IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Brown v. Terins,*
2016 BCSC 42

Date: 20160115
Docket: S146436
Registry: Vancouver

Between:

Sharon Brown

Plaintiff

And

Tara Terins, Ria Terins, and Tara Megan Cicely Terins and Ria Emily Ann Terins in their capacity as co-executrices and co-trustees of the Estate of Janis Alfreds Terins, also known as John Alfred Terins, John Alfreds Terins, John Terins and John A. Terins, deceased

Defendants

Before: The Honourable Mr. Justice Thompson

Reasons for Judgment

Counsel for the Plaintiff:	J.M. Richter K.A. Dotten
Counsel for the Defendants, in their capacities as estate beneficiaries:	A.D. Francis D.W. Klaudt
Counsel for the Defendants, in their capacities as estate representatives:	R.D. Lee
Places and Dates of Trial:	Vancouver, B.C. June 1-5 & 8-9, 2015 Nanaimo, B.C. September 4, 2015
Place and Date of Judgment:	Vancouver, B.C. January 15, 2016

[1] This is a wills variation action. John Terins died suddenly on 31 March 2014 at age 76. When he died, the plaintiff Sharon Brown had been his common-law spouse for 14 years. This was a second spousal relationship for both Mr. Terins and Ms. Brown, and each entered the relationship

with independent adult children — Mr. Terins' two daughters and Ms. Browns' four sons. The defendants Tara Terins ("Tara") and Ria Terins ("Ria") are Mr. Terins' daughters.

[2] Mr. Terins' last will, executed in 2010, leaves the residue of his estate in equal shares to his daughters, and appoints them co-executrices of his will and co-trustees of his estate. The will makes no provision for Ms. Brown, who seeks an order that the estate make adequate provision for her as the will-maker's spouse, pursuant to s. 60 of the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 [*WESA*].

Background

[3] John Terins was born in Latvia in 1937. After the war, the Terins family — father, mother, John and his sister Edite — immigrated to Canada and eventually settled in Vancouver. Mr. Terins graduated from Gladstone High School. Thereafter he took some courses at the University of British Columbia, and worked for several years as a lifeguard before settling into his career as a commercial artist. Mr. Terins married Sally Davison, and their daughters Tara and Ria were born in 1969 and 1971.

[4] In 1968, Mr. Terins' parents purchased two adjacent Kitsilano properties: 2416 and 2426 West 6th Avenue. In time, Mr. Terins and his sister Edite each became owner of one of these properties. Mr. Terins' family moved into the home at 2416 West 6th Avenue shortly after Tara's birth in 1969. By 1994, Mr. Terins was the sole owner of 2416 West 6th Avenue. This property, which I will refer to from this point forward as the "Kitsilano home," is the estate's principal asset. The appraisal evidence indicates that the fair market value of the Kitsilano home at the date of death was $2,100,000.

[5] Mr. Terins' wife Sally died early in 1998. He was the sole beneficiary of her estate. Later in 1998, Mr. Terins, then 60 years old, was introduced to Ms. Brown, then 59 years old. Their marriage-like relationship began in April 2000 when Ms. Brown sold her Richmond townhome and moved into Mr. Terins' Kitsilano home. Ms. Brown had hoped to keep the townhome and rent it out, but her application to the strata corporation for the required approval to rent the townhome failed.

[6] When Ms. Brown moved in with Mr. Terins, he was retired and living on pension income. Ms. Brown was working in a lower level management position at a clothing importing company. She continued that work until her retirement in 2002. Through the years that Mr. Terins and Ms. Brown lived together they did not mingle their financial assets. There was no mortgage on the Kitsilano home. Mr. Terins paid the property taxes and, with few exceptions, the home maintenance expenses. Ms. Brown and Mr. Terins divided the other household expenses approximately equally using rough-and-ready methods.

