IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Hancock v. Hancock,*
2014 BCSC 2398

Date: 20141218
Docket: VLC-S-S-122012
Registry: Vancouver

Between:

Brian Henry Hancock and Robert Drummond Hancock

Plaintiffs

And

Ernest Griffin Hancock in his capacity as the Executor of the last Will and Testament of Gertrude Elizabeth Hancock, Ernest Griffith Hancock in his personal capacity; Kevin Joseph Hancock, and Marno Marion Hancock

Defendants

Corrected Judgment: The front page of the judgment was corrected on December 22, 2014

Before: The Honourable Madam Justice Dardi

Reasons for Judgment

Counsel for the Plaintiffs:	C. Cho J. Ko
Counsel for the Defendants:	R. Kasting
Place and Date of Trial:	Vancouver, B.C. April 22-25, July 4, 2014
Place and Date of Judgment:	Vancouver, B.C. December 18, 2014

INTRODUCTION

[1] The late Gertrude Elizabeth Hancock died on August 20, 2011, at the age of 93, in Penticton, B.C. Mrs. Hancock was predeceased by her husband, Percy Griffin Hancock, who died in 1995. Mrs. Hancock left five surviving children.

[2] The Hancock children are, from eldest to youngest: the defendant Ernest Hancock, the plaintiffs, Brian Hancock and Robert Hancock, who are twins, the defendant Kevin Hancock, and the defendant Marno Marion Hancock ("Marnie").The parties share the common surname of Hancock. In the interest of clarity, I will refer to the parties by their given names and in doing so, I intend no disrespect.

[3] The plaintiffs, Brian and Robert, seek a variation of their mother's will pursuant to the *Wills Variation Act*, R.S.B.C. 1996, c. 49 (the "*WVA*"). Marnie is the sole residual beneficiary of her mother's will and vigorously defended the action. Ernest is executor of his mother's will. He is not pursuing a claim, but did testify at trial. Kevin did not participate in this proceeding.

[4] Before turning to the analysis, it is necessary to summarize the pertinent facts and to outline the positions of the parties.

FACTS AND CHRONOLOGY

[5] The majority of the relevant background facts are not in contention.

[6] Mrs. Hancock and her late husband were long-time residents of Naramata, British Columbia. Mr. Hancock was an orchardist. Mrs. Hancock was a former school teacher and, for most of her married life, a homemaker.

[7] The totality of the evidence supports a finding that Mrs. Hancock cherished her family. She was very traditional and conducted herself in accordance with proper social conventions. Her status in the community was important to her.

[8] Unlike many claims brought pursuant to the *WVA*, each of the plaintiffs were dutiful sons who enjoyed a close, loving, and harmonious relationship with their

mother. There is no history of any estrangement in their respective relationships with their mother.

[9] Mr. and Mrs. Hancock owned several parcels of property in the Naramata area, which included:

(i) three separate parcels of farmland, one of which had the family homestead located on it (collectively the "Farmland Properties");

(ii) a waterfront beach lot located at 4377 Mill Road ("the Hancock Beach Property"); and

(iii) a waterfront residence located at 440 Dorothy Road ("the Dorothy Road Property").

[10] In 1989, the upper part of the Farmland Properties – two lots (8 acres), located at 4755 and 4789 North Naramata Road, and the farmhouse which straddled the lots – were transferred to Kevin who had returned to Naramata to work on the family farm ("Naramata Road"). At that time, Mrs. Hancock and her late husband moved from the farmhouse in which they raised their family to the residence on the Dorothy Road Property. There was no appraisal evidence tendered of the value of the lots transferred to Kevin and there was insufficient evidence to reliably determine the value of the properties as of 2011, the year of Mrs. Hancock's death.

[11] In 1990, the lower part of the Farmland Properties (4.9 acres), located at 4697 Gulch Road, which had no improvements on it, was transferred to Robert ("Gulch Road"). In November 2013, the Gulch Road property was appraised at $689,000. Robert disputes the valuation on the basis that the property is subject to limitations and restrictions, but he did not adduce any appraisal evidence to support his assertions in this regard.

[12] In 1992, the Hancock Beach Property was transferred to Ernest and Brian, as tenants in common. The Hancock Beach Property is an approximately 60 by 70 foot waterfront lot with no improvements. Ernest and Brian were both professionals who

had moved to the Lower Mainland. After the transfer, the entire family continued to enjoy the Hancock Beach Property and there were many family gatherings there. There is a work shed and a trailer located on the property.

[13] Percy Hancock moved into a care facility and he died on June 4, 1995.

[14] On June 20, 1995, Mrs. Hancock transferred the Dorothy Road Property into joint tenancy with Marnie.

[15] It is common ground that all of the transfers of the real property referred to above were gifts.

[16] In 1997, Brian sold his half-interest in the Hancock Beach Property to Ernest's children for $60,000. The selling price was based upon the appraised value of the property. There was no appraisal evidence tendered of the value of the Hancock Beach Property as of the date of Mrs. Hancock's death.

