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WILLS VARIATION CLAIMS INVOLVING INDEPENDENT ADUT CHILDREN -- 1995 TO 2005

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Claims by and involving adult children since Canada's landmark wills variation decision in *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R, 807; [1994] S.C.J. No. 65 fall into two main categories, each carrying with it its own particularities. I have classified these for convenience as follows:

- Claims in which the adult children's primary opponent is the testator's spouse[1]. The vast majority of these cases are "blended family" disputes, in which the deceased had one or more children (biological or adopted) prior to entering the relationship she was in at death.
- Claims in which the adult children's dispute is amongst each other. Of course, some cases involve both scenarios, but they are relatively rare and, for the sake of analysis, I have segregated the scenarios in this paper as set out above. I will review first the main principles in *Tataryn* and then consider how they have been applied to each of the foregoing categories of wills variation claims.

A. The Main Principles in *Tataryn*

I classify the *Tataryn* principles as follows:

1. Marriage is, among other things, an economic unit which generates financial benefits (the "Economic Unit Principle").

2. An adult dependent child is entitled to such consideration as the size of the estate and the testator's other obligations may allow (the "Availability Principle").

3. Legal claims are to be given priority over moral claims (the "Legal Over Moral Principle").

1. The "Economic Unit Principle"

It is apparent from *Tataryn* that a testator's most immediate familial obligations are in favour of spouses and minor children. At para. 29 (S.C.J), McLachlin J. stated:

> The first consideration must be the testator's legal responsibilities during his or her lifetime. The desirability of symmetry between the rights which may be asserted against the testator before death and those which may be asserted against the estate after his death has been noted by the dissenting member of the British Columbia Law Reform Commission in its 1983 report on the Act, Report on Statutory Succession Rights (Report No. 70). Mr. Close argues (at p. 154):
>
> > A person is under a legal duty to support his or her spouse and minor children. If this duty is not observed then it may be enforced through the courts. *That a testator's estate should, therefore, be charged with a duty*

similar to that borne by the testator in his lifetime is not troublesome.

[Emphasis added]

At para. 30:

> …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: *Petticus 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-Dube 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.
>
> [emphasis added]

2. The "Availability Principle"

The court's articulation of *most* dependent children's claims fell under the rubric of moral rather than legal duties. At para. 31, McLachlin J. wrote:

> 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...
>
> > ...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...
>
> [emphasis added]

3. The "Legal Over Moral Principle"

If the subordination of such moral claims was not made clear enough by these *dicta*, it is clearly apparent from the following at para. 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.*
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> [Emphasis added]

While both blended family disputes and inter-sibling disputes are governed by the principles set out in *Tataryn*, the application of these principles varies largely depending on which of the above categories the case falls into.

B. Disputes between Adult Children and the Testator's Subsequent Surviving Spouse

Estate litigation counsel are often confronted with claims on behalf of surviving children who believe strongly that they are entitled to the lion's share of the deceased's estate. This entitlement is felt to arise from such factors as: the length of the original marriage relative to the most recent; the contribution to the current estate by the children's first-deceased parent; and the financial wherewithal of the surviving spouse. At law, however, due to the interplay amongst the above principles, surviving spouses have generally come out well ahead of the testator's children. Exceptions arise primarily in cases of prior separation with payout and fair prenuptial agreements.

Surviving Spouse Variation Claims Against the Interests of Children

In *Tigchelaar v. Tigchelaar Estate*, [1995] B.C.J. No. 820 (S.C.), the testator had left his assets, consisting mainly of his one-half interest in the family home and $27,000 in cash, to his adult children from his first marriage. The second wife, who was registered owner of the other one-half interest, successfully applied to have these valuable assets transferred to her absolutely.

Based largely on the Economic Unit Principle, the court awarded the testator's underlying one-half interest in the assets to the second wife. The primary factor dictating this result was that the will did not contemplate, as it should have, the fact that the survivor's pension would be less than the joint pensions while the cost of maintaining the survivor in the same home would be almost as much as it had cost to maintain both of them. Nor did the will contemplate the day when the second wife might need to find alternate, more costly accommodation and care.

