IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20150422
Docket: S100887
Registry: Kelowna

Between:

Janice Muriel Cybak

Plaintiff

And

Beverly Ellen Yeadon and Melvin Dale Myhre as Executor of the Will of Norman Harry Myhre, Deceased, and in his personal capacity

Defendants

Before: The Honourable Madam Justice Beames

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	K.A. Sabey
Counsel for the Defendants:	M.A. Misner
Place and Date of Trial/Hearing:	Kelowna, B.C. March 12, 13 and 31, 2015
Place and Date of Judgment:	Kelowna, B.C. April 22, 2015

[1] **THE COURT:** On August 18, 2013, Norman Myhre died. His death was quite sudden and unexpected. He was 63 years old. His Will, made in 1989 and amended by Codicil in 1992, appointed his sister, the defendant Beverly Yeadon, to be the executor of his Will, and his brother, the defendant Melvin Myhre, to be his alternate executor. He left his estate to the defendants in equal shares.

[2] The plaintiff Janice Cybak, applies by summary trial to vary the Will pursuant to the *Wills Variation Act*, R.S.B.C. 1996, c. 490, claiming that she was the spouse of Norman Myhre and that his Will failed to make adequate provision for her.

[3] The issues before me are:

a) Is this matter suitable for disposition pursuant to Rule 9-7?

b) Were the plaintiff and the deceased spouses as defined by the *Wills Variation Act*?

c) If so, did the Will of the deceased fail to make adequate provision for the plaintiff?

d) If so, what variation of the Will would be adequate, just, and equitable?

[4] By way of background, as I have said, the deceased was 63 years old at the time of his death. He was one of four children born to his parents, Harry and Louise Myhre. The family was a very close one while the siblings were children, and then continuing in their adult years. They provided financial support to one another from time to time as needs arose, vacationed together, and spent considerable time together. Some of them worked together from time to time.

[5] In 1987 or 1988, the deceased suffered a back injury at work, and he was permanently disabled from work thereafter and in receipt of disability benefits from the time of his injury until the time of his death. In 1989, the second oldest sibling in the Myhre family died as a result of injuries sustained in a motor vehicle accident. Shortly after his death, the deceased, who was a single man without children, executed his Will, dividing his estate into four shares and providing that one share

should go to his parents, one share to each of his two surviving siblings, and one share to his deceased brother's widow.

[6] In 1992, the deceased's brother married his deceased brother's widow, and the deceased executed his Codicil to remove the separate gift to his sister-in-law, so that his surviving brother received an equal share to his sister.

[7] The plaintiff was born on November 13, 1953. She was married at the age of 17 and divorced in 1984 after being separated for approximately seven years. She has three children and four grandchildren. Her parents are deceased and she has limited contact with her siblings. The plaintiff completed Grade 9 in a special education program and then left school. She has never been employed outside the home.

[8] Her doctor, in a report dated October 8, 2014, says the plaintiff “has been suffering with at least a moderate degree of cognitive impairment” since birth, as well as chronic anxiety, a relatively high degree of dependence, and a need for frequent reassurance, support, and occasional treatment intervention. Her health situation, in his opinion, has worsened considerably since the death of the deceased. The plaintiff has been a long-time recipient of disability income assistance from the Province of British Columbia.

[9] The parties met in the fall of 1994 when the plaintiff purchased golf clubs from the deceased for one of her sons. After she met him to buy the golf clubs, she had to call him back because the clubs were left-handed clubs and her son golfed right. They then met for coffee and immediately started dating.

[10] The plaintiff says that on her birthday in November 1994, the deceased invited her to move in with him. She did so in mid-December 1994, and the parties lived together from then until the date the deceased died. The plaintiff says that the relationship was spousal-like and that they lived essentially in a common-law relationship. While the defendants concede that the plaintiff and the deceased lived together for almost 19 years and that the deceased cared for and indeed loved the

plaintiff, they say that the relationship was one of friendship and one of landlord/tenant.