[17] In or around 1999, Mrs. Hancock agreed to list the Dorothy Road Property for sale but she cancelled the listing because she did not wish to show the residence to prospective purchasers.

[18] On February 1, 2002, Mrs. Hancock executed her new will. I will return to the provisions of her will later in these reasons.

[19] In 2002, Mrs. Hancock granted a power of attorney to Ernest, her eldest son, who is a retired professional engineer. She reposed her trust in him and she relied on him to assist her with her affairs. Ernest presented as a very straightforward and forthright witness and I found him to be thoroughly credible.

[20] Mrs. Hancock made *inter vivos* gifts to Marnie totalling approximately $20,000 to $25,000: $10,000 in 1997 for the purchase of an apartment, and further amounts totaling between $10,000 and $15,000 in the years from 2001 to 2004. The evidence supports a finding that the funds Mrs. Hancock advanced after 2001 were to assist Marnie with her business ventures because she was concerned that Marnie "get on with her life".

[21] In the fall of 2006, Mrs. Hancock moved into an independent living facility in Penticton.

[22] In 2007, Mrs. Hancock suffered a stroke and, after her release from the hospital, moved to an extended care facility in Summerland. Thereafter, the status of her health fluctuated from time to time but she never fully recovered from the speech impairment she suffered as a result of the stroke.

[23] In December 2007, the Dorothy Road Property sold for $1,400,000 and Marnie and Mrs. Hancock each received $682,765.35 in net sale proceeds.

[24] On February 8, 2008, Mrs. Hancock gifted $20,000 to each of her nine grandchildren, the children of Ernest, Brian, Robert, and Kevin. Ernest effected the gifts through the power of attorney he held for his mother. The propriety of these gifts was never challenged in any legal proceedings.

[25] In the spring of 2008, Mrs. Hancock moved to the Haven Hill care home in Penticton.

[26] Brian hired Tina Savoie to be Mrs. Hancock's caregiver and companion in June 2007. Ms. Savoie worked with Mrs. Hancock two or three days per week until her death. It is common ground that Ms. Savoie's assistance was very beneficial to Mrs. Hancock. Marnie herself acknowledged Ms. Savoie was "very competent and very capable". I found Ms. Savoie to be an objective witness, whose evidence was credible and reliable.

[27] In the years after Mrs. Hancock's stroke, verbal communication was difficult and frustrating for her. Ms. Savoie explained to the court that, despite these difficulties, she was able to effectively communicate with Mrs. Hancock. Ms. Savoie described Mrs. Hancock as very intelligent and as someone with a good memory. During this period of her life, Mrs. Hancock, who was very particular and somewhat of a perfectionist, reacted negatively to any interference with her routine.

[28] Mrs. Hancock passed away on August 20, 2011.

[29] A grant of probate of Mrs. Hancock's will issued to Ernest on November 3, 2011.

The Will

[30] Mrs. Hancock made a new will on February 1, 2002 (the "Will"). It is common ground that her prior will provided that her estate would be divided equally among her five children. The Will appointed Ernest as the executor, and named Marnie as the sole beneficiary. The Will provided that if Marnie predeceased her mother, the estate would devolve equally to Mrs. Hancock's four sons.

[31] Mrs. Hancock did not provide any written statement as to her reasons for disinheriting her four sons, either in the Will, or at all.

[32] Mr. James Dewdney was the solicitor who prepared the Will. His affidavit was admitted at trial by consent. Mr. Dewdney has no independent recollection of Mrs. Hancock stating that she preferred or favoured one child over another, and there is also no notation of this on the Will Instruction Sheet. Mr. Dewdney has therefore concluded that Mrs. Hancock never stated to him that she preferred or that she favoured any child over another.

[33] Mr. Dewdney made a notation on the Will Instruction Sheet under the heading "Wills Variation" that Mrs. Hancock "doesn't want reasons in Will – suggested she make and sign a writing". He does not have a specific recollection of suggesting to Mrs. Hancock that she prepare a memorandum setting out her reasons for excluding her sons as beneficiaries in the Will. He stated his general practice is to advise his clients to record their reasons for disinheritance in a separate document if they do not wish to have those reasons included in the actual will.

[34] Mrs. Hancock never provided Mr. Dewdney with any written memorandum stating her reasons for excluding her sons as beneficiaries under the Will.

[35] Mr. Dewdney deposed as follows:

> I noted that I repeatedly discussed the issue of wills variation with Mrs. Hancock. Although I do not specifically recall, the discussion necessarily

> would have involved the contents of the e-mail I received from Jolene Fletcher… as the e-mail was included as part of my will file with Wills Instruction Sheet …

[36] Ms. Jolene Fletcher, a solicitor in Mr. Dewdney's firm, has no recollection of a specific communication with Mrs. Hancock which gave rise to the email that she sent to Mr. Dewdney. There is no evidence that Ms. Fletcher spoke directly to Mrs. Hancock. The email, referenced above, was dated November 26, 2001 and bore the subject line "Gertrude Hancock". In that email Ms. Fletcher recorded in part that:

> … She needs to update her will and possibly do some estate planning … Apparently the sons have all taken parts of the land and she wants her daughter to have everything she owns on her death….