Although purporting to apply the testator's legal duty, the court did not cite any statute or clearly articulate the principle of law supporting that duty.

The courts in both *Glanville v. Glanville*, [1998] B.C.J. No. 2960 (C.A.) and *Erlichman v. Erlichman Estate*, [2002] B.C.C.A. 160 came to the aid of surviving spouses, although the results of these cases may be difficult to reconcile. Both cases involved a basic spousal legal obligation: the testator, having family assets registered entirely in his name, had left some portion of them in trust for the surviving second wife with a gift over to adult children or grandchildren thereafter to whom the testator had no legal duty. In *Glanville*, the Court of Appeal reined in a relatively more generous trial judge, but the net result still favoured the applying spouse. The testator had left his wife a life interest in the matrimonial home and joint bank account, which the judge increased to a 50% interest outright in the home. On appeal, this interest was converted into an obligation on the residual beneficiaries to pay all taxes, insurance and repair costs on the home out of their remainder interest. In a strongly worded dissent, Esson J.A. would have awarded the widow full title to the atrimonial home subject to some legacies payable to other beneficiaries upon sale or transfer.

Five years later in *Erlichman*, the Court of Appeal went the extra step of awarding the widow, based on the Economic Unit Principle, a one-half interest outright although the estate was so large that she did not need the entire interest to sustain herself. Family property laws were the main justification cited by the majority, the widow's legal rights being underscored by the following observation by Saunders J.A. at paras. 51 and 53:

> In reaching my conclusion as to a fit disposition, I have considered Mrs. Erlichman's entitlement to provide for her issue and their offspring from her life's *labours as she sees fit, not as the testator saw fit*…
>
> It occurs to me that the *independence sought by Mrs. Erlichman through this appeal may provide her the right to spend some of the funds unwisely*. While that has not been her history, while the trial record does not support this

concern and while it is to be hoped this will not occur, *it is perhaps the mark of independence that the risk should be there*...

[emphasis added]

Westman (Guardian ad litem of) v. Westman Estate, [2000] B.C.J. No. 347 (S.C.) was much to the same effect as *Erlichman*. Again, the husband had attempted to discharge his obligations to his third wife by setting up a modest trust for her maintenance and benefit. Again, and without considering necessity as determining factor, one-half of the entire estate was awarded to the third wife based on family property legislation.

Glanville, *Erlichman* and *Westman* provide an important lesson for solicitors advising clients on wills. Spouses who attempt to control their partners too tightly after death risk being reined in by the courts at serious cost to all involved. Although none of them expressly rejected the earlier decision in *Crerar v. Crerar* (1998), 61 B.C.L.R. (3d) 55 (C.A.) - a case not involving blended families - they are out of sync with it. The majority in *Erlichman* noted that, unlike in *Crerar*, there was no evidence of the widow's inability to manage her portion of the estate [per Saunders J.A. at para. 53]. It appears that the door remains open for a controlling trust of the widow's share of family assets only where incompetency is proven.

In *Bronke v Lyseng*, [2000] B.C.J. No 2774 (S.C.), due to actual need, the testator's obligations were held to exceed his liability under a family property split. By the will, the third wife would have been left a life interest in the matrimonial home, leaving the residue to the deceased's daughter from a previous marriage. Although the testator's moral duty to his daughter was recognized, given the value of the estate, it had to be subordinated to his duty in favour of the widow. The daughter's legacy of the residue of the matrimonial home was reduced such that she was left only the residue of one-third. In the end, all three *Tataryn* principles were applied, collectively again in favour of the widow. The wife's need, exceeding her entitlement under family property legislation, trumped the daughter's moral claim.

Green v. King Estate, [2003] B.C.J. No. 2929 (S.C.) exemplifies the application of the *Tataryn* principles to common-law spouses to similar effect. The court fashioned a remedy comparable to what Esson J.A. would have awarded in *Glanville*. Again the testator had named his two adult children from his first marriage as beneficiaries. The will was varied to give the common-law widow effectively about a two-thirds share in the house with a choice whether to sell or keep it subject to pay out the children's interests. The court did not find that the widow required these funds to sustain herself and, in fact, held that her debts were paid off and that she enjoyed a steady income.