[7] In June 2001, Ms. Brown and Mr. Terins signed a document titled “Cohabitation Contract”:

> Whereas we now wish to enter into a formal binding agreement concerning our relationship and wish to be bound in law in that regard in so far as possible.
>
> We have each disclosed to the other all of our separate estate, property and present and future prospects, debts and financial obligations, and each of us is conversant with the estate, property, present and future prospects and financial obligations of the other.
>
> THEREFORE IN CONSIDERATION of the mutual promises contained in this agreement, we SHARON RAY BROWN and JOHN ALFRED TERINS agree to be bound by the following terms:
>
> > 1. If and when there is a purchase of property as a family home, the title shall be registered in both our names as Tenants in Common according to the amounts of money invested in the property respectively.
> >
> > 2. All debts which are obligations of SHARON RAY BROWN and JOHN ALFRED TERINS respectively, are the separate debts of the person contracting for them and that person shall remain solely liable and responsible for payment.
> >
> > 3. We shall each execute a Last Will and Testament which provides that our respective estates, both real and personal, shall go to our own issue according to our individual wishes.
>
> In placing our signatures to this agreement, we confirm our intention to be bound by its terms in so far as is legally possible. We confirm that each of us has carefully read and considered the terms of this agreement in private, free from the influence of the other. We confirm that each of us has knowingly placed his or her signature on this agreement with full knowledge of the terms of this agreement and their import. We confirm that each of us has entered into this agreement free from compulsion or coercion exercised by the other.

[8] In summary, the cohabitation agreement recites that the parties have disclosed their estate particulars to one another, that they wish to enter into a formal legally binding agreement, and that they have read and understand the agreement’s terms. The agreement’s terms address the possibility of acquisition of a family home, the treatment of debts, and the content of the wills to be executed by each party. The third term, regarding wills, is particularly material to the issues in this action.

[9] Ms. Brown executed a will dated 4 May 2005, leaving her estate to her children, her grandchildren, and her daughter in-law. The will makes no provision for Mr. Terins. Her net worth at the time she entered into the common law relationship with Mr. Terins was approximately $500,000, consisting mainly of investment funds, RRSPs, and the sale proceeds from her townhome. Ms. Brown’s net worth at Mr. Terins’ death was approximately $375,000.

[10] As noted above, Mr. Terins executed a will dated 13 October 2010 leaving his estate to his two daughters and making no provision for Ms. Brown. When the common-law relationship with Ms. Brown began in 2000, Mr. Terins’ net worth was approximately $600,000, consisting mainly of the estimated fair market value of the Kitsilano home. The date of death net value of his estate was

approximately $2,000,000. The increase in the value of Mr. Terins' estate between 2000 and 2014 is accounted for by the rise in the value of Vancouver real estate to vertiginous heights. Since Mr. Terins' death, Ms. Brown has continued to live in the Kitsilano home.

[11] Neither Tara nor Ria works full time. Neither is in financial need; both are in stable relationships with spouses who are well able to support them financially. A RRIF owned by Mr. Terins with a date of death value of $48,562.51 was transferred to Tara and Ria outside of the estate through beneficiary designation.

[12] Mr. Terins was a man of admirable character. He enjoyed a close and loving relationship with his first wife, with Ms. Brown, and with both his daughters.

The Legal Framework

[13] The parties agree that Mr. Terins and Ms. Brown were in a marriage-like relationship dating back to 2000, and thus Ms. Brown was a "spouse" as defined by s. 2 of the *WESA*. The fundamental question in this case is whether Mr. Terins' will makes adequate provision for the proper maintenance and support of Ms. Brown. Section 60 of the *WESA* provides:

> Despite any law or enactment to the contrary, if a will-maker dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the will-maker's spouse or children, the court may, in a proceeding by or on behalf of the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the will-maker's estate for the spouse or children.

[14] There are two interests protected by this wills variation legislation: the primary interest of promoting adequate, just and equitable provision for a will-maker's spouse and children, and the secondary interest of testamentary autonomy. See *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807. These sometime conflicting interests are accommodated by considering whether the will-maker's arrangement of his affairs is "within the range of testamentary autonomy entitled to deference": *Saugestad v. Saugestad*, 2008 BCCA 38 at para. 39. Any variation of the will must be limited to the extent required to make adequate provision: *Tataryn*, at 823-824.

[15] With frequent reference to *Tataryn*, Madam Justice Ballance outlined the concept of "adequate provision" in *Dunsdon v. Dunsdon*, 2012 BCSC 1274:

> [131] The concept of adequate provision is a flexible notion and is highly dependent upon the individual circumstances of the case. The adequacy of a provision is measured by asking whether a testator has acted as a judicious parent or spouse, using an objective standard informed by current societal legal and moral norms. The considerations to be weighed in determining whether a testator has made adequate provision are also relevant to the determination of what would constitute adequate, just and equitable provision in the particular circumstances.