[37] Marnie candidly acknowledged that she had approached her mother about changing her will and that following that discussion it was she who initially called Mr. Dewdney's office. Marnie had gone to high school with Mr. Dewdney. Marnie knew that her mother had been on a debating team with his father and would want to do business with him.

[38] On the totality of the evidence, I find, on balance, that it was Marnie who spoke to Ms. Fletcher and that it was Marnie who conveyed the information Ms. Fletcher recorded in the email.

The Estate

[39] Mrs. Hancock's date of death is the appropriate date at which to assess the value of the estate: *Graham v. Chalmers,* 2010 BCCA 13 at para. 35.

[40] The gross value of the estate, declared for probate purposes, was $517,673. The parties have agreed that, for purposes of the proceeding, the net value of this estate is $500,000, after payment of expenses and executor's fees.

POSITION OF THE PARTIES

[41] The plaintiffs submit that Mrs. Hancock did not act as a judicious parent in disinheriting them. Accordingly, they submit that the Will should be varied such that

they are each awarded one quarter of the estate. They submit that their sister Marnie ought to receive the remaining half of the estate.

[42] Marnie counters with the submission that she is a deserving recipient of the entirety of her mother's estate and that there is no principled basis to support a variation in favour of the plaintiffs. Marnie's overarching contention is that the plaintiffs' claim should be dismissed because they each received *inter vivos* gifts which were sufficient to satisfy Mrs. Hancock's moral obligations to them.

LEGAL FRAMEWORK

[43] The key provision of the *WVA* is s. 2. That section provides that if, in the Court's opinion, a will fails to make adequate provision for the proper maintenance and support of the testator's spouse or children, the Court is empowered, in its discretion, to vary the will to make provision that it considers adequate, just and equitable in the circumstances.

[44] *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807, is the governing authority in British Columbia on the *WVA*. McLachlin J., as she then was, writing for the Court, articulated the relevant considerations and principles that animate the application of the *WVA*. The fundamental approach is anchored in her observation that "[t]he search is for contemporary justice": *Tataryn*, at 815. The courts must read the *WVA* "in light of modern values and expectations" and "are not necessarily bound by the views and awards made in earlier times": *Tataryn*, at 814-815.

[45] The Court in *Tataryn* stated that the determination of whether a will makes adequate provision and, if not, what provision would be adequate, just and equitable, are "two sides of the same coin": *Tataryn*, at 814.

[46] The main statutory objective of the *WVA* is the adequate, just, and equitable provision for a testator's spouse and children. As identified by the Court in *Tataryn*, the other protected interest is testamentary autonomy. However, testamentary freedom must yield to the extent required to achieve adequate, just, and equitable provision for the applicant spouse and/or children. To that requisite degree only,

testamentary autonomy will be curtailed by the application of the *WVA*: *McBride v. Voth*, 2010 BCSC 443 at para. 125.

[47] In addressing the adequacy of the testamentary provision, Madam Justice McLachlin clarified that the question of whether a testator has acted as a judicious parent or spouse in relation to the provision under the will is measured by an objective standard, assessed in light of current societal legal norms and moral norms. As outlined in *Tataryn*, legal norms are the obligations that the law would impose upon the testator during his or her life if the question of provision for a claimant's spouse or child were to arise. A testator's moral duties are grounded in "society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards": *Tataryn*, at 820-821.

[48] *Tataryn* expressly acknowledged that moral duties are more susceptible to being viewed differently by different people because there is no clear legal standard by which to judge such duties: *Tataryn*, at 822. However, the analysis in *Tataryn* underscores that the court must apply an approach that accords with a contemporary view of marital and parental obligations.

[49] The Court in *Tataryn* recognized that the foregoing assessment necessarily involved balancing of competing claims, and held that where the size of the estate permits, all moral and legal claims should be satisfied. Where prioritization is necessary, generally, claims that would have been recognized as legal obligations during a testator's lifetime take precedence over moral claims. The court must also weigh the competing moral claims and assign each its priority according to their relative strength: *Tataryn*, at 823. The Court recognized that this analysis would produce a range of options which might be considered appropriate in the circumstances. It is only where the testator's chosen distribution falls outside of this range can they be said to have abrogated their obligations.

[50] In reference to the moral claim of independent adult children, the Court in *Tataryn* observed that while they "may be more tenuous" than that of a spouse or

dependent child, some provision for adult independent children should be made if the size of the estate permits and in the absence of circumstances that would negate the existence of such an obligation: *Tataryn*, at 822-823.