In cases involving common-law relationships, it is reasonable to expect the Economic Unit Principle and the Legal Over Moral Principle to be applied in a different manner, the legal obligations arising more upon rights in trust and statutory support obligations than from statutory property division rules. Nevertheless, at the end of the day, *Green* demonstrates that the common law spouse's rights may prevail to much the same extent.

Children's Variation Claims Against the Interest of the Surviving Spouse

By the same token, variation claims of adult children in blended family situations have been largely unsuccessful when running up against the interests of the surviving spouse.

In *Mann v. Canada Trust Co.*, [1996] B.C.J. No. 1253 (S.C.), the court allowed only a minor variation in regard to two children of the first marriage who had each been left $50,000 of an $848,000 estate despite the court's finding, at para. 15, that the estate was, "...of sufficient size to properly satisfy the legal obligations he owes to his widow…and the moral obligations owing to both [the widow] and his two children." The small increase was due to an historical accident in the size of the estate and the testator's subjective perception of his moral duty toward his children. Interestingly, the second wife's need did not appear to play a large role in the decision. She enjoyed a considerable income, anticipated a pension

upon retirement, and held some $150,000 in her own name.

Munro v. Munro Estate, [1996] B.C.J. No. 1038 (S.C.) involved a more modest (less than $200,000) estate. The deceased's children from a previous marriage were not well off and most of them applied for a portion of the estate based in part on their need and on the short duration of the second marriage (two years), The court's assessment of their position is instructive, at para. 15: "I take it that they regard this major part of their father's estate as their rightful inheritance; and that is the reason behind those who are plaintiffs commencing this action...".

In denying the children's claims, the court applied collectively the Availability Principle and the Legal Over Moral Principle, at para. 27: "Did he have any moral duty toward them? The answer to this depends, it seems to me, upon the size of the estate. Here, it is not large..." And at para. 28: "In my view, there is no room in it to provide for any moral claims of the children."

In *Russell v Lidstone*, [2001] B.C.J, No. 1542 (S.C.), the testator's daughter challenged his disposition of one-half of his small ($100,000) estate to a live-in companion. It was held on summary trial that the deceased had discharged his duties to both individuals.

Morphy v. Mohr, [1998] B.C.J. No. 71 (S.C.) is an extreme example of the application of the *Tataryn* principles against the (minor) child of a former marriage. In this case, the testator had left his 14-year-old daughter only $2,500 of a $320,000 estate. It seems obvious that the bequest was grossly insufficient to discharge his duties toward her, yet it was increased to only $25,000 being "her maintenance requirements during her minor years", in other words, his legal duties.

This case is most striking since the majority of the estate was left to the wife in trust with a residual interest largely to charities (in fact, two of the six equal residual beneficiaries renounced). Having specifically found that the child had discharged her burden of showing that the reasons acted upon by the testator in leaving her such a small sum were unwarranted, the court could easily have varied the will to take into account a moral duty by providing the daughter with a share of the residue.

Legal and moral duties may cross paths where the parent has unresolved obligations from earlier in life. In *Pattie v. Standal Estate* (1997), 42 B.C.L.R. (3d) 211; [1997] B.C.J. No. 2145 (S.C.), Smith J. ruled in favour of a son from the deceased's earlier marriage, at para. 26 (B.C.J.):

> The legal obligation for a parent to support his or her child, during the parent's lifetime, if unfulfilled, may create circumstances for an adult child to advance a moral claim against he parent's estate if the support is inadequate or if no provision is made for the child from the estate...

In that case, the court varied the will to provide a one-half share of the estate. The competing common-law spouse of two years was not in great need, having received a widow's pension and life insurance proceeds apart from the estate.

Cases Involving Separations and Prenuptial Agreements

In contrast to these cases, the factors in cases involving separations and prenuptial agreements turn largely upon the terms of those relationships and agreements. Although there remain cases in which the courts are obviously sympathetic to surviving spouses, there is not the same pattern of clear preference for surviving spouses over adult children. See *Lobe v. Lobe Estate*, [1996] B.C.J. No. 1210 (S.C.); *More v. More Estate*, [2002] B.C.J. No. 1376 (S.C.).

