IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Waldman v. Blumes,*
2009 BCSC 1012

Date: 20090727
Docket: S070070
Registry: Vancouver

Between:

Vallry Blumes Waldman

Plaintiff

And

Esther Kornfeld Blumes a.k.a. Esther Lea Kornfeld, as Executor of the Estate of Joseph Blumes, and Jacob Andrew Blumes, and Esther Kornfeld Blumes a.k.a. Esther Lea Kornfeld, and Jedidiah Adian Blumes, an infant, by his litigation guardian, Nelson Rudelier, and Joy De La Ren

Defendants

Before: The Honourable Madam Justice Gerow

Reasons for Judgment

Counsel for the Plaintiff:	A.E. Farber
Counsel for the Defendant, Esther Blumes:	A.A. Mortimore
Counsel for the Defendant, Joy De La Ren:	A.E. Thiele
Counsel for the Defendants, Jacob Andrew Blumes and Jedidiah Adian Blumes, an infant by his litigation guardian, Nelson Rudelier:	A.D. Francis
Place and Dates of Trial:	Vancouver, B.C. July 6–9, 2009
Place and Date of Judgment:	Vancouver, B.C. July 27, 2009

[1] On this summary trial, Vallry Waldman is seeking an order that the will of her father, the late Dr. Blumes, be varied in her favour. Ms. Waldman is a daughter of Dr. Blumes and his first wife, Beverly Blumes. Beverly Blumes died in 1985 and Dr. Blumes married Esther Kornfeld Blumes the same year. At the time of his second marriage, Dr. Blumes was 70 years old and Esther Blumes was 37. The couple had two sons, Jacob and Jedidiah, who were 17 and 15 years old at the time of Dr. Blumes' death. Joy De La Ren, Dr. Blumes' other daughter with Beverly Blumes, and his two sons are also seeking a variation in the will in counterclaims they have filed.

[2] Dr. Blumes wrote a will in 1991 naming Esther Blumes as the executor and sole beneficiary of his will. None of his children were left any bequest in the will.

[3] The issues are:

1. is this matter suitable for determination by summary trial;

2. what is the value of the estate; and

3. should the will be varied.

BACKGROUND

[4] Dr. Blumes died on June 17, 2006, at the age of 91. During his working career he practiced as a dentist. He was married to Beverly, the mother of Ms. Waldman and Ms. De La Ren, for 48 years until her death. Shortly after Beverly Blumes' death in 1985, Dr. Blumes married Esther Blumes. He retired from his practice in 1989, approximately four years after marrying Esther Blumes.

[5] Ms. Waldman is currently 63 years old. She lives in Toronto with her husband Arieh Waldman, who she married in 1981. She has two sons, Eitan born in 1984 and Avidan who was born in 1987. She is a high school teacher and librarian by profession, and has been retired from full time work since 2003. Ms. Waldman receives a pension, which provides her with a net income of $39,000 per year, and

continues to work as a teacher and librarian approximately 50 days per year. Mr. Waldman has a Masters of Business Administration and works as a consultant. Ms. Waldman and her husband own a home in Toronto that is fully paid for with an assessed value of $560,000. Between September 2006 and July 2007, Ms. Waldman and her husband travelled throughout the world. The cost of the trip was approximately $54,000. Both she and her husband have retirement savings plans.

[6] Ms. Waldman's oldest son is self-sufficient. Her younger son has completed his undergraduate degree, and is undertaking an internship.

[7] Esther Blumes is the executor of the estate and is the sole beneficiary of the estate. She is presently 60 years old and is a lawyer by profession, having been called to the bar of British Columbia in 1989. She has worked on a part-time basis continually since 1989.

[8] She lives in the matrimonial home with her two sons. The home was transferred into her name by the deceased shortly before his death. The 2007 assessed value of the home was $880,800. The 2009 assessed value is $1,002,800. She has some savings in her own name.