[11] I will deal first with whether this action can be resolved by summary trial pursuant to Rule 9-7.

[12] Rule 1-3 provides that the object of the rules is the "just, speedy, and inexpensive determination" of proceedings on their merits, and that as far as practicable, the proceedings are to be conducted in ways that are proportionate to the amount involved, the importance, and the complexity of the proceedings.

[13] Rule 9-7(15) provides:

> On the hearing of a summary trial application, the court may
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> > (a) grant judgment in favour of any party, either on an issue or generally, unless
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> > > (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
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> > > (ii) the court is of the opinion that it would be unjust to decide the issues on the application ...

[14] The importance of proportionality was recently emphasized by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7, where the court said:

> [28] This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible — proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.
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> [29] There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedures used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

[15] The leading British Columbia case dealing with when summary trials are appropriate remains *Inspiration Management v. McDermid* (1989), 36 B.C.L.R. (2d) 202 (C.A.). Then Chief Justice of British Columbia McEachern, writing for the panel of five in the Court of Appeal, said:

> 53 The test for Rule 18A, in my view, is the same as on a trial. Upon the facts being found the chamber judge must apply the law and all appropriate legal principles. If then satisfied that the claim or defence has been established according to the appropriate onus of proof he must give judgment according to law unless he has the opinion that it will be unjust to give such judgment.
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> 54 In deciding whether the case is an appropriate one for judgment under Rule 18A the chambers judge will always give full consideration to all of the evidence which counsel place before him but he will also consider whether the evidence is sufficient for adjudication. ...
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> 55 Lastly, I do not agree, as suggested in *Royal Bank v. Stonehocker supra*, that a chambers judge is obliged to remit a case to the trial list just because there are conflicting affidavits. In this connection I prefer the view expressed by Taggart J.A. in *Placer*, quoted at p. 15 [pp. 201-13] of these reasons. Subject to what I am about to say, a judge should not decide an issue of fact or law solely on the basis of conflicting affidavits even if he prefers one version to the other. It may be however, notwithstanding sworn affidavit evidence to the contrary, that other admissible evidence will make it possible to find the facts necessary for judgment to be given. For example, in an action on a cheque, the alleged maker might by affidavit deny his signature while other believable evidence may satisfy the court that he did indeed sign it. Again, the variety of different kinds of cases which will arise is unlimited. In such cases, absent other circumstances or defences, judgment should be given.

[16] In this case, most of the evidence is not in fact contradictory. Only one party to the relationship remains alive, and she has provided affidavit evidence and has been examined for discovery over approximately one and a half days. There are documents available and in evidence before me written by the deceased in the form of letters, greeting cards, emails, and texts.

[17] The defendants have provided their own affidavit evidence and the evidence of others with regard to their direct knowledge about the parties' relationship and about statements they say the deceased made.

[18] There are photographs, some with inscriptions. There are documents submitted to the government in the form of the parties' income tax returns and forms,

and correspondence with the Provincial Government with regard to the plaintiff's disability income assistance. There is affidavit evidence from third parties and from the plaintiff's children with regard to their observations of the parties' relationship.

[19] Although the documents from the Provincial Government with regard to the plaintiff's income assistance were received relatively late in the proceedings, the defendants did not seek an adjournment before me, nor do they apparently suggest that disclosure is not yet complete. They did not seek to cross-examine the plaintiff or any of her witnesses on the affidavits filed.

[20] Further, while the estate is not insignificant, neither is it very large. The gross value of the estate as shown in the statement of assets, liabilities, and distribution filed with the court was just over $500,000.

[21] Finally, the issues in this proceeding are not unduly complex.

[22] I have concluded that the matter is suitable for disposition by summary trial.

[23] I turn now to the nature of the parties' relationship.

[24] Under the provisions of the *Wills Variation Act*, only a spouse or children are entitled to bring an action to vary a Will. Section 1 of the Act defines a spouse as a person married to the testator or a person who is “living with another person in a marriage-like relationship, and has lived in that relationship for a period of at least 2 years”.