C. Disputes Among Adult Independent Children

Although the bulk of `competing children' cases do not encompass legal obligations, the Legal Over Moral Principle

dictates that consideration first be made to this possibility. Beyond the rights of dependent adult children - which are beyond the scope of this paper - legal claims of independent children may arise from, *inter alia*, debt or as beneficiaries under a constructive trust, particularly if they had been caring for the deceased.

In considering moral obligations to competing children, a helpful starting point is the Court of Appeal's directive in *Vielbig v Waterland Estate* (1995), 1 B.C.L.R. (3d) 76; [1995] B.C.J. No. 170 that a testator who gives equal gifts to all independent children demonstrates, "on a moral duty basis prima facie compliance with the requirements of the *Act*" (at para. 37 (B.C.J.)). One then asks the question:

- if the gifts are unequal, whether that is supported by the testator's rational considerations; or
- if the gifts are equal, whether one or more of the children can prove a "disproportionate" moral claim.

In relation to moral obligations, the following considerations referred to in *Tataryn* summarized by Satanove J. in *Clucas v. Clucas Estate* (1999), 25 E.T.R. (2d) 175; [1999] B.C.J. No. 436 (S.C.) - and cited with approval in several subsequent cases - should be taken into account, at para. 12 (B.C.J.):

> …
>
> 2. The other interest protected by the Act is *testamentary autonomy*. 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 insofar as the statute requires.
>
> 3. The test of what is "adequate and proper maintenance and support" as referred to in s. 2 of the Act is an objective test. The fact that the testator was of the view that he or she adequately and properly provided for the disinherited beneficiary is *not relevant if an objective analysis indicates that the testator was not acting in accordance with society's reasonable expectations* of what a judicious parent would do in the circumstance by reference to contemporary community standards.
>
> 7. Examples of *circumstances which bring forth a moral duty* on the part of a testator to recognize in his Will the claims of adult children are ... an assured expectation on the part of an adult child, or an implied expectation on the part of an adult child, arising from the abundance of the estate or from the adult child's treatment during the testator's life time; the present financial circumstances of the child; the probably future difficulties of the child …
>
> 8. Circumstances that will negate the moral obligation of a testatrix are "valid and rational" reasons for disinheritance, *the reason must be based on true facts and the reason must be logically connected to the act of disinheritance."*
>
> [emphasis added]

Under the Legal Over Moral Principle, these considerations as to the existence and extent of moral claims are taken into account once it is determined that there are sufficient assets within the estate to satisfy more than just legal claims.

Varying an Unequal Distribution

It has been much more common for independent adult children to seek a variation where they are left nothing or a smaller share than their siblings, than when siblings are all left an equal share.

A number of post-*Tataryn* decisions have assessed whether the reasons for disinheritance - or subordinate treatment - of adult independent children have been "valid and rational". The benchmark pre-*Tataryn* case of *Price v Lypchuk Estate* (1987), 37 D.L.R. (4th) 6 (C.A.) continues to be a main source of analysis of the "judicious parent" standard, particularly the strong dissent of Esson J.A. therein. The standard was reaffirmed post-*Tataryn* by the Court of Appeal in *Sawchuk v. MacKenzie Estate* (2000), 31 E.T.R. (2d) 119.

Shortly after *Tataryn*, the "valid and rational" test was examined by Finch J.A. (as he then was) in *Kelly v. Baker* (1996), 82 B.C.A.C. 150; [1996] B.C.J. No. 3050 (C.A.) at para, 58:

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

If a variation is called for by the facts, the courts have also to decide to what extent the will should be varied.

The "logical connection" test was further explored in *Coles v. Coles Estate*, [2003] B.C.J. No. 1071 (S.C.) wherein the testatrix left $1 to her son with most of the $300,000 estate being split equally between his two sisters. The will stated that the testatrix intended to treat the three children equally and took into consideration certain benefits that the plaintiff

had received earlier and which enabled him to acquire a farm. After considering the family history and the son's potential future needs, Powers J. held, at para. 52, that the two sisters had "no greater or moral claim to the estate than he [the plaintiff] does" and, at para 53, that the "decision to disinherit is based on true facts that are logically connected to the act of disinheritance...".