[9] Esther Blumes also owns some other real estate:

- a vacant lot located at 209 58th Ave., Vancouver, B.C., which has an assessed value of $613,000, and which she owned when she married Dr. Blumes; and

- A 50% interest in her parents' former home which has an assessed value of $999,400 which she inherited, and which generates income of approximately $900 per month.

[10] Ms. De La Ren is a plaintiff by counterclaim. She is currently 66 years old, is divorced, and resides in San Diego, California. She is the mother of two adult children. Ms. De La Ren owns a home in San Diego which was apparently damaged

in a flood. She is currently living in a trailer on the property while the home is being repaired. Ms. De La Ren runs her own business, Camp Stamps, and a non-profit society related to assistance dogs. As well, she receives United States social security and a pension under the Canada Pension Plan. She deposes that her receipt of CPP may cause her US Social Security payment to decrease. She did not provide any income tax returns. Nor did she provide a property assessment for her home in San Diego, beyond a general note from a realtor as to what properties in the area are worth. After giving the general value of houses in the neighbourhood, the realtor states: "Please note that each property is unique and an "on-site" visit would provide a more precise evaluation" and asks Ms. De La Ren to let her know when would be the best time together for that purpose. Ms. De La Ren deposes that she does not have any retirement savings.

[11] Jacob Blumes is a plaintiff by counterclaim. He is the son of Esther Blumes and Dr. Blumes and is presently 20 years old. He attends the University of Toronto, and is going into third year of an undergraduate program. He has very modest savings.

[12] Jedidiah Blumes is also a plaintiff by counterclaim. He is the son of Esther Blumes and Dr. Blumes and is presently 18 years old. He has just graduated from high school and will be attending first year university in the fall. Jedidiah has very modest savings.

[13] Dr. Blumes was married to Beverly Blumes, the mother of Ms. Waldman and Ms. De La Ren, for 48 years until her death in 1985. During the time he was married to Beverly Blumes, the matrimonial home, the apartment and the townhouses were acquired. Beverly left her estate to Dr. Blumes as the sole beneficiary when she died in 1985.

[14] Dr. Blumes executed a will on April 23, 1991, naming Esther Blumes as the executrix and sole beneficiary of his will. None of his children are mentioned in the will and none of them received any bequest in the will.

[15] Letters Probate were issued to Esther Blumes on April 17, 2008.

ANALYSIS

Is this matter suitable for determination by summary trial?

[16] The test for granting summary relief pursuant to a summary trial is set out in Rule 18A(11) of the *Rules of Court*. The court may grant judgment in favour of any party, either on an issue or generally, unless the court is unable to find the facts necessary to decide the issues of fact or law, or if it would be unjust to decide the issues on the application.

[17] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202, the Court of Appeal set out a number of factors a judge should consider in deciding whether a determination by way of 18A is appropriate. These factors include the amount involved, the complexity of the matter, the cost of a conventional trial in relation to the amount involved, and the course of the proceedings.

[18] In this case, all parties agree that this matter is appropriate for determination by way of summary trial. However, even when the parties agree that a matter is suitable for a determination by way of summary trial, the judge should consider whether the administration of justice, as it affects not only the parties to the motion but also the orderly use of the court's time, will be enhanced by determining the matter by way of summary trial.

[19] This matter is set for a 10 day trial in October 2009, and there are four counsel. The estate would be eroded substantially by a 10 day trial with four counsel.

[20] There is some conflicting affidavit material. Although there was some reservation expressed by counsel for Ms. Waldman as to whether the value of the estate could be determined on the basis of conflicting affidavit evidence, there are contemporaneous documents that assist in determining the value.

[21] Having reviewed the affidavit material, and the authorities presented by counsel, I am of the view that this matter is suitable for determination by way of summary trial.