[25] The law with regard to what constitutes a marriage-like relationship was recently summarized in *McFarlane v. Sawatzky*, 2014 BCSC 1449:

> [21] The question of whether a couple is to be regarded as having had a marriage-like relationship can be answered having regard to objective and subjective criteria. The nature of the objective test and its limitations were described by Justice Cory in *M. v. H.*, [1999] 2 S.C.R. 3, at para. 59:
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> > *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), sets out the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the

> couple. However, it was recognized that these elements may be present in varying degrees and not all are necessary for the relationship to be found to be conjugal. … In order to come within the definition, neither opposite-sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is "conjugal".

[22] In my view, there were sufficient objective indicators in this case for the couple to be regarded as spouses. They shared the plaintiff's home and they shared her bed. The plaintiff provided care and support to Mr. Goodburn to the degree and in the manner of someone who was more than simply a friend. In their interactions with members of her family, and in their other social interactions, they would have appeared to function as a unit.

[23] The subjective test, based on the court's assessment of the parties' degree of mutual commitment, is as stated by Justice Lambert in *Gostlin v. Kergin* (1986), [1986] 5 W.W.R. 1, 3 B.C.L.R. (2d) 264 (C.A.). Referencing the support obligations set out in s. 57 of the *Family Relations Act*, , R.S.B.C. 1979, c. 121, he stated:

> So I would ask whether the unmarried couple's relationship was like the relationship of the married couple in that the unmarried couple have shown that they have voluntarily embraced the permanent support obligations of s. 57. If each partner had been asked, at any time during the relevant period of more than two years, whether, if their partner were to be suddenly disabled for life, would they consider themselves committed to life-long financial and moral support of that partner, and the answer of both of them would have been "Yes", then they are living together as husband and wife. If the answer would have been "No", then they may be living together, but not as husband and wife.

[26] In *Austin v. Goerz*, 2007 BCCA 586, the Court of Appeal, in noting the variation that exists in relationships that are or may be found to be marriage-like, said:

> [55] While financial dependence may at one time have been considered an essential aspect of a marital relationship this is no longer so. Today marriage is viewed as a partnership between equals and there is no principled reason why marital-equivalent relationships should be viewed differently.
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> [56] Mrs. Austin relies on *Gostlin v. Kergin* (1986), 3 B.C.L.R. (2d) 264 (C.A.), and *Takacs v. Gallo* (1998), 48 B.C.L.R. (3d) 265 (C.A.). While the need to examine the financial relationship between the parties is discussed in both, in neither do I find support for the proposition that a marital-equivalent relationship cannot exist absent some level of financial dependence.
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> [57] Apposite is the more recent decision of the Supreme Court of Canada in *M. v. H.*, [1999] 2 S.C.R. 3, which concerned that portion of the definition of

"spouse" in the *Family Law Act*, R.S.O. 1990, c. F.3, conferring certain rights on either a man or woman who are not married to each other but who live together in a "conjugal relationship." In discussing the requirements of conjugal (i.e., marriage-like) relationships, Cory J. indicated that while financial dependence is a factor it is but one of many to be considered:

> 59 *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), sets out the generally accepted characteristics of a conjugal relationship. They include shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple. However, it was recognized that these elements may be present in varying degrees and not all are necessary for the relationship to be found to be conjugal. While it is true that there may not be any consensus as to the societal perception of same-sex couples, there is agreement that same-sex couples share many other "conjugal" characteristics. In order to come within the definition, neither opposite-sex couples nor same-sex couples are required to fit precisely the traditional marital model to demonstrate that the relationship is "conjugal".