[51] In *Dunsdon v. Dunsdon*, 2012 BCSC 1274, Madam Justice Ballance conveniently summarized the considerations that inform the existence and strength of a testator's moral duty to independent children:

> [134] In the post-*Tataryn* era, the following considerations have been accepted as informing the existence and strength of a testator's moral duty to independent children:
>
> - relationship between the testator and claimant, including abandonment, neglect and estrangement by one or the other;
> - size of the estate;
> - contributions by the claimant;
> - reasonably held expectations of the claimant;
> - standard of living of the testator and claimant;
> - gifts and benefits made by the testator outside the will;
> - testator's reasons for disinheriting;
> - financial need and other personal circumstances, including disability, of the claimant;
> - misconduct or poor character of the claimant;
> - competing claimants and other beneficiaries:
>
> (See *Clucas v. Clucas Estate*, [1999] B.C.J. No. 436; *McBride v. McBride Estate*, 2010 BCSC 443; *Yee v. Yu*, 2010 BCSC 1464; *Wilson v. Lougheed*, 2010 BCSC 1868).

[52] In *Bell v. Roy Estate* (1993), 75 B.C.L.R. (2d) 213 (C.A.), the Court of Appeal held that where financial need is not a factor, if the court finds that a testator's reasons purporting to explain a disinheritance are valid and rational, the testator's moral duty in respect to that child is negated; the burden then shifts to the plaintiff to show that the will-maker's reasons were false or unwarranted: *McBride* at para. 138. In a subsequent decision, *Kelly v. Baker* (1996), 82 B.C.A.C. 150 (C.A.), the Court of Appeal reaffirmed the requirement that the testator's reasons must be valid, meaning factually true, and rational, in the sense there is a logical connection between the reasons and the act of disinheritance. The Court went on to conclude

that the contents of the testator's reasons for disinheriting a child need not be justifiable.

[53] In *McBride*, Madam Justice Ballance observed that it is difficult to reconcile the analytical framework endorsed in *Bell* and *Kelly* with the fundamental principles of *Tataryn*, that a testator's moral duty must be assessed objectively from a standpoint of what a judicious parent would do in the circumstances, by reference to contemporary community standards. Notably, McLachlin J., as she then was, cited *Bell* as an example of a case where a testator's moral duty was seen to be negated, but she did not clarify whether the propositions formulated by Goldie J.A. were sound.

[54] The analytical approach and commentary in various authorities from this Court, decided subsequent to *McBride*, underscore the uncertainty regarding the apparent incompatibility between the analytical framework articulated in *Bell* and *Kelly,* on the one hand, and *Tataryn* on the other. This question has engendered significant judicial commentary: *Brown v. Ferguson*, 2010 BCSC 1890 at para. 115; *LeVierge v. Whieldon*, 2010 BCSC 1462; *Schipper v. De Lange*, 2010 BCSC 1067; *Holvenstot v. Holvenstot*, 2012 BCSC 923; *McEwan v. McEwan*, 2014 BCSC 916.

[55] Notably, however, in *Hall v. Hall*, 2011 BCCA 354, the Court of Appeal applied the analytical approach endorsed in *Kelly*, without any critical commentary. As is the case with *Kelly* and *Bell*, it is difficult, in light of the particular facts, to challenge the result in *Hall*. However, based on comments in the more recent jurisprudence from the Court of Appeal in *Scott-Polson v. Lupkoski*, 2013 BCCA 428, I respectfully observe that it may be an unsettled question in this province as to whether the formulation of the analytical approach applied in *Kelly* can be reconciled with the core principles of *Tataryn*. In *Scott-Polson*, Madam Justice Newbury, in *obiter dicta*, remarked at para. 43:

> [43] … The legally significant finding in terms of the trial judge's reasoning, however, was that the explanation given in her will was "valid and rational" (see para. 76), or "genuine and valid" (see para. 83). I agree with the trial judge's comment at para. 84 that this was a "relevant circumstance". Given this, and given the fact that the plaintiffs did not pursue their cross appeal, it

> is not necessary for us to consider whether it is in law determinative of what a fair and judicious parent would have thought appropriate. (See *McBride v. Voth, supra*, at paras. 135-42.) That issue, if it is seen as one, must await another day.

[56] In my respectful view, there are sound reasons for raising the question of whether the analytical approach endorsed in *Kelly* is reconcilable with *Tataryn*. This is particularly apparent in the absence of circumstances where a claimant was clearly estranged from the will-maker. However, in the final analysis, this Court, in compliance with the principle of *stare decisis*, must continue to apply the analytical framework articulated in *Kelly* and *Bell*.

ANALYSIS

[57] The essential question in this case is whether the Will made adequate provision for the plaintiffs who were disinherited by their mother. The circumstances existing at Mrs. Hancock's death, as well as those that were reasonably foreseeable to her at that time, are to be taken into consideration to determine whether she has made adequate provision: *Mawdsley v. Meshen*, 2010 BCSC 1099 at para. 317, aff'd 2012 BCCA 91; *Eckford v. Vanderwood,* 2014 BCCA 261 at para. 53.

[58] It is uncontroversial that neither the plaintiffs nor Marnie have any legal claim against the estate. I turn to address the moral claims of the plaintiffs.

[59] Applying the *Tataryn* principles, the size of the estate in this case is such that some provision should be made for the plaintiffs unless there are circumstances that would negate such an obligation.

[60] Marnie opposes any variation in reliance on the principles enunciated in *Bell* and *Kelly*. For the reasons that follow, I am of the view that those principles do not assist Marnie.