Value of the estate

[22] There is a dispute regarding the value of the estate. Esther Blumes takes the position that the largest assets of the estate have the following values:

> 1. An RBC Dominion Securities account, which had a value of $145,494 at the time of death. As of April 30, 2009, the value was $71,391.48. Its current value is approximately $50,000. Apparently the reduction in value is partly as a result of the market downturn and partly as a result of professional and executor's fees being incurred.
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> 2. A tenanted apartment building located at 777 West 70th Avenue, Vancouver, B.C. (the "apartment"). The current assessed value is $1,348,000, which is the same as the assessed value at the time of death.
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> 3. Three rental townhouse located at #2, #10 and #25, 1975 Guthrie Road, Comox, B.C. The 2007 assessed value of each of the townhouses is as follows:
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> Unit #2 - $125,000
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> Unit #10 - $127,400; and
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> Unit #25 - $125,000.

[23] Esther Blumes submits that the following factors should also be considered when determining the net value of the estate:

> 1. To date, no estate taxes have been filed. There will be professional fees, taxes and interest payable on the estate. The executrix has allocated $50,000 for the expenses.
>
> 2. If the apartment or townhouses are sold capital gains tax will be payable. Should the apartment and townhouses be sold, tax and interest payable would be approximately $465,000. As well, there would be realtor commissions of approximately $67,772.
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> 3. Esther Blumes takes the position that she beneficially owns at least 50% of the apartment.

[24] Esther Blumes submits that if her beneficial interest is accepted, the value of the estate is approximately $700,000. If she is not entitled to a beneficial interest in the apartment, the value of the estate is approximately $1,170,540, taking into

account the estimated taxes and capital gains which would be payable on the sale of the apartment and townhouses.

[25] Ms. Waldman takes issue with the valuation of the estate calculated by Esther Blumes. Ms. Waldman says the following values should be used:

> 1. RBC Dominion securities account showing a value as of May 31, 2006 of $152,497 and as of June 20, 2008 a value of $178,780.
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> 2. The assessed value of the apartment is $1,378,000.
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> 3. The three townhouses with assessed value as of March 31, 2009 of $149,400, $151,900 and $149,900. The property assessments show the assessed values in 2007, which would have reflected the value at the date of death, are those identified by Esther Blumes.

[26] Ms. Waldman says that since Dr. Blumes' death, Esther Blumes has used the income from the apartment to pay for personal expenses for herself and the two boys. As well, she says that Esther Blumes has used the RBC Dominion account to purchase a Manulife bank investment savings account that has been used pay her legal fees associated with this litigation.

[27] Although Ms. Waldman suggests that the amount of $50,000 that Esther Blumes has estimated for professional fees and estate taxes is too high, she has not presented any evidence as to an appropriate amount, nor does she take issue that there will be some professional fees and estate taxes payable. The assessed value for the apartment she has included in her valuation is incorrect. The assessed value of the apartment is $1,348,000.

[28] The relevant date for determining the sufficiency of the provision the testator made in a will is the date of death of the testator: *Landy v. Landy Estates* (1991), 85 D.L.R. (4th) 1, 8 B.C.A.C. 130.

[29] At the time of Dr. Blumes' death, the assets that comprised the estate consisted of the following:

> 1. The apartment with an assessed value of $1,348,000;
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> 2. The townhouses with a combined assessed value of $377,400;

3. Personal property, including the RBC Dominion Account, in the amount of $168,118.

[30] The debts and liabilities totalled $25,156.45.

[31] Before taxes, capital gains, and professional fees, and excluding any claim of Esther Blumes for a beneficial interest in the estate, the gross value of the estate at the time of the death was $1,868,362.

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

[33] As indicated earlier, Esther Blumes is claiming a 50% interest in the apartment as a result of a constructive trust. The issue of whether Dr. Blumes would have had maintenance or obligation to Esther Blumes based on unjust enrichment should be reflected in the court's interpretation of what is "adequate, just and equitable in the circumstances after his death." In *Tataryn v. Tataryn Estate,* [1994] 2 S.C.R. 807, McLachlin J. noted at para. 30:

> 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.