[58] It is understandable that the presence or absence of any particular factor cannot be determinative of whether a relationship is marriage-like. This is because equally there is no checklist of characteristics that will invariably be found in all marriages. In this regard I respectfully agree with the following from the judgment of Ryan-Froslie J. in *Yakiwchuk v. Oaks*, 2003 SKQB 124:

> [10] Spousal relationships are many and varied. Individuals in spousal relationships, whether they are married or not, structure their relationships differently. In some relationships there is a complete blending of finances and property - in others, spouses keep their property and finances totally separate and in still others one spouse may totally control those aspects of the relationship with the other spouse having little or no knowledge or input. For some couples, sexual relations are very important - for others, that aspect may take a back seat to companionship. Some spouses do not share the same bed. There may be a variety of reasons for this such as health or personal choice. Some people are affectionate and demonstrative. They show their feelings for their "spouse" by holding hands, touching and kissing in public. Other individuals are not demonstrative and do not engage in public displays of affection. Some "spouses" do everything together - others do nothing together. Some "spouses" vacation together and some spend their holidays apart. Some "spouses" have children - others do not. It is this variation in the way human beings structure their relationships that make the determination of when a "spousal relationship" exists difficult to determine. With married couples, the relationship is easy to establish. The marriage ceremony is a public declaration of their commitment and intent. Relationships outside marriage

> are much more difficult to ascertain. Rarely is there any type of "public" declaration of intent. Often people begin cohabiting with little forethought or planning. Their motivation is often nothing more than wanting to "be together". Some individuals have chosen to enter relationships outside marriage because they did not want the legal obligations imposed by that status. Some individuals have simply given no thought as to how their relationship would operate. Often the date when the cohabitation actually began is blurred because people "ease into" situations, spending more and more time together. Agreements between people verifying when their relationship began and how it will operate often do not exist.

[27] I turn to the *Molodowich* factors, as they appear and as I analyze them in this case.

Shelter

[28] The evidence is uncontroverted that the plaintiff and the deceased lived in the same house from December 1994 until the sudden death of the deceased in August 2013. They did not share a bedroom, except on the plaintiff's evidence for perhaps the first year of their cohabitation, which the plaintiff says was because the deceased had restless legs and they both snored. They did share a bed when they vacationed together. No one else lived with the parties.

Sexual and Personal Behaviour

[29] The plaintiff says that she and the deceased had a sexual relationship from before she moved into the deceased's home and that they continued to be intimate. The defendant Beverly Yeadon says that the deceased told her in approximately 1989 that he was no longer able to function sexually, as a result of his workplace injury, and she says that if the deceased was having sex with the plaintiff, he would have told her.

[30] There is no medical evidence with regard to any sexual dysfunction on the part of the deceased, and of course there are many ways in which the plaintiff and the deceased could have been intimate. There is no suggestion either of them had an intimate relationship of any sort with anyone else once they commenced cohabitation.

[31] In terms of the feelings of the deceased and the plaintiff for each other, those are well documented and demonstrated by letters, greeting cards, emails, texts, and photographs. The photographs clearly show that the deceased and the plaintiff were close and physically affectionate with one another. The greeting cards from the deceased to the plaintiff contain such statements as, "To the best wife ever" and "All my love" or "All my love only", and from the plaintiff to the deceased similar statements and sentiments.

[32] The deceased, in a letter written to one of the plaintiff's children, sent in approximately 1996, said:

> For a long time I lived by myself and after all I had done, it seemed like I was heading nowhere. Down deep, I still knew there was something missing. The first day I saw your mom, I knew what that was. Your mom filled that lonely, hollow, empty void I had carried with me for so long. Shes [*sic*] cares for me, she makes me feel alive, we love each other very much.

[33] In addition to greeting cards, the plaintiff and the deceased exchanged gifts. They holidayed together, ate meals together, and assisted each other in times of ill health. Shortly before the deceased died, the plaintiff was sick. The deceased sent texts to one of her sons saying, "Was up until 3:30 a.m. listening for Mom's next breath".

[34] The plaintiff called the ambulance when the deceased suddenly became ill and she, her three children, one daughter-in-law, and three of her grandchildren were in the hospital room, together with the defendants and their families, with the deceased before his death.

[35] On the other hand, the defendant Beverly Yeadon, who lived close by, often attended the deceased's home and provided back rubs for pain relief for him, she says at all hours of the day and night, and the plaintiff, at least on the evening visits, would already be asleep in her room.