At para. 55:

> Ms. Coles' decision to disinherit her son was based on a consideration of only a portion of the facts. The decision neglected to consider the real benefits Mr. Coles' sisters had also received from their parents during their lifetime. In these circumstances, the disinheritance was not based on a valid reason, although it was rational in the sense that it was logically connected to the act of disinheritance.

Cavadini v. Mahaffey Estate, [1994] B.C.J. No, 1923 (S.C.) was decided after, and in reliance upon, the Court of Appeal's decision in *Tataryn* but before the Supreme Court of Canada's judgment therein. The testatrix had four children by her first husband whom she had abandoned early in life, and two by her second husband. She had left a specific bequest to one of the latter children, with the residue to be shared equally by the latter children. *Cavadini* is not clouded by need on the part of some children; all six were found to be financially independent.

Both *Price* and *Cavadini* were cases of long-term estrangement but they were decided from different perspectives. In *Price*, the court held that the absence of a relationship between the parties, at p. 16:

> ...precluded the development of any mutual feelings of moral responsibility... [the testator] was told that he could not see his [original] children and was to have nothing to do with them. The children were not consulted; they were too young.
>
> In those circumstances, the relationship of parent and child was effectively drained of moral obligation. And it received no replenishment from the kind of mutual support through life's discouragements that continuous

> association or regular communication might have provided.

The cases illustrate the importance of the size of the estate in determining not only the extent of a moral duty, but whether a moral duty arose in the first place under the Availability Principle.

The court in *Cavadini*, though, put the test in the reverse.. Although there was similarly no relationship over many years, the court focused on the question of blame, concluding at para. 84:

> By disinheriting the plaintiffs without good cause, Mrs. Mahaffey failed in the moral duty she owed to them, as she had failed in her parental duty when they were young. She failed to make provision for their proper maintenance and support,

In other words, the courts in these case focused not on the conduct of the estranged children but on that of the testator: where the testator was to blame (*Cavadini*) a moral duty arose, where he was not to blame (Price) the duty did not arise. *Quaere* whether the question of blame would have been as decisive had the estate in Price been as sizeable as that in *Cavadini*,

The British Columbia Court of Appeal had occasion to further address blameworthiness in *Gray v Gray Estate* (2002), 98 B.C.L.R. (3d) 389; [2002] B.C.J. No, 270. In choosing to focus on the testator's duty to maintain relations with his or her children, rather than on whether the circumstances allowed for the development of any mutual feelings of moral responsibility, the court may have overruled its earlier decision in *Price* without mentioning it by name.

> In *Gray*, the, judge at trial made an analysis similar to the majority's in Price. As summarized by the Court of Appeal at para. 4 (B.C.J.) The trial judge ... decided that since the appellant and the testator had nothing to do with each other for most of the appellant's life, any moral duty owed by the testator was negligible.

On appeal, a unanimous bench held that in assessing the testator's moral obligation, it is necessary to look to the root causes of this "complete void in the relationship", at para. 17:

I cannot accept that a child so neglected for his first 18 years and then treated shabbily during a brief reconciliation can be said to forfeit the moral claim to a share in his father's estate by abandoning any further effort to establish a relationship. The fault in this sad story lies with the father and, in my opinion, the onus to seek further reconciliation was on his shoulders. The testator gave the appellant virtually nothing in an emotional or material way; the will was his last opportunity to do right by his son.

This analysis is more in keeping with the *Cavadini* than with the *Price* perspective. Perhaps the subtle indicator of the change in perspective was the use of the term "moral claim" in *Gray* as opposed to "moral obligation" in *Price*.

A series of other "estrangement" cases demonstrates the consideration of the concepts of duty and blameworthiness in considering the existence of moral claims. See *Tamboline v. Dobbs Estate*, [1998] B.C.J. No. 1692 (S.C.) (conduct of both parents and applicant contributed to estrangement - held to be a departure from the testator's moral duty to act judiciously); *Berryere v. Berryere*, [2000] B.C.J. 851 (S.C.) (plaintiff had taken no steps to communicate with her mother for 30 years, and the expressed reasons for disinheritance were rational); *Comeau v. Mower Estate*, [1999] B.C.J. No. 26 (S.C.) (prior dispute based on daughter's withdrawal of $100,000 from testatrix's bank account, subsequent litigation settled; disinheritance rationally connected to prior events and supported by settlement); *Elliot v. Clark*, [1998] B.C.J. No. 2056 (SC.) (plaintiff had failed to initiate contact with his mother and failed to attend to her when she was ill - held rationally connected to disinheritance).