[34] Accordingly, the factors that Esther Blumes says entitle her to a claim for a beneficial interest in the apartment based on unjust enrichment are subsumed in the will variation action, and should be considered in the context of what legal and moral obligations the testator owed to her in determining what is adequate, just and equitable in the circumstances of this case.

Should the will be varied?

Position of the parties

Ms. Waldman's position

[35] Ms. Waldman takes the position that Dr. Blumes did not act as a judicious parent to the children in disinheriting all of them, and that Dr. Blumes did not fulfil his moral obligation to his adult independent children.

[36] Ms. Waldman says that the criteria set out in *Clucas v. Royal Trust Corporation of Canada*, 1999 CanLII 5519 (B.C.S.C.) all redound in the favour of a redistribution of the estate. She seeks an order that the estate pay a fixed sum in the amount of $250,000 to her, plus special costs.

[37] Ms. Waldman says that Dr. Blumes failed to recognize the efforts of his first wife of 48 years in accumulating the assets. The evidence is that the apartment and townhouses were purchased during the time her mother was married to Dr. Blumes. Dr. Blumes retired soon after marrying Esther Blumes, and the family has lived to a large extent on the income from the assets he accumulated during his marriage with Beverly.

[38] Ms. Waldman says that in considering the moral obligations Dr. Blumes owed to her, all of the circumstances have to be considered. Esther Blumes has substantial assets of her own, as well as income from her profession, to provide for herself and her children without changing her lifestyle. Another factor that Ms. Waldman says should be considered is that Jacob and Jedidiah will soon be independent and self-sufficient, and Esther Blumes' financial needs will diminish.

Ms. De La Ren's position

[39] Ms. De La Ren takes the position that a redistribution in her favour should be made on the basis of need. She says that she has health problems, and that she lives on a very restricted income. Ms. De La Ren says that the will does not take into

account the fact that the bulk, if not all, of the assets in the estate were accumulated during the marriage between Dr. Blumes and her mother, Beverly.

[40] Ms. De La Ren says that at the time Dr. Blumes executed his will in 1991 her financial situation was not as precarious. At that time, it would be a reasonable expectation of the testator that Ms. De La Ren did not need assistance, as opposed to his sons who were 2 years old and a newborn.

[41] Ms. De La Ren says she has a need for immediate capital to raise her standard of living to one which is reasonable. She seeks an order that the will be varied to provide her a 30% share in the estate, or the amount of $450,000. Ms. De La Ren further submits that the case law supports such a distribution when one family member is in need and relatively impecunious compared to the other family members.

Esther Blumes' position

[42] Esther Blumes takes the position that the will should not be varied. Esther Blumes says that in the circumstance of this case, and having regard to the plans made and lifestyles adopted by Dr. Blumes and her during their lengthy marriage, there is a sound basis upon which she was named as the sole beneficiary. Esther Blumes submits that the testamentary autonomy of Dr. Blumes should not be interfered with. She argues that this is not a case where justice requires that the will be rewritten. Rather, based on the particular circumstances of this couple's financial and family arrangements, the will should not be varied.

[43] Dr. Blumes was 70 when he married Esther Blumes, and was 34 years her senior. He was 74 when Jacob was born and 76 when Jedidiah was born. Apparently Esther Blumes was reluctant to have children given Dr. Blumes' age, but Dr. Blumes wanted to have children with her. As a result of deciding to have children, the couple arranged their finances and she carried out her work schedule with the intention that the entire estate would come to her upon his death to continue to provide for her and the dependent children.

[44] Dr. Blumes discouraged Esther Blumes from working full time during the marriage. He was semi-retired when they married and retired fully four years later, and wanted to spend time with her. The family primarily lived off the income and investments of Dr. Blumes, supplemented by Esther Blumes' income from working part-time as a lawyer.

[45] Esther Blumes submits that if the will was varied there would be insufficient funds to provide for her or to address the legal and moral obligations Dr. Blumes owed to her, particularly in light of specific assurances made to her by Dr. Blumes regarding the estate.