[61] It is important to appreciate that the only assets Mrs. Hancock held at the time the Will was executed in 2002 were her interest in the Dorothy Road Property and two bank accounts. Mr. Dewdney has no independent recollection of discussing the

value of her assets with her, nor is there any indication in his file materials that such a discussion took place.

[62] It can reasonably be inferred, on the preponderance of the evidence, that in 2002, the amount of funds Mrs. Hancock held in her bank accounts was relatively modest, in the approximate range of $25,000. I accept Ernest's evidence that his mother never believed the Dorothy Road Property to be very valuable because of problems associated with mould, ants, a challenging sewage system, and the proximity of a boat launching ramp. I find, on the totality of the evidence, that as of 2002, and based on a prior cancelled listing, Mrs. Hancock believed that the value of the Dorothy Road Property was in the range of $240,000 to $300,000. Notably, at the time of her death, she had knowledge that the value of the Dorothy Road Property had significantly appreciated, as it sold for $1,400,000.

[63] The *Bell/Kelly* model of inquiry and the subsequent appellate authorities that have applied that analysis are predicated on an express statement having been made by a testator as to the reasons for disinheriting a claimant and/or for the distributions made in a will. The pertinent authorities do not endorse the court "conducting an open-ended roving inquiry of the circumstantial evidence to ascertain whether a testator's plan has a valid and rational basis": *Wilson v. Lougheed Estate*, 2010 BCSC 1868 at para. 397.

[64] As I noted earlier, there is neither a statement in the Will of Mrs. Hancock's reasons for disinheriting the plaintiffs nor any evidence of any written statement regarding those intentions. I will next consider whether any express reasons are ascertainable on the evidence.

[65] I have found that it was not Mrs. Hancock who spoke with Ms. Fletcher in November 2001. Nonetheless, if I am incorrect in that regard, I am not persuaded that the statement "apparently the sons have all taken parts of the land and she wants her daughter to have everything she owns on her death" constitutes a reliably ascertainable reason for Mrs. Hancock changing her will. At best, it may amount to some evidence about how Mrs. Hancock wished to change her will. Crucially, it does

not provide any insight or explanation as to why she chose to disinherit her sons, given that, at the material time, Marnie had also received an interest "in the land", namely a 50 percent interest in the Dorothy Road Property.

[66] Secondly, Mrs. Hancock told Ernest in 2002 that she was changing her will because she thought the boys had been "fairly well looked after" and she wanted the remainder of her estate to go to Marnie. It can reasonably be inferred that in 2002, Mrs. Hancock believed that Marnie had not been looked after. However, in any event, to the extent Mrs. Hancock's statement to Ernest constitutes cogent evidence of her reasons for changing her will in 2002, and to the extent that Marnie's counsel asserts there were valid and rational reasons for Marnie to be preferred in the Will because – unlike her brothers Marnie had not been "looked after" as of 2002 – I conclude that these reasons were not valid as of the date of Mrs. Hancock's death in 2011. In 2007, Marnie had in fact received $683,000 from the sale of the Dorothy Road Property in addition to the $20,000-$25,000 her mother had gifted her. The evidence supports a finding that Mrs. Hancock was surprised and embarrassed by the amount proceeds of the sale of the Dorothy Road Property. I accept Ernest's evidence that Mrs. Hancock told him that, given that Marnie had received half of the net sale proceeds, Marnie had been "well taken care of".

[67] In his written opening, Marnie's counsel postulated that the valid and rational reason for the exclusion of the plaintiffs from the Will was that they had received *inter vivos* gifts of real estate from their parents and that was "as far as the analysis need[ed] to go". I am not persuaded that there is any merit to this submission. At the time of the Will's execution, all five Hancock children had received *inter vivos* gifts of real estate. These gifts, in and of themselves, cannot be regarded as a valid and rational reason for Mrs. Hancock disinheriting four of her five children within the *Bell*/*Kelly* paradigm.

[68] All matters considered, I am not persuaded that the analysis formulated in *Bell* and endorsed in *Kelly* is engaged in this case. However, as noted above, even if

it were, the reasons were not valid and rational as of the date of Mrs. Hancock's death.

[69] In my view, this case turns on a determination of the nature and extent of the moral obligation Mrs. Hancock may have owed the plaintiffs and whether it has been negated. The question that lies at the heart of this dispute is whether, having regard to all the circumstances, Mrs. Hancock's testamentary disposition falls within the range of adequate provision made by a judicious parent, assessed objectively by reference to contemporary community standards.

[70] Marnie submits that Mrs. Hancock's decision to exclude Robert and Brian from the Will was entirely consistent with the decision of an objectively judicious parent. She contends that the *inter vivos* gifts the plaintiffs received were sufficient to satisfy any moral obligation she may have owed to them.

