncertainty about the net value of the estate. I agree with that general submission.

[103] Given the fact that the plaintiff is without sufficient cash flow to meet her ongoing obligations to live in the fashion to which she became accustomed, and that she will need cash reserves to satisfy the Nicoson debt, and considering the now irreversible tax liability paid by the estate and the ongoing liabilities of the estate, the appropriate order is to provide the plaintiff with a share of the residue that is adequate, just and equitable given all the circumstances I have described.

[104] Accordingly, I vary the will to provide that 25% of the residue of the estate be paid to the plaintiff together with the minority shareholding in Nicoson. The balance of the residue or 75% will be divided equally among the five children.

[105] I direct that before the final order is entered the parties be allowed to make submissions if they cannot agree on directions for the most tax-efficient manner to deal with the payment of the Nicoson debt and interest.

[106] The parties may speak to the issue of costs.

"The Honourable Mr. Justice J. Sigurdson"