Jacob and Jedidiah Blumes' positions

[46] Jacob and Jedidiah Blumes take the position that neither Ms. Waldman nor Ms. De La Ren ought to be entitled to a variation of the will in their favour. They say that the only variation to the will should be in favour of them as dependent children at the time of their father's death.

[47] Both Jacob and Jedidiah are academically successful and have years of post-secondary education ahead of them. Jacob has just finished second year undergraduate university and is intending to apply for medical school. It will be a number of years before either of them is in a position to be self-sufficient. Their expectations are that their father would assist them with their education and the purchase of their first home, just as he did with Ms. Waldman and Ms. De La Ren.

Applicable Law

[48] The *Wills Variation Act*, R.S.B.C. 1996, c. 490 (the "*Act*"), provides a statutory exception to the general common law principle of testamentary freedom.

[49] In *Tataryn*, the Supreme Court of Canada discussed the principles to be applied in a wills variation action under the *Act*. The language of s. 2 of the *Act* is broad and requires the court to determine whether the testator has made adequate provision for his spouse and children. If in the court's opinion the testator has not

made adequate provision, the court may exercise its discretion to order that the estate provide what it considers adequate, just and equitable in the circumstances for the spouse or children. In exercising its discretion, the court is to read the provisions of the *Act* in light of modern values and expectations.

[50] At para. 17, McLachlin J. noted that the other interest protected by the *Act* is testamentary autonomy. If that principle must yield, then the question is what is adequate, just and equitable in the circumstances based on contemporary standards.

[51] Both the legal and the moral obligations of the testator are to be considered. The legal obligations were discussed at paras. 29 and 30:

> 29 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):
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> 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.
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> It follows that maintenance and property allocations which the law would support during the testator's lifetime should be reflected in the court's interpretation of what is “adequate, just and equitable in the circumstances” after the testator's death.
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> 30 The legal obligations on a testator during his or her lifetime reflect a clear and unequivocal social expectation, expressed through society's elected representatives and the judicial doctrine of its courts. Where provision for a spouse is in issue, the testator's legal obligations while alive may be found in the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp), family property legislation and the law of constructive trust: Pettkus v. Becker, [1980] 2 S.C.R. 834; Sorochan v. Sorochan, [1986] 2 S.C.R. 38; Peter v. Beblow, [1993] 1 S.C.R. 980. Maintenance and provision for basic needs may be sufficient to meet this legal obligation. On the other hand, they may not. Statute and case law accepts that, depending on the length of the relationship, the contribution of the claimant spouse and the desirability of independence, each spouse is entitled to a share of the estate. Spouses are regarded as partners. As L'Heureux-Dubé J. wrote in Moge v. Moge, [1992] 3 S.C.R. 813, at p. 849:
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> > ... 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.
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> The legal obligation of a testator may also extend to dependent children. And in some cases, the principles of unjust enrichment may indicate a legal duty toward a grown, independent child by reason of the child's contribution to the estate. The legal obligations which society imposes on a testator during his lifetime are an important indication of the content of the legal obligation to provide “adequate, just and equitable” maintenance and support which is enforced after death.

[52] The Court went on to discuss the moral duties towards a spouse and children at para. 31:

> For further guidance in determining what is “adequate, just and equitable”, the court should next turn to the testator's moral duties toward spouse and children. It is to the determination of these moral duties that the concerns about uncertainty are usually addressed. There being no clear legal standard by which to judge moral duties, these obligations are admittedly more susceptible of being viewed differently by different people. Nevertheless, the uncertainty, even in this area, may not be so great as has been sometimes thought. For example, most people would agree that although the law may not require a supporting spouse to make provision for a dependent spouse after his death, a strong moral obligation to do so exists if the size of the estate permits. Similarly, most people would agree that an adult dependent child is entitled to such consideration as the size of the estate and the testator's other obligations may allow. While the moral claim of independent adult children may be more tenuous, a large body of case law exists suggesting that, if the size of the estate permits and in the absence of circumstances which negate the existence of such an obligation, some provision for such children should be made: Brauer v. Hilton (1979), 15 B.C.L.R. 116 (C.A.); Cowan v. Cowan Estate (1988), 30 E.T.R. 216 (B.C.S.C.), aff'd (1990), 37 E.T.R. 308 (B.C.C.A.); Nulty v. Nulty Estate (1989), 41 B.C.L.R. (2d) 343 (C.A.). See also Price v. Lypchuk Estate, supra, and Bell v. Roy Estate (1993), 75 B.C.L.R. (2d) 213 (C.A.) for cases where the moral duty was seen to be negated.

[53] The Court noted at para. 32 that where the size of the estate permits it, all of the conflicting claims should be met. Where priorities must be considered, legal claims should take precedence over moral claims. As between moral claims, some may be stronger than others. Any moral duty must be assessed in light of the testator’s legitimate concerns. A will should only be varied if the testator has divided the assets in a manner which falls below his obligations as defined by reference to legal and moral norms.

[54] Counsel have referred to a number of cases which have been decided since *Tataryn*. They are of limited assistance because this case is unusual on its facts.

Application of the law to the facts

[55] In this case, Dr. Blumes had legal obligations to his wife and to his dependent children at the date of his death. As well, he had moral obligations to his wife, his dependent children, and his older independent children.

Legal Obligations

[56] As stated earlier, Dr. Blumes had a legal obligation to his wife. The marriage was a lengthy one. It was also a marriage in which there was a substantial age difference. From the beginning of their relationship, Dr. Blumes encouraged Esther Blumes to work part-time. He was semi-retired in 1985 when they married, and retired fully in 1989. During the marriage, Esther Blumes continued to work part-time, and contributed to the ongoing expenses of the family and to the maintenance of Dr. Blumes' assets. She contributed to the maintenance and upkeep of both the matrimonial home and the apartment. She also cared for Dr. Blumes during his later years, keeping him at home until just before his death.

[57] The evidence is that during their more than 20 year marriage Esther Blumes contributed to the apartment by managing and maintaining it, as well as providing funds to pay for the expenses associated with the apartment. At the time Esther Blumes and Dr. Blumes married, the management of the apartment was carried out by a manager who lived in the large ground floor of the apartment. Shortly after their marriage, Esther Blumes assumed primary management of the apartment, although she was under no obligation to do so.

[58] Dr. Blumes allocated income in the amount of $12,000 a year for managing the apartment to Esther Blumes, which she and Dr. Blumes agreed would be used to pay expenses, including taxes, insurance, food, clothing and other household expenses. Throughout their marriage, the apartment was used as a joint asset and the income was used to support the family. When there were insufficient funds in the

bank account for apartment-related expenses, either Dr. Blumes or Esther Blumes would deposit personal funds into the bank account to cover the expenses. The uncontradicted evidence of Esther Blumes is that the management fee paid to her was below market value for caretaking costs of a building of this condition, age and location.

[59] Apparently, it was Dr. Blumes that wanted the couple to have children. The boys were born when he was 74 and 76. Esther Blumes was concerned about their age difference and how she would manage as a single parent when he died. In reliance on Dr. Blumes' assurances that their combined assets would be sufficient to support her after he died, Esther Blumes did not pursue law on a full-time basis during their relationship.

[60] The evidence is that Esther Blumes inherited some monies from her father and mother when they died, which she has used for family purposes, including paying for their sons' Bar Mitzvahs and Dr. Blumes' income tax.

[61] In reliance on their plans for all of the family assets to be passed to her upon Dr. Blumes' death, Esther Blumes did not pursue her practice as a lawyer on a full-time basis. Accordingly, it is my view, that Dr. Blumes had a legal obligation to Esther Blumes of the highest order.