[71] As a starting point in this analysis, I note that the weight of the authorities establishes that the law imposes no requirement that children be treated equally by a will-maker. The fact that an independent adult child has not received the same provision under the will as the will-maker's other child or children, will not, of itself, constitute a breach of the will-maker's moral duty: *Dunsdon* at para. 136; *McBride* at para. 134; *Doucette v. McInnes,* 2009 BCCA 393; *Price v. Lypchuk Estate* (1987), 11 B.C.L.R. (2d) 371 (C.A.).

[72] The jurisprudence also establishes that the court may consider the gifts outside the will to determine whether the will-maker has fulfilled his or her obligations. Depending on the circumstances, a will-maker's moral duty may be diminished or negated entirely where he or she has made *inter vivos* gifts to a claimant; *McBride* at para. 133; *Doucette* at para. 84.

[73] I turn to consider the pertinent circumstances that inform Mrs. Hancock's moral duty to her children.

Marnie

[74] Marnie is 57 years old and, as previously noted, is the youngest of the Hancock children. She married in 1987, divorced, and then re-married her former husband in 2013. She has no children.

[75] Marnie is a poor historian and while she endeavoured to give accurate testimony in court, I found much of her evidence unreliable. Where and to the extent her evidence conflicts with the testimony of Ms. Savoie, Ernest, Robert, and Brian, I prefer their evidence.

[76] Marnie attended university and obtained a teaching diploma in 1985. In approximately 2001, she ceased working as a teacher and embarked on a business venture involving the publication of a book on goal-setting techniques, which ultimately proved to be unprofitable. She resumed teaching in the Lower Mainland from September 2006 until 2010.

[77] Marnie now lives in Ashland, Oregon in a manufactured home on a rented pad. She is presently looking for part-time employment as a teacher because she finds full-time employment too stressful. Her husband, who is a discharged bankrupt, was employed as a custodian but is currently unemployed. According to Marnie, the cost of living in Oregon is much lower than in Vancouver.

[78] With sale proceeds she received from the Dorothy Road Property, Marnie provided her husband with financial support, which included paying off some of his debts. She also purchased a van for $18,000 and a triplex in Oregon, valued at about $200,000, which provides her with rental income of between $1,200 and $1,300 per month. Her net worth in 2011 was approximately $470,000 inclusive of a locked-in B.C. teacher's pension she valued at $100,000. In 2011, based on her income tax return, Marnie's line150 income was $19,705.95. There was no suggestion that she was in necessitous financial circumstances at the time of her mother's death.

[79] Marnie moved away from Naramata after high school graduation. She would sometimes spend summers there and visited her parents on holidays. In the period of time after her father's death in 1995 Marnie lived, at various times, in Oregon, Hawaii, the Lower Mainland, and Naramata. In the time period from 1995 to 2000, Marnie worked on her book during any summers she spent in Naramata. Marnie resided during the winters of 2005 and 2006 with her mother in the residence on the Dorothy Road Property. Notably, Mrs. Hancock had a weekly housekeeper and, for the most part, cooked for herself. During the period Mrs. Hancock was in care facilities, Marnie did not live in Naramata, but she periodically visited her mother. Marnie told Ms. Savoie that she had no plans to take over her mother's care and that she would not move back to Naramata where her brothers lived.

[80] Although the mother-daughter relationship was strained at times because of some of Marnie's lifestyle choices, she loved her mother and genuinely believed she was acting in her best interests. In the years after Percy Hancock's death until Mrs. Hancock went into care, the evidence establishes that Marnie provided companionship, emotional support, and some household assistance to her mother, from time to time. However, on the totality of the evidence, I conclude that Marnie did not sacrifice her personal life, career, or other opportunities, to care for her mother. In the circumstances, I found her assertion that her brothers should have paid her for the care and companionship she provided to her mother reflective of her generally self-absorbed perspective of family matters.

[81] Ms. Savoie observed that during the period Mrs. Hancock was in care, Marnie was not more involved than her brothers in her mother's care. Ms. Savoie clarified that Mrs. Hancock's sons regularly visited their mother and took her to appointments and social functions.

[82] Ms. Savoie persuasively related to the court that Marnie's allegations and complaints about the facilities and staff at Haven Hill and her overbearing and unreasonable demands resulted in interactions with Marnie being a source of considerable discomfort and stress for Ms. Savoie, as well as the Haven Hill staff

members. According to Ms. Savoie, Mrs. Hancock was happy living at Haven Hill and she never observed any indications that Mrs. Hancock was being mistreated or neglected by the staff at the care facility. Notably, Ms. Savoie also observed that Mrs. Hancock was frequently agitated and anxious after Marnie's visits. Robert's testimony echoed these observations.

[83] Ms. Savoie described to the Court her dismay when Marnie told her at a lunch in July 2008 that by hiring Ms. Savoie, her brothers were spending her inheritance. In their discussions, Marnie referred to her brothers hiring Ms. Savoie "on her dime". Marnie explained to Ms. Savoie that her brothers had received their inheritances and that by hiring Ms. Savoie, they were spending her inheritance.