Ryan v. Delahaye Estate, [2003] B.C.J. No. 1670 (SC) may be the high-water mark in favour of under-inherited children. Here there was no question of the existence of a moral duty, but the decision to differentiate was subjected to the same "valid and rational" analysis. There was a clear and continuing relationship with both children and the testator saw fit to

leave a 20% share to her daughter, as opposed to 80% to her son. Unlike *Gray*, the reasons for the distinction had been carefully outlined in the wills of both the testatrix and her late husband, at para. 1:

> I have carefully considered my obligations toward my said children. and have subsequently made the above distribution for the following reasons. Bernard has been of great assistance to me and to his father over the years and the distribution has been made in special recognition of that devotion. Marcelle seldom visits or contacts us on her own initiative, only on request from us. Another reason for the above distribution is that Marcelle was the recipient of my late mother-in-law's entire estate in 1966 which was bequeathed to my husband but which he gave over to her.

After carefully reviewing the family history, the court concluded each of these reasons to have been rationally unjustified, and varied the will,

Extent of the Variation - the Remedy

Where a moral claim has been established, in some circumstances the plaintiff has been entitled to share equally with his or her siblings, while in others the courts have focused on the principle of testamentary autonomy in limiting the extent of the variation. The decisions in this regard are not, in my view, entirely consistent. In *Ryan*, the court simply opted for an even distribution, paying no heed to the principle of testamentary autonomy. The testator's views were of course clearly visible in the will.

A similar result was reached in *Sammon v. Stabler*, [2000] B.C.J. No. 1.370 (S.C.) although the plaintiffs intent was undiscernible. The plaintiff was the only one of six independent adult children to be disinherited. All others were to share equally save for an uncontested additional gift to one daughter. Unlike *Ryan*, the court was, on the evidence, unable to reach any conclusion about what the reasoning of the testatrix had been; one possibility being that she incorrectly believed that the plaintiff had received a substantial prior gift or "early inheritance". The order was simply that he take an equal share.

These decisions are to be contrasted with *Cavadini* in which the court declined to make an order for an equal distribution on the basis that, "...a testator is permitted to favour one child over another..." (at para. 87). Coultas J. cited with approval, at para. 87, an early Court of Appeal quote that, "...the greatest care should be taken to appreciate the motives which swayed him in the disposition of his property or the justification which might be apparent for his decisions...": *Swain v. Dennison* (1966), 54 W.W.R. 606 at 611, affirmed [1967] S.C.R. 7.

Interestingly, the court in *Cavadini* somehow managed to discern the "motives which swayed [the testator]" although no mention of such motives had been made in the will and in the absence of any other referenced evidence justifying such a conclusion. Indeed, at para, 66, the trial judge refers to "the only evidence touching on the testator's reasons for making the disposition she did..." - which had nothing to do with the plaintiffs' disinheritance.

In my view, the differential approaches to remedy in *Ryan* and *Cavadini* cannot be reconciled without taming on its head the long-heralded caution to testators to carefully express in the will - or in a statutory declaration - the reasons for preferring some children over others. In *Cavadini*, where no reasons were expressed, the court's decision was based on speculation to impute reasons to the testator. In *Ryan* with three distinct reasons, the court did not take them into account when deciding upon the ultimate split. Contrary to Satanove J.'s summary of the law, might the absence of detailed reasons \make wills less - rather than more - "appealable"?

The Court of Appeal's decision in *Gray* would suggest that the result in *Ryan* is to be preferred over that in *Cavadini*.. The court held that the plaintiff was entitled to the same share as his brother who was part of the will, at para, 22 (B,C.J,): "As

between [Danny] and the appellant I see no reason to differentiate since the appellant is not to blame for the lack of a relationship..."