[62] Dr. Blumes also owed a legal obligation to his sons. They were both minors at the time of his death. As a result, he had a legal obligation to provide maintenance for them.

Moral obligations

[63] In addition to his legal obligations, Dr. Blumes had a moral obligation to Esther Blumes. On his encouragement, she had two children with him knowing that it was likely that she would be widowed while their sons still required significant parental support.

[64] Both Esther Blumes and Dr. Blumes regarded their estate as being there to provide for their old age. Given their plan for their family, it cannot be just and equitable to deprive her of the estate because he died first.

[65] As well, Esther Blumes cared for Dr. Blumes as his health started to fail. In the circumstances, Dr. Blumes had a strong moral obligation to Esther Blumes.

[66] Dr. Blumes also had a moral obligation to his sons. The moral obligation to minor children is higher than the moral obligation to independent adult children: *L.A.C. (Guardian ad litem of) v. Koller Estate*, 2004 BCSC 30 at paras. 63 and 64.

[67] The moral obligation to Jacob and Jedidiah includes an obligation to provide financial assistance, to the extent appropriate in the context of the family's lifestyle and the size of the estate, during the period of time that they are pursuing their education and getting a start in life. Contemporary community standards mandate that a parent will endeavour with whatever means to give assistance to their children as young adults until they complete their education, even when the children are no longer minors: *Handlen v. Handlen Estate*, 2001 BCSC 1528 at para. 27.

[68] The sons have years of post-secondary education ahead of them.

[69] The evidence is that Dr. Blumes paid for Ms. Waldman's university education and gave both Ms. Waldman and Ms. De La Ren monies when they bought their homes.

[70] Additionally, Jacob and Jedidiah assisted in the care giving to their father when he became more elderly. For example, they helped him with showers and cleaned up after him. In my view, Dr. Blumes did not discharge his legal and moral obligations to his sons by not providing for them in the will.

[71] Dr. Blumes also had a moral obligation to his adult independent children. The claim of an adult independent child is always more tenuous than the claim of a spouse or a dependent child. Some of the factors to be considered when

determining the moral obligations to an adult independent child are summarized in *Clucas* at para. 12:

> 6. The moral claim of independent adult children is more tenuous than the moral claim of spouses or dependent adult children. But if the size of the estate permits, and in the absence of circumstances negating the existence of such an obligation, some provision for adult independent children should be made. (Tataryn, supra)
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> 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: a disability on the part of an adult child; 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 probable future difficulties of the child; the size of the estate and other legitimate claims. (Dalziel v. Bradford, supra and Price v. Lypchuk, supra
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> 8. Circumstances that will negate the moral obligation of a testatrix are "valid and rational" reasons for disinheritance. To constitute "valid and rational" reasons justifying disinheritance, the reason must be based on true facts and the reason must be logically connected to the act of disinheritance. (Bell v. Roy Estate (1993), 75 B.C.L.R. (2d) 213 (B.C.C.A.); Comeau v. Mawer Estate, [1999] B.C.J. 26 (B.C.S.C.); and Kelly v. Baker (1996), 15 E.T.R. (2d) 21 (B.C.C.A.))
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> 9. Although a needs/maintenance test is no longer the sole factor governing such claims, a consideration of needs is still relevant. (Newstead v. Newstead (1996), 11 E.T.R. (2d) 236 (B.C.S.C.))

[72] In this case, neither Ms. Waldman nor Ms. De La Ren contributed to the acquisition of the assets making up the estate. However, as stated earlier, most of the assets were accumulated during their mother's lifetime. Neither daughter received any bequest in their mother's will, as Dr. Blumes was the sole beneficiary.