Services

[36] The plaintiff and the deceased divided chores. The plaintiff was primarily responsible for indoor activities such as cooking, cleaning, and laundry. The deceased performed the majority of the outdoor activities such as garden and yard work, and he did the barbecuing and the home repairs.

[37] The plaintiff never has had a driver's licence and the deceased drove her to appointments and provided other transportation.

Social and Societal

[38] The plaintiff and defendant appear to have socialized together, including with each other's families. Three long-time neighbours have provided affidavit evidence. All three saw the plaintiff and the deceased together most of the time. All three considered that they were spouses. All three saw demonstrations of physical affection between the plaintiff and the deceased and other indicia of a marriage-like relationship.

[39] Friends and family of the plaintiff and the deceased treated the couple as if they were in a marriage-like relationship. The plaintiff's children were addressed by the deceased by name or as "son", both in conversation and in writing. Her grandchildren were encouraged to call the deceased Grandpa, and he referred to them as his grandchildren. Friends and family sent the plaintiff and the deceased correspondence addressed to both of them, sometimes addressed as “Norman and Janice Myhre”. The defendants sent cards to the couple referring to the plaintiff as their “sister-in-law” and their children referred to the plaintiff as their aunt.

[40] The plaintiff and the deceased attended family functions on both sides of their families together, including holidays, special occasions, weddings, and funerals.

[41] On the other hand, the pastor who assisted the family with funeral arrangements has provided affidavit evidence, and she says that the defendant Melvin Myhre and his wife made most of the arrangements for the funeral. She recalls that she only met the plaintiff shortly before the service was to start. The

plaintiff's son wanted the plaintiff announced as the wife of the deceased, which the pastor found unusual because she had previously been told by the family, that is the defendant and his wife, that the plaintiff was the deceased's very dear friend. This request shortly before the service was the first time anyone had mentioned the plaintiff as a spouse to the pastor. After discussion with, the pastor says, “the entire family”, she decided not to announce the plaintiff as the spouse of the deceased. She says the defendant Melvin Myhre and his wife did not agree with having the plaintiff announced as the spouse.

[42] Further, a long-time friend of the Myhre family who lost touch with the family in 1989, re-established contact in 2013. He met the deceased twice in 2013, both times when the deceased was with the plaintiff. The deceased introduced the plaintiff to his old friend, but did not use the words "my wife" or "my girlfriend", and the witness says “their interactions were not exactly like a couple”. On the second meeting at a barbecue at the witness's home, the deceased spoke to the witness about an old girlfriend from before 1994, and showed the witness a picture of her from his wallet. The deceased made comments about his old girlfriend in front of others and in a way that made the witness think that the deceased and the plaintiff were not “boyfriend and girlfriend”.

[43] Also of note is that over the entire duration of the relationship, both the plaintiff and the deceased filed income tax returns as either “single” or “divorced”, and not as common-law or married. The plaintiff continued to receive monthly disability income assistance and had to report monthly that she had no change in her circumstances. Both she and the deceased represented to the Ministry that they had a landlord and tenant relationship, and indeed for the vast majority of the relationship the plaintiff did pay rent, or a sum or money characterized as rent, to the deceased, initially in the amount of $300 per month, and later in the amount of $375 per month. However, no rental income was ever declared by the deceased to Canada Revenue Agency.

Economic Support

[44] As I have just said, for most of the relationship, the plaintiff paid a monthly sum to the deceased, initially in the amount of $300 per month and later in the amount of $375 per month. She bought some groceries.

[45] The deceased managed all of the finances. He obtained a credit card for the plaintiff on one of his accounts and would total up her monthly charges, for which she would then reimburse him. The deceased made most of the parties' larger expenditures and paid for most of their vacations. If the plaintiff ran out of money in any given month, the deceased would ensure that she had everything she needed. In other words, he provided financial support to her.