[132] Legal norms are said to be the obligations that would be imposed upon the testator during his or her life if the question of provision for the claimant spouse or child were to arise. Accordingly, a testator's legal obligations that could have arisen in relation to support, division of matrimonial property and the law of constructive trust/unjust enrichment are relevant to the assessment. *Tataryn* left open the prospect that an independent adult child might have a legal claim against a parent based on unjust enrichment: *Tataryn,* at 822. In terms of the guidelines for societal moral norms, *Tataryn* proposed that they are "found in society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards": at 821.

[133] All legal and moral claims should be satisfied where the magnitude of the estate permits. In cases where complete satisfaction of all claims is not possible, the competing claims are to be prioritized. Claims that would have been recognized as legal obligations during a testator's lifetime should generally take precedence over moral claims: *Tataryn*, at 823. The court must also weigh the competing moral claims and rank them according to their strength. While claims of independent adult children may be more tenuous than those of a spouse or dependent child, where the size of the estate permits, some provision should be made for them unless the circumstances negate such an obligation: *Tataryn,* at 822 - 823.

…

[137] The *Tataryn* Court also recognized that there is no single way for testators to divide the estate in order to discharge their legal and/or moral duties. It emphasized that it is only where a testator has chosen an option that falls below his or her obligation as defined by reference to the contemporary notion of legal and moral norms, that a court will vary a will so as to achieve "the justice the testator failed to achieve": at 823-824.

[16] It is common ground that Ms. Brown's wills variation claim is not barred by the cohabitation agreement. The agreement that each would execute a will providing that their individual estates would go to their own issue — and the fact that each of the spouses executed a will consistent with this agreement — does not end the analysis. Having regard to the public interest and the scope and policy of the wills variation statute, the obligations of Mr. Terins must be examined in the complete factual context existing at the date of his death. A cohabitation agreement ought to receive consideration, but even an agreement that is fair, solemn and well-considered is unlikely to be a complete answer to a wills variation claim. See *Boulanger v. Singh* (1984), 59 B.C.L.R. 383 at 389 (C.A.); *Wagner v. Wagner Estate* (1991), 62 B.C.L.R. (2d) 1 at paras. 31-32 (C.A.); *Steernberg v. Steernberg*, 2006 BCSC 1672 at paras. 70-87; *Morgan v. Pengelly Estate*, 2011 BCSC 1114 at paras. 145-176.

[17] In short, it is necessary to examine Mr. Terins' legal responsibilities and his moral obligations in the full context of the facts as they existed or could have been reasonably foreseen by Mr. Terins at the date of his death in order to determine whether Mr. Terins made adequate provision for Ms. Brown.

Legal Responsibilities

[18] *Tataryn* establishes that the first consideration must be the extent of Mr. Terins' legal

responsibilities during his lifetime if the question of provision for Ms. Brown had arisen; the search is for contemporary justice, in the light of current societal norms as expressed in legislation and judicial doctrine (pp. 815 and 821). Maintenance and property allocations that the law would support during Mr. Terins' lifetime are directly relevant to the inquiry (p. 821). In this connection, family law legislation is at the centre of the analysis of Mr. Terins' legal responsibilities.

[19] There is no suggestion that Mr. Terins had legal obligations to his daughters. The live issue is the extent, if any, of his legal responsibility to Ms. Brown. Arriving at a notional spousal support and property allocation on the assumed basis of a spousal separation immediately before Mr. Terins' death has been approved as a proper approach to developing an understanding of Mr. Terins' legal obligations to his spouse: *Saugestad*, at para. 73. Ms. Brown concedes that she would not receive spousal support in the assumed case of a March 2014 separation. Accordingly, the sole question on the legal responsibility side of the analysis is the result of a notional property division assuming a March 2014 separation.