[73] Dr. Blumes was of the view that he had satisfied any moral obligations to his adult independent children by providing them with support earlier in their life. Hartley Cramer, Dr. Blumes' lawyer, deposed that in March 2006, he talked to Dr. Blumes on the phone and met with him regarding his estate planning. Mr. Cramer deposes that Dr. Blumes was concerned that he wanted to protect the assets in his name for his current wife and minor children from the possibility of claim under the *Act*. Dr. Blumes told Mr. Cramer that he wanted to arrange his affairs to be able to provide for his minor children, Jacob and Jedidiah, after his death just as he had

already provided for his adult children during his life. Mr. Cramer informed Dr. Blumes that he could set up an alter-ego trust, but Dr. Blumes instructed him not to proceed with such a trust because of the cost.

[74] The evidence is that Dr. Blumes paid for Ms. Waldman's post-secondary education and gave her $25,000 towards the purchase of a house in 1986. Dr. Blumes gave Ms. De La Ren $16,000 towards the purchase of a house after her marriage ended in 1977. There was no evidence about the cost of the houses purchased by either Ms. Waldman or Ms. De La Ren, or what percentage of the price of the house was paid by their father.

[75] Ms. De La Ren asserts that she has a claim based on need. However, she has not satisfied the onus on her to prove need based on the evidence. She has not provided her income tax returns, any specific evidence regarding the value of her property in San Diego, or evidence that the health issues she has disable her from working. In her affidavit, Ms. De La Ren does not set out her income from the various companies she has.

[76] As well, her affidavit evidence regarding her financial situation did not accord with the documents. In her affidavit, Ms. De La Ren deposes that after her marriage break down, she received part of the equity in the matrimonial home, which was not significant, and child support until her daughter turned 18. However, the separation agreement between Ms. De La Ren and her former husband set out that she was to receive spousal support as well as child support until the children reached 21 or completed full-time education, and the matrimonial home was to be transferred solely to her. As well, a vacant property that was in joint tenancy was to be transferred to tenancy in common and Ms. De La Ren was to receive a lump sum payment.

[77] Although Dr. Blumes was of the view that the monies he paid to his daughters discharged his moral obligations, what is adequate, just and equitable in the circumstances must be judged by contemporary standards. There is no doubt that the gifts were generous at the time they were made, however, the assets comprising

the estate have appreciated considerably since the time the gifts were made. Having considered the size of the estate, the amount of Dr. Blumes' earlier gifts to his daughters, the circumstances of the various beneficiaries and, in particular, the contribution Beverly Blumes made to the acquisition of the assets that make up the estate, I have concluded that some provision for Ms. Waldman and Ms. De La Ren should have been made in the will.

[78] As indicated earlier, the most significant obligation Dr. Blumes had was to his wife, followed by his dependent sons. Dr. Blumes had both legal and moral obligations to his wife and his dependent sons.

[79] In all of the circumstances of this case, it is my opinion that it is adequate, just and reasonable for Ms. Waldman and Ms. De La Ren to receive a fixed sum in the amount of $75,000 each from the estate. This variation, in my view, properly addresses Dr. Blumes' moral obligations to Ms. Waldman and Ms. De La Ren, and his legal and moral obligations to his wife and two dependent sons, without interfering with Dr. Blumes' testamentary autonomy more than the *Act* requires.

CONCLUSION

[80] The will be varied in order to provide that a fixed sum in that amount of $75,000 each be paid to Ms. Waldman and to Ms. De La Ren.

[81] At the end of the hearing, counsel for Jacob and Jedidiah suggested that in the event I did not accede to the claims for variation of Ms. Waldman and Ms. De La Ren, I adjourn the application of her clients to vary the will in order to allow them an opportunity to settle their claim with their mother. I am of the view that given the amount of the provision I have ordered to be made from the estate to Ms. Waldman and Ms. De La Ren, it is appropriate to adjourn the application of Jacob and Jedidiah Blumes in order that they can attempt achieve a settlement of their claims. If a settlement cannot be achieved, the parties have liberty to apply for further directions as to the disposition of the remainder of the estate.

[82] Ms. Waldman and Ms. De La Ren are entitled to their costs at Scale C from the estate.

"Gerow J."