[84] Marnie threatened her brother Ernest with "governmental and legal action", after he assisted Mrs. Hancock in making gifts to her grandchildren. Marnie's sense of entitlement and her perception that she should manage her mother's share of the sale proceeds of the Dorothy Road Property as her future inheritance resulted in her brothers' negative perception of her as somewhat controlling and grasping. Sadly, her mother shared this perception of her daughter, to some degree, as she stated to Ernest in 2008 that "Marnie is getting greedy". Mrs. Hancock also told Brian in 2008 that Marnie "has had enough" and "I can do what I want with my money".

Robert

[85] Robert is 69 years old. He was divorced in 1999 and has not remarried. He has two adult daughters.

[86] Robert presented as a gentle and self-effacing individual. While his evidence was occasionally vague, he testified in an unadorned and straightforward way. Overall, I found him credible and I accept his evidence.

[87] Robert has asthma and type II diabetes and continues to experience difficulties with his lumbar back, stemming from a back surgery he underwent as a young man.

[88] It cannot be said that Robert is in need, within the meaning contemplated in the pertinent authorities. However, his financial circumstances have been challenging for the last several years. Robert's divorce had a detrimental impact on him financially. Throughout his life he had owned, at various times, six different parcels of real estate in Naramata. Due to a series of adverse financial events, as of 2011, the only property he owned was Gulch Road, the property given to him by his parents. Robert has lived in a trailer on this property since his divorce. His trailer is 40 years old.

[89] Robert has been a farmer since he was 16 years old. His lifestyle is very modest. He continues to be self-employed, pursuing his farming endeavours on his own land as well as performing some contract work on farms in the area. In 2009, he converted his orchard over to a vineyard. He earns minimal income from farming to supplement his government pension income. In 2010, he declared his net farming income as $6,669 but in 2011, his expenses exceeded his farming income. He continues to farm because, as a third-generation farmer, that is the life he knows and from which he derives enjoyment.

[90] There was no appraisal tendered of the value of Robert's real estate as of the date of Mrs. Hancock's death. For reasons that were not explained at trial, there was an appraisal tendered as of November 2013. Robert's net worth as of the date of death – based on the November 2013 appraised value of his real estate at $689,000 – was approximately $900,000, which was comprised largely of the real estate bequeathed to him by his parents and RRSPs valued at $100,000. His net worth has decreased to approximately $800,000, in large measure due to his efforts to finance his farming endeavours.

[91] I find that Robert made a significant contribution to his parents by remaining in Naramata and assisting with the family orchards. Before Kevin moved home to Naramata, Robert had managed the entirety of his parents' orchards for several years.

[92] In 1990, his parents transferred the lower acreage, Gulch Road, to Robert. I accept his evidence that he had been working on that property for approximately five to six years prior to the transfer. He landscaped and re-planted it with fruit trees. Notably, this acreage was significantly smaller than the acreage transferred to his brother Kevin and, unlike Kevin's property, Gulch Road had no house on it.

[93] In addition to assisting his parents in a very meaningful way with the family orchards, Robert clearly enriched his mother's well-being and quality of life by providing her with support and companionship throughout her life. In earlier years, he described assisting his mother with the gardening and canning. During the years she resided at the Dorothy Road Property Robert took his mother shopping, to her appointments, to the old-age pension club, and sometimes to church and other functions. After she moved into care, Robert regularly visited his mother. Mrs. Hancock, in a written composition tendered at trial, described her son Bob as being "good to his mother". Marnie herself acknowledged that Robert had a very good relationship with their mother.

[94] Ms. Savoie related to the court that while she was very proud of and loved each of her children, Mrs. Hancock was especially fond of and close to Robert, with whom she had a "special" relationship. She described Mrs. Hancock's face as "lighting up when Robert walked in the room". Robert clearly had a very special place in her heart. Brian convincingly testified that Mrs. Hancock loved all her children but that Robert deserved to be her favorite because of all the time he devoted to taking her to various events and functions.

[95] In all the circumstances, I find that the totality of Robert's contributions over the years, including his companionship and the enrichment of Mrs. Hancock's quality of life, enhanced Mrs. Hancock's moral duty to Robert.

[96] I accept Robert's evidence that while his mother was living on the Dorothy Road Property, she approached him and suggested that it was not fair that he had ended up with the smaller acreage and perhaps Kevin had received too much. She indicated to Robert that she was aware of his challenging financial circumstances.

Sometime later, when she was in the care facility , Mrs. Hancock mentioned to Robert a few times that she should have given him more.

[97] This account is consistent with Ernest's evidence, which I accept, that at the time his mother was considering listing the Dorothy Road Property for $900,000 in 2007, she told him that she would like to help Robert out because she felt guilty that he had received "the short end of the stick" with the transfer of the smaller farm property, Gulch Road, which had no improvements.

Brian

[98] Brian is married to Lorna Hancock. They lived in Burnaby for 32 years and retired in Naramata in 2005. They have three adult daughters.

[99] I found both Brian and Lorna to be forthright and responsive witnesses.

[100] Brian is a retired Air Canada pilot. In 2011, in addition to his government pension, Brian received an Air Canada Pension of approximately $105,000 per year.