[20] Regarding this property division, I agree with Ms. Brown's submission that the provisions in the *Family Law Act*, S.B.C. 2011, c. 25 [*FLA*], express societal norms respecting property issues for common law spouses at the date of Mr. Terins' death. I heard much argument on the technical issue of whether the *FLA* would have application to a hypothetical separation of this couple in March 2014. However, *Tataryn* directs that the analysis is to be informed by contemporary societal norms. Microscopically examining the details of the transition provisions of the *FLA* as they apply to common law spouses is taking the hypothetical exercise too far. One important purpose of the *FLA* is to bring common law spouses within the umbrella of the family property regime — the relevant societal norm, contemporary to the date of Mr. Terins' death, is that common law spouses are presumptively entitled to share in family property. While at the time Mr. Terins' will was drawn in 2010 there was no legal obligation to Ms. Brown, the relevant date for the analysis of whether an obligation exists is the date of death: *McBride v. McBride Estate*, 2010 BCSC 443 at para. 117. By the date of death, there had been a change in the current societal norm respecting the legal right of a common law spouse to share in family property, as revealed by the enactment of the family property provisions in the *FLA*.

[21] The 2001 cohabitation agreement was another focal point of the parties' submissions on the notional property division: Ms. Brown submits that the document did not affect the parties' legal rights, and on the hypothetical division she would have received half of the family property and in particular half of the increase in value in the Kitsilano home; Tara and Ria submit that the agreement is important evidence, and that an unequal division in relation to the Kitsilano home would have occurred and this would have resulted in Ms. Brown receiving nought. For the reasons that follow, I find that (1) the cohabitation agreement was intended to be legally binding and is important evidence; (2) in the hypothetical case, there would be an unequal division of the increase

in value of the Kitsilano home that would leave Ms. Brown with a small portion of the increase in its value.

The Cohabitation Agreement

[22] The cohabitation agreement addresses debts and the contingency of a joint purchase of a new family home but otherwise does not directly address property issues. This likely reflects the fact that common law spouses did not have legislated property rights in 2001, and the reality that the circumstances in this case were not likely to give rise to an unjust enrichment or constructive trust claim by either party. It is plain that the terms of the cohabitation agreement do not directly determine the outcome of a hypothetical claim by Ms. Brown under the *FLA* to half of the increased value of the Kitsilano home.

[23] So, then, why does the cohabitation agreement matter? It matters to the assessment of Mr. Terins' legal responsibilities because the agreement that each spouse would leave their estate to their own issue is one of the potentially important facts to be considered on the hypothetical question of whether the increase in value of the Kitsilano home would be unequally divided. If the agreement was not an enforceable contract, then it arguably might be unavailable as evidence for Mr. Terins in the hypothetical property division. It also matters to the assessment of Mr. Terins' moral obligations because it is evidence of Mr. Terins' and Ms. Browns' intentions respecting the inheritance of their property.

[24] Ms. Brown's testimony was to the effect that the cohabitation agreement was just a "piece of paper," signed by her for the sole purpose of helping pave the way to a strong relationship with Tara and Ria by providing reassurance that Ms. Brown would not be spending their inheritance. She argues that the agreement was a purely domestic arrangement with no intention on the part of either signatory that the terms would be enforceable in law. Ms. Brown's submission goes even further: she contends that the document is not binding on her on the basis of the doctrine of *non est factum*.

[25] I reject both contentions. I will dispose of the *non est factum* argument first. The defence of *non est factum* relieves a person from having to stand behind their signature in very narrow circumstances where someone has signed a document that is, in its essential terms, fundamentally different from that which was intended. See *Marvco Color Research Ltd. v. Harris*, [1982] 2 S.C.R. 774.

[26] I am not persuaded on the balance of probabilities that the agreement that Ms. Brown signed is fundamentally different than what she believed she was signing. To the contrary, for the reasons that follow I find that Ms. Brown — who impressed me as an organized and pragmatic person —

was well aware of the terms and the meaning of the terms of the cohabitation agreement, and that the agreement was a true reflection of her intentions at the time she signed it.

[27] The agreement was fair and made good sense from both parties' perspectives. At the outset of their relationship and at the time of the 2001 agreement, Ms. Brown's estate was approximately the same size as Mr. Terins': this is not a case of Ms. Brown entering into a relationship with a wealthy partner. Each of these middle-aged people with adult children, entering upon a second spousal relationship, had cogent reasons for recording their understanding about property. Viewed from the perspective of both parties and from the perspective of the time it was executed, the cohabitation agreement is pragmatic and sensible.