[46] The plaintiff spent all of her money each month; that is, the money received from her disability income assistance, and she has no savings.

[47] In my view, the only factor which weighs against a finding that the plaintiff and the deceased were in a marriage-like relationship is their failure to declare their common-law status or a common-law status to Canada Revenue Agency, and more particularly to the Provincial Ministry. However, that failure is not determinative of the issue (*Mazur v. Berg*, 2009 BCSC 1770 and *McFarlane v. Sawatzky*, 2014 BCSC 1449) even where, as here, the plaintiff received government income assistance that she would not have been entitled to if she had declared the common-law relationship, from which assistance I am satisfied both parties benefited to a certain degree.

[48] Considering all of the evidence in this case and the relevant factors set out earlier, I am satisfied that the plaintiff and the deceased “shared their lives”, to quote Mr. Justice Lambert in *Gostlin v. Kergin*, and that they did so “with a permanent mutual support commitment” and that the relationship was marriage-like for well over two years and, on a balance of probabilities, from shortly after they commenced cohabitation. That relationship remained marriage-like right up until the time the deceased died.

[49] Having concluded that the plaintiff was the spouse of the deceased, it is plain and obvious that the Will of the deceased, which was made before he ever met the plaintiff, failed to make adequate provision for the plaintiff.

[50] What then would be a just, adequate, and equitable distribution to the plaintiff?

[51] As I said earlier, the estate of the deceased had a gross value of just over $500,000. The plaintiff's counsel estimated that the net value of the estate will be in the range of $450,000 to $460,000, although I do not have the precise figure.

[52] The plaintiff has no assets beyond personal possessions. She is permanently disabled from working. After the deceased died, she reported to the Ministry that she and the deceased were, in fact, in a common-law relationship, and she has been found to owe the Ministry just over $130,000 representing the overpayment of disability income assistance payments made to her for which she was not eligible as a result of her common-law relationship. She does now receive federal government payments as the deceased's spouse in the form of CPP and survivor's allowance, which payments total approximately $1,200 per month. Her expenses include approximately $100 per month for prescription and non-prescription medication. She has remained in the home she shared with the deceased to date and has been unable to find any affordable place to rent.

[53] The defendant Melvin Myhre is married. He and his wife have combined income of approximately $15,400 per year. They own their own home, mortgage free, and with a B.C. Assessment value of $418,000. In addition, they have approximately $392,000 in investments. Melvin Myhre was born in 1956 and he retired in 1992. Since that date, his income has come from investments and a small amount of money he has made buying and reselling things from garage sales and auctions. He says he has vertigo and can no longer do the type of work he did before retirement.

[54] The defendant Beverly Yeadon is married. Their combined income is approximately $22,000 per year. They have a mortgage free home with a B.C. Assessment value of $295,000. They also have investments worth approximately $295,000. They are the holders of a mortgage arising out of the sale of a business, which mortgage is in the face value of $240,000. Ms. Yeadon is 60 years old. She has not been a continual wage earner throughout her adult life and says her husband has been the main income earner in their family. Ms. Yeadon has health issues and she says she is no longer able to work. She and her husband help to support their daughter and her three children.

[55] The leading authority on the *Wills Variation Act* remains *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807 in which the Supreme Court of Canada provided the following guidance:

> 16 The two interests protected by the Act are apparent. The main aim of the Act is adequate, just and equitable provision for the spouses and children of testators. The desire of the legislators who conceived and passed it was to "ameliorat[e] ... social conditions within the Province". At a minimum this meant preventing those left behind from becoming a charge on the state. But the debates may also be seen as foreshadowing more modern concepts of equality. The Act was passed at a time when men held most property. It was passed, we are told, as "the direct result of lobbying by women's organizations with the final power given to them through women's enfranchisement in 1916". There is no reason to suppose that the concerns of the women's groups who fought for this reform were confined to keeping people off the state dole. It is equally reasonable to suppose that they were concerned that women and children receive an "adequate, just and equitable" share of the family wealth on the death of the person who held it, even in the absence of demonstrated need.
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> 17 The other interest protected by the Act is testamentary autonomy. The Act did not remove the right of the legal owner of property to dispose of it upon death. Rather, it limited that right. The absolute testamentary autonomy of the 19th century was required to yield to the interests of spouses and children to the extent, and only to the extent, that this was necessary to provide the latter with what was "adequate, just and equitable in the circumstances." And if that testamentary autonomy must yield to what is "adequate, just and equitable", then the ultimate question is, what is "adequate, just and equitable" in the circumstances judged by contemporary standards. Once that is established, it cannot be cut down on the ground that the testator did not want to provide what is "adequate, just and equitable".
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> ...

