# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Li v. Ellison,*
2014 BCSC 501

Date: 20140228
Docket: S127209
Registry: Vancouver

Between:

**Wendy Ling Li**

Plaintiff

And

**William David Ellison, Wendy Lynne Gorrie, Trevor Ellison, Katrina Michelle Gorrie and Julia Dawne Gorrie**

Defendants

Before: The Honourable Mr. Justice Savage

## Oral Reasons for Judgment

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|---|---|
| Counsel for the Plaintiff: | W. Mussio |
| Counsel for the Defendants W. Ellison, T. Ellison, K. Gorrie and J. Gorrie: | L.F. Kuschner |
| Counsel for the Defendant W. Gorrie: | G. Fraser |
| Place and Date of Hearing: | Vancouver, B.C.<br>February 28, 2014 |
| Place and Date of Judgment: | Vancouver, B.C.<br>February 28, 2014 |

[1] This is a summary trial of an issue under the *Wills Variation Act*, R.S.B.C. 1996, c. 490. The parties are in agreement that the matter is suitable for summary disposition. The facts are not in dispute although the parties emphasize different aspects of the facts in their submissions.

[2] The basic facts are as follows:

[3] The testator was born in 1938. He was divorced from his wife for more than 30 years. He had two children of the marriage who are now independent adults and three grandchildren. He was 75 at the time of his death. There is an existing will from 1999 which divides his estate between his children and grand-children.

[4] In 2004 the deceased commenced cohabiting with the plaintiff. He did so until his final hospitalization and death in January 2012, although there may have been a very brief period of non-cohabitation. The deceased brought all the assets into the relationship.

[5] When the plaintiff met the deceased in 2004, she was a relatively recent immigrant from China. While cohabiting with the deceased she obtained employment qualifications and currently earns about $37,000 per year. She has little in the way of savings, as she supported her family overseas. The deceased earned about $75,000 per year during the latter part of their cohabitation. There is some evidence that the parties intended to marry.

[6] The deceased supported the plaintiff during the relationship. He suffered various health conditions in his later years and the plaintiff cared for him, although she did not leave her employment. The evidence shows they had a loving relationship and the deceased intended to make some provision for her after his death although the documentary and other evidence is unclear as to what that was. The deceased also had loving relationships with his immediate and extended family and it is clear that he intended to make provision for them as well.

[7] Assets have passed outside of the estate, primarily to the deceased’s children and grandchildren, although the plaintiff has benefited from receiving a vehicle, a

very small pension, the balance in an account, and has continued living in the condominium which was the matrimonial home. The defendants received approximately $409,000 outside of the estate. The net amount appropriate for distribution in the estate appears to be between approximately $480,000 and $600,000.

[8] The defendants acknowledge that the plaintiff meets the definition of a common law spouse under the *WVA*.

[9] The leading case on the interpretation of Section 2 of the Act is that of the Supreme Court of Canada in *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807. McLachlin J., as she then was, giving judgment for the Court, held that the first consideration in determining what is "adequate, just and equitable" is the testator's legal responsibilities during his or her lifetime.

[10] The second consideration is the Testator's moral duties toward spouse and children. Clearly there are strong moral obligations to support and maintain a dependent spouse. The situation of independent adult children has another perspective. As noted by the Court in *Tataryn* at 822-823:

> … 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.

[11] Where there are conflicting claims and where the size of the estate permits, all claims should be considered. Where priorities must be considered, legal claims recognized during a testator's lifetime should generally take precedence over moral claims. The Court in *Tataryn* makes it clear that there a number of different ways which may be appropriate and produce a disposition which is adequate just and equitable:

> … In other words, there will be a wide range of options, any of which might be considered appropriate in the circumstances. Provided that the testator has chosen an option within this range, the will should not be disturbed. Only where the testator has chosen an option which falls below his or her obligations as defined by reference to legal and moral norms, should the court make an order which achieves the justice the testator failed to achieve. … (at 824)

[12] As I have said, the parties do not dispute that the will making no provision fails to meet legal and moral norms. That is not surprising as it was made without reference to the deceased's circumstances over the last eight years of his life.

[13] The parties have referred the courts to a wide range of cases, providing differing results, all of which are heavily fact dependent. I agree with the submission that the decision of Williams J. in *Tenorio v. Redman Estates*, 2011 BCSC 1403, citing *Clucus v. Clucus Estate*, (1999), 25 E.T.R. (2d) 175 (B.C.S.C.), is very helpful in setting out the competing principles at play. There is a very useful discussion of the application of the factors at paragraphs [90] - [102] of the *Tenorio* decision.

[14] Counsel referred to the factors referenced in *Tenorio.* I observe that this was a much longer relationship than that in *Tenorio*, and significant assets passed outside the estate. That said, virtually all of the estate was accumulated here prior to the relationship, the plaintiff is relatively young, was not disadvantaged by the relationship, and has a career which produces a reasonable income. The legal obligation to the plaintiff is relatively modest, although the moral obligation is significant, I agree that it would not extend to provide an equal division of assets and lifelong support. In my opinion the legal and moral obligations arising from the combination of factors here would produce a higher percentage award than that in *Tenorio*.

[15] The amount remaining in the estate is somewhat uncertain, between $480,000 and $600,000. As best I can, based on the information before me, I have taken into account the assets that have passed outside the estate. In order to avoid unnecessary additional litigation, bearing in mind the principle of proportionality, I think I should award an easily determinable amount.

I award the plaintiff $155,000 or 2/7th the net value of the estate, whichever sum is greater. In my view that amount provides a not insubstantial sum to the plaintiff, recognizing a significantly lengthy relationship but at the same time, taking into account all of the assets passing, both outside and inside the estate, and is appropriately mindful of both the legal and moral claims.

"The Honourable Mr. Justice Savage"