[28] Consistent with her 2005 will, her organized manner, and the cohabitation agreement that she now seeks to disavow, I find that throughout the relationship Ms. Brown kept close track of her property so as to ensure that it would be left to her issue. The foremost example of her keeping close track of her property is the detailed list she kept of the household contents. The list is in evidence and shows what belongs to Ms. Brown, what belongs to Mr. Terins, and what is shared. Ms. Brown made amendments to this list from time to time when property was disposed of or newly acquired. Ms. Brown testified that she kept this list so that their children would know, in the event of the death of both Mr. Terins and Ms. Brown, who was responsible for getting things out of the house; she said that there was nothing of value and it was a matter of who would be responsible for getting rid of the items. I reject this evidence as being out of harmony with the preponderance of the surrounding probabilities. In particular, I think it unlikely that items such as their furniture, appliances, crystal, silver, and dishware were of no value.

[29] The final form of the agreement was prepared by a lawyer engaged by Mr. Terins, but the evidence establishes that the first draft (which is similar in many respects but not the same as the final agreement) was created by either Ms. Brown or Mr. Terins. Despite Ms. Brown's evidence that she was not the author of the first draft, for the following reasons I conclude that it was prepared by her alone or with her substantial involvement:

a) Mr. Terins was not in the habit of using a typewriter; indeed, the cover note for the first draft (addressed to the lawyer) is hand-printed by Mr. Terins;

b) The cover note to the first draft says, in part: "Please find enclosed a draft agreement that we have come up with …"; the word "we" is consistent with Ms. Brown's involvement in preparation of the draft;

c) The first draft is typed in all-caps, as was the detailed list of household contents prepared by Ms. Brown; and

d) The first draft contains only one spelling mistake in the more than 200 words that appear on the document: a misspelling of Tara's then last name as "Leahman" instead of "Lehman"; other evidence makes it clear that Mr. Terins was a terrible speller but that he knew how to spell "Lehman" as he had made the invitations for Tara's wedding to Mr. Lehman, and Lehman was the last name of his grandchildren — I think it likely that Ms. Brown made this spelling mistake.

[30] For the foregoing reasons, I conclude that Ms. Brown knew exactly what she was signing when she executed the 2001 cohabitation agreement. This is not a case of Ms. Brown being presented with an agreement that she had no hand in creating. The cohabitation agreement contains express acknowledgements that the parties have read and considered the terms of the agreement and that each has placed their signature on the document with full knowledge of its terms. I find that Ms. Brown did have full knowledge of the agreement's terms, and I reject her evidence that she only skimmed the document before signing it.

[31] As part of her *non est factum* argument, Ms. Brown submits that expert and other evidence establishes that she has a reading comprehension disability. Given my conclusions that she knew exactly what she was signing and that the agreement accorded with her wishes, there is little point in addressing this submission in detail. I will only say that if it were necessary for me to reach a conclusion on the subject, I would not find that Ms. Brown suffers from a reading comprehension weakness to the extent that she could not understand this simple form of agreement.

[32] I turn to Ms. Brown's argument that the parties did not intend the agreement to be enforceable. Ms. Brown relies on the judgment in *Wald v. Horning et al.*, 2001 BCSC 1643 at paras 31-32, where Oppal J. (as he then was) makes the point that courts have historically treated agreements between family members differently from agreements entered into between strangers. The basis for the different treatment is that "persons who enter into family arrangements do not do so with the intention that legal consequences ought to flow from such agreements." However, this statement comes with an important caveat attached: "That is not to suggest that in appropriate cases courts will not enforce agreements between family members."

[33] The answer to the submission that the parties did not intend the cohabitation agreement to be enforceable is that the agreement is very plain on its face that the parties did intend the document to be legally binding. On the facts of this case, the "family arrangement" was made with the intention that legal consequences would attach.