Yet at the same time, the Court itself seems to have violated the oft-cited dictate to heed testamentary autonomy. In arriving at the court's conclusion, Donald J. A,, differentiated between both sons, on the one hand, and the daughter, on the other, at para. 22:

> Georgina deserves some additional recognition for her attentiveness to the testator. I would divide the residue 4-3-3 in Georgina's favour.

The testator himself had seen fit to divide the residue equally between Georgina and Danny, Danny having been given a gun collection in addition. There is no suggestion that Georgina had argued that the gun collection should be compensated by a higher share of residue in her favour.

Hence, in my respectful view the court of appeal did do the "redrafting" which is cautioned against.

The consideration of testamentary autonomy in determining the extent of the variation was similarly addressed in *Coles*. Notwithstanding the testatrix's expressed intention to treat all three children equally, and the court's findings that: (a) the plaintiff had *not* in fact received more *inter vivos* benefits than two his sisters; (b) the sisters had "no greater or

moral claim [sic] than he does"; (c) the plaintiff was in fact the neediest of the three children; the court nevertheless awarded the plaintiff only about one-fifth of the estate, The decision was made in purported recognition of, at para. 56, "the testator's autonomy by making an order which is within the range of options that would be considered appropriate in the circumstances." This approach is in direct contrast with that of the court in *Ryan*, and for the reasons expressed above I believe the latter is to be preferred..

Dring v. Ziefflie, [2004] B.C.J. No. 1666 (S.C.) demonstrates a measured approach to both the absence of reasons for differentiation and maintaining the testator's intentions to the extent possible. In this case, the testator left most of a modest estate to his daughter ($275,000 - including an *inter vivos* gift of the house) and only $25,000 to his son, He had maintained close relations with both and there were, at para. 26, "no known reasons for the testator's differential treatment of the plaintiff". In increasing the son's gift to only $60,000, Dillon J. put it this way, at para. 27:

> I do not think that this court should rewrite the will to create equality between the children when the testator did not intend such. This is especially so when it was always known in the family that Mary would "get the house" ...

Assuming that the testator's intent was indeed to this effect and given the determination that the house was the testator's only significant asset, the inferences drawn appear reasonably consistent with the testator's intent.

In assessing the strength of potential claims, estate counsel must consider such factors as the existence legal obligations, the deceased's rationale for excluding beneficiaries and the size of the estate. These factors will often dictate the prospects of a claim irrespective of the various claimants' relative needs.

Conclusion and Advice for Prospective Litigants and Wills Drafters

It is often remarked that wills variation law is fraught with uncertainty. While that may be so, the three *Tataryn* principles offer a reasoned approach to variation without the kinds of factual minefields often at play in undue influence and testamentary capacity cases. The main uncertainty inherent with regard to variation law is, of course, the testator's inability to foresee the circumstances of prospective claimants at death.

In disputes against the testator's spouse, children of a prior marriage should be cautioned that the *Tataryn* principles often weigh heavily in favour of the spouse. In many cases the are simply insufficient estate assets for the spouse to comply with

legal and moral obligations in favour of the spouse, leaving little room for the children to inherit. In such eases, all parties should consider a settlement based on a life interest in favour of the surviving spouse or partner with a gift over in favour of the children.

Will drafters should caution their clients that seeking to assert excessive control over their surviving spouse may backfire at the expense of all involved. Will drafters should also caution their clients that explicitly outlining facts as the rationale for favouring some children over others may have the effect of giving the less-favoured child fodder for an ultimate challenge, as in *Ryan*. Not only may the premise(s) for a disinheritance or "under-inheritance" prove invalid, but the facts may no longer be correct at death, for example a subsequent gift may have been made to another child. On the other hand, a clearly expressed preference coupled with a reasonable gift to the less-favoured so that the testator is acting "within the range of reasonable options" may not withstand a challenge under the *Act* if the supporting facts are at all questionable.

The law remains unsettled primarily in the result which obtains if the testator is held not to have complied with her moral obligations.

End Notes

1 I use the term "spouse" to include common law spouses, both in opposite and same-sex relationships, as required by *Grigg v. Berg Estate*, [2000] B.C.J. No. 36 (S.C.); reconsidered at [2000] B.C.J. 1080.