[101] As outlined above, Brian received half of the Hancock Beach Property in 1992. It was a narrow lot and the uncontroverted evidence is that it was difficult to build any structure on it because of the high clay bank behind it. Brian and Ernest had invested their own funds in the property for several years before the transfer. They had paid the costs associated with connecting power and water to the property which cost in the range of $4,000-$5,000 at the material time. They also had paid property taxes on the property for several years prior to the transfer. I accept their evidence on this point.

[102] After Brian sold his share of the property to Ernest's children in 2007 for $60,000, Brian subsequently purchased a larger neighbouring beach front property for $325,000, upon which he built a home. As of November 17, 2013, it was appraised at $1,840,000. According to Brian, its assessed value in 2011 was $1,700,000. His net worth as of the date of his mother's death was $1,707,000, comprised of his Naramata home, a vehicle, and two boats .The evidence

establishes that Brian and his wife transferred their home in Burnaby to their three daughters for "tax purposes" and that they stay there when they are in Burnaby. Contrary to Marnie's counsel's submissions, this evidence does not establish that Brian continues to "control" his Burnaby home. There is insufficient evidence to reliably determine whether Brian retained any beneficial interest in the Burnaby property. Moreover, there is no evidence of the value of the Burnaby property.

[103] When Brian was living with his family in Burnaby, they would spend the summers and as many Thanksgivings and Christmases as possible in Naramata. Brian visited his mother regularly when she was residing in the care facility. As I mentioned, it was Brian who hired Ms. Savoie to assist his mother. Ms. Savoie's testimony, which I accept, was that Mrs. Hancock was very happy to be part of Brian's daughter's wedding in 2007 and she enjoyed spending time with Brian and Lorna.

[104] The preponderance of the evidence supports a finding that Mrs. Hancock was very proud of Brian and his accomplishments and that they had a loving and close relationship. Marnie candidly acknowledged in her testimony that she believed Brian was her mother's favourite child.

[105] In the spring of 2008, some months after the sale of the Dorothy Road Property completed Mrs. Hancock had a discussion over lunch with her daughter-in-law, Lorna. Lorna related to the Court that Mrs. Hancock was embarrassed about the amount of the sale proceeds of the Dorothy Road Property. Mrs. Hancock also expressed frustration over Marnie's behaviour and stated that Marnie was "just being greedy" and that she "has had enough". Mrs. Hancock also stated that she had always felt sad that Brian and Ernest did not get very much and that she felt sorry for Robert and worried about him because he needed financial assistance. I accept Lorna's evidence regarding that conversation.

DISPOSITION

[106] In its search for contemporary justice, this Court must have in mind whether adequate provision has been made for the plaintiffs. Viewing the facts of this case

objectively, as of the date of her death, a judicious parent in Mrs. Hancock's circumstances would recognize a moral obligation to each the plaintiffs, which was not negated by the *inter vivos* transfers to them. To the extent that Marnie asserts that Mrs. Hancock's gifts of $20,000 in 2008 to each of Robert's two adult daughters and Brian's three adult daughters extinguished her respective moral duties to the plaintiffs, I reject that submission.

[107] The statements Mrs. Hancock made to Lorna, as well as those she made to Robert directly, and to Ernest, as referenced above, may be interpreted as demonstrating that Mrs. Hancock recognized, at least to some degree, the moral duty she owed to Robert and Brian. Although relevant in the overall analysis, this is by no means determinative of whether this Court should exercise its discretion to vary her testamentary disposition. Indeed, as the Court observed in *Dunsdon*, in the vast majority of cases when a court finds a testamentary disposition to be inadequate and varies a will, it does so in the face of a will-maker's contrary intention: *Dunsdon*, at para. 190.

[108] In weighing the totality of the evidence, and having regard to the relevant legal principles, I conclude that Mrs. Hancock did not discharge the moral obligation of a contemporary judicious parent. Mrs. Hancock's disposition of her estate did not fall within a range of options that could be considered appropriate in the circumstances. She failed to make adequate provision for either Brian or Robert.

[109] It is not the function of this Court to re-write Mrs. Hancock's will. Rather, it is incumbent on this Court to vary the Will, only to the extent required to provide the justice to Robert and Brian that the Will failed to achieve, commensurate with Mrs. Hancock's moral obligations to her children.

[110] I have considered the relative financial circumstances of each of the plaintiffs and Marnie as of the date of Mrs. Hancock's death. While I have also considered the relative values of the various properties transferred to the Hancock children, the assessment of the residual moral duty owed to the plaintiffs is not amenable to an arithmetical calculation.

[111] Considering all of the circumstances, I cannot conclude that Mrs. Hancock owed an equal moral duty to the two plaintiffs. Given Robert's overall contributions and his lifetime commitment to his mother and Brian's superior financial circumstances, I find that a variation which provides the bequest of $125,000 to Robert and $75,000 to Brian is an adequate, just, and equitable provision.

[112] There will be an order accordingly to vary the Will.

COSTS

[113] If the parties are unable to agree on costs they are at liberty to reserve a date through Supreme Court Scheduling to address the issue.

"Dardi J."