[34] In support of her attacks on the cohabitation agreement, Ms. Brown relies on the fact that she did not have independent legal advice. She submits that the lawyer involved in the preparation of the agreement ought to have seen that she had independent advice. In *Gold v. Rosenberg*, [1997] 3 S.C.R. 767 at para. 85, Mr. Justice Sopinka explained that:

> Whether or not someone requires independent legal advice will depend on two principal concerns: whether they understand what is proposed to them and whether they are free to decide according to their own will. The first is a function of information and intellect, while the second will depend, among other things, on whether there is undue influence.

I have found that Ms. Brown understood the terms of the cohabitation agreement, and there is no question that arises in this case about her freedom to decide. On the facts of this case, the absence of independent legal advice is not material.

[35] Finally, Ms. Brown argues that on an *FLA* property division the cohabitation agreement would likely be varied. It seems unlikely to me that the court would entertain such an application given that the agreement that did not purport to address the issue of property division on separation. Rather, it seems likely that the court would take notice of the agreement as evidence relevant to the question of whether there ought to be an unequal division of property. However, in doing so, the court would take cognizance of the fact that it was a 13 year old agreement and that it was made at a time when there was a different family property regime for common law spouses.

Unequal Division of the Increase in Value of the Kitsilano Home

[36] On the notional property division question, Ms. Brown argues that the cohabitation agreement does not address property other than the contingent acquisition of a new family home. Therefore, she submits, the cohabitation agreement would not control the outcome of an *FLA* property allocation analysis. Ms. Brown further submits that Part 5 of the *FLA* would presumptively allocate to her a half interest in the "family property", including the sharp increase in value of the Kitsilano home that occurred between 2000 and 2014. This argument is sound, as far as it goes.

[37] However, it is my view that Mr. Terins would have a strong case to divide the family property unequally. The only family property that is "in play" in this hypothetical analysis is the increase in value of the Kitsilano home between the beginning and the end of the spousal relationship, because the property that each acquired before their relationship began is "excluded property" (s. 85(1)(a) *FLA*).

[38] Subsection 95(1) of the *FLA* provides for an unequal division of family property if an equal division would be significantly unfair. The relevant considerations are listed in s. 95(2):

> 95 (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
>
> (a) the duration of the relationship between the spouses;
>
> (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) *[setting aside agreements respecting property division]*;
>
> (c) a spouse's contribution to the career or career potential of the other spouse;
>
> (d) whether family debt was incurred in the normal course of the relationship

between the spouses;

(e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;

(f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;

(g) the fact that a spouse, other than a spouse acting in good faith,

(i) substantially reduced the value of family property, or

(ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;

(h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;

(i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

[39] Although this was a 14 year marriage-like relationship, an equal property division would be significantly unfair. The parties entered into this relationship late in middle age. Each wanted to leave their property to their own family, and there is no persuasive evidence that either party wavered in abiding by this understanding as their relationship unfolded. The Kitsilano home had been in the family for many years; Ms. Brown made no contribution to its acquisition and little contribution to its upkeep. Tara and Ria argue that in light of these facts in the hypothetical case, fairness would dictate that the increase in value of the Kitsilano home would be reapportioned entirely to Mr. Terins.

[40] However, it must be borne in mind that the cohabitation agreement was made in 2001. By the time of his death, the assets that Mr. Terins' brought into the relationship had quadrupled in value while Ms. Brown's assets did not appreciate. There is no evidence that either party foresaw this turn of events. It is only with the benefit of hindsight that it can be said that Mr. Terins made better investment choices than Ms. Brown. The investment choice that Mr. Terins made, if it can be called that, was to continue to live in the Kitsilano home, and there is no indication that Ms. Brown has made improvident investment decisions.

[41] Having regard to s. 95(2) of the *FLA*, and the factual considerations I have just reviewed, it is my sense that on a hypothetical separation an equal division of property would be seen to be significantly unfair, and an order would be made allocating the increase in value of the Kitsilano home 80 percent to Mr. Terins and 20 percent to Ms. Brown.

[42] The appraisal evidence on the Kitsilano home indicates that the fair market value was

$575,000 in May 2000, $2,100,000 in March 2014, and $2,600,000 in May 2015. Ms. Brown argued that the relevant end date for measuring the increase in value is the date of trial value of $2,600,000. She cites s. 87 of the *FLA*, which provides that the valuation date of family property is the date of the hearing before the court respecting the division of property (in the absence of an agreement or order providing otherwise). The difficulty with this argument is that this trial is not a hearing respecting the division of property. It is, in part, a hearing for the purpose of deciding the result of a notional property division at the date of death. Being a thought experiment, it is possible as part of this exercise to conduct the trial of the hypothetical case on the date of death. In this sense, to express it in the framework of s. 87 of the *FLA*, the date of the hypothetical hearing before the court respecting the division of property is the date of death, and this is the proper valuation date.