> 28 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 plaintiff 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.
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> ...
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> 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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> 33 ... 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.

[56] In this case, the deceased owed both legal and moral obligations to the plaintiff. They had a long-term relationship which involved mutual support. The plaintiff was clearly not capable of self-sufficiency. Indeed, she was not self-sufficient throughout the entirety of the relationship. Had the parties separated before the deceased died, the plaintiff would have had claims for support and for division of assets. The plaintiff is the only person to whom a legal duty was owed by the deceased. The plaintiff is also the only person to whom a moral duty was owed (*Graham v. Chalmers*, 2010 BCCA 13 at para. 17), despite the obvious and apparent closeness of the Myhre family.

[57] Determining what is adequate, just, and equitable for the plaintiff to whom the legal and moral duties were owed must be considered in the circumstances of this case and in the light of contemporary standards (*Graham* at para. 29). “Against this consideration is balanced the principle of testamentary autonomy. However, as said earlier, testamentary autonomy must ultimately yield to what is adequate, just, and equitable” (*Graham* at para. 30).

[58] In *Orr v. Orr*, 2013 BCSC 208, Mr. Justice Barrow said:

> [29] As to the legal obligations of a testator, an indication of their content lies in the obligations the law would impose during the testator's life. In that regard, reference may be had to the various statutory and common law obligations and entitlements that spouses have to one another. The precise dimensions of the moral obligation are somewhat less clear, but they go beyond a testator's legal obligations. As Neilson J.A. put it in *Hall v. Korejwo*, 2011 BCCA 355, a testator's legal obligations are the starting point, a point which may be "amplified" by a substantial moral obligation (at para. 47). The nature and strength of the moral claims will vary according to the circumstances. Among the relevant circumstances will be the testator's "legitimate concerns", which may extend to such things as the reasons for making or not making a particular bequest. …

[59] The plaintiff's circumstances in this case are compelling. She has no assets to speak of and a debt owed to the Ministry of over $130,000. Her income is approximately $1,200 per month, an exceedingly modest income by any standards, and she has no means by which she can increase her income, given her disabilities. She is relatively young and may yet live a long time.

[60] The defendants have made choices and ordered their financial affairs independent of any expectation of inheritance from the deceased. They could not have been relying on any prospective inheritance for several reasons. The deceased's death was sudden and unexpected and at a young age. He was not much older than his siblings and could well have outlived them, were it not for an unexplained ruptured aorta or aneurism. He owed the defendants no legal or moral duties. His death has not radically altered their living circumstances or financial security as it has the plaintiff's.

[61] I have concluded in this case that an adequate, just, and equitable award to the plaintiff would be 75 percent of the estate. I order that the Will be varied to provide the plaintiff with 75 percent of the net estate. The balance will be distributed in accordance with the terms of the Will.

[62] Counsel may, if necessary, make arrangements through the Supreme Court scheduler's office to speak to the matter of costs.

[63] That concludes my decision. Is there anything arising?

[64] MR. SABEY: No, thank you, My Lady.

[65] MR. MISNER: No, thank you, My Lady.

[66] THE COURT: All right. What I will say, counsel, is that in the event it is going to be necessary to speak to costs, you have 30 days to contact the Supreme Court scheduler's office to advise her that you need time. She will then make those arrangements with you in conjunction with my calendar.

"A.J. Beames J."