[43] It must be remembered that the appropriate focal point for deciding whether adequate provision has been made is the circumstances that the testator would have been aware of or could have reasonably foreseen at the time he died: *Landy v. Landy Estate* (1991), 60 B.C.L.R. (2d) 282 (C.A.); *Eckford v. Vanderwood*, 2014 BCCA 261. In my opinion it follows logically that the date of death is the proper reference point for the appraisal evidence in this notional property division. In the result, the appreciation of the value of the Kitsilano home during their spousal relationship was $1,525,000. It is common ground that a $44,000 reduction must be made for deferred property taxes. The net increase in value is, therefore, just less than $1,500,000, and of this increase Ms. Brown would have been allocated 20 percent: that is, approximately $300,000.

[44] Accordingly, I conclude that $300,000 is a fair estimation of the extent of Mr. Terins' legal responsibility to Ms. Brown.

Moral Obligations

[45] What are society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards (*Tataryn*, at pp. 820-821)? The following passage from *Tataryn* (at p. 822) is instructive on the subject of moral duties:

> 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 [citations omitted].

[46] Important principles spring from this excerpt from *Tataryn* that have direct application to the case at bar. First, strong moral obligations are imposed on supporting spouses to dependent spouses. Mr. Terins was not a supporting spouse and Ms. Brown was not a dependent spouse. Each had independent means, and they divided the household expenses. This is not to say that the moral obligation only extends to a dependent spouse — the reference by McLachlin J. (as she then was) to support and dependency in this passage was in the course of providing an example. The absence of dependency does not necessarily eliminate the moral claim, but does reduce its strength.

[47] Second, the reference to the moral claim of independent adult children is couched in language of qualification and relativity: it "may be more tenuous." In context, this means that the claim may be more tenuous than the claim of adult dependent children or the claim of a dependent spouse; it does not mean that claims by independent adult children are tenuous *per se*. This passage from *Tataryn* leaves room for cases where the moral claims of independent adult children will carry substantial weight, and more weight than the moral claim of a non-dependent spouse. The matter at hand is such a case.

[48] In *Dunsdon*, Ballance J. compiled a list of considerations to assist in the assessment of the moral claims independent children:

> [134] In the post-*Tataryn* era, the following considerations have been accepted as informing the existence and strength of a testator's moral duty to independent children:
>
> - relationship between the testator and claimant, including abandonment, neglect and estrangement by one or the other;
> - size of the estate;
> - contributions by the claimant;
> - reasonably held expectations of the claimant;
> - standard of living of the testator and claimant;
> - gifts and benefits made by the testator outside the will;
> - testator's reasons for disinheriting;
> - financial need and other personal circumstances, including disability, of the claimant;
> - misconduct or poor character of the claimant;
> - competing claimants and other beneficiaries:
>
> (See *Clucas v. Clucas Estate*, [1999] B.C.J. No. 436; *McBride v. McBride Estate*, 2010 BCSC 443; *Yee v. Yu*, 2010 BCSC 1464; *Wilson v. Lougheed*, 2010 BCSC 1868).
>
> [135] These considerations tend to overlap and are not approached in isolation as independent, air-tight categories.

[49] Tara and Ria submit that the evidence shows them to have been loving and dutiful daughters

and that their father maintained close relationships with both of them. I agree. Counsel for Ms. Brown attempted to lay the foundation for an argument that Mr. Terins' relationship Ria was strained. I am not in any way persuaded that this was so. It is difficult for those outside of a relationship to make accurate judgments about such matters. I accept without hesitation Ria's evidence about the close and loving relationship she enjoyed with her father. While Mr. Terins had a different relationship with Tara than he had with Ria, his relationship with both of his daughters was excellent.

[50] Reasonably held expectations may be considered when deciding on the existence and strength of moral obligations to independent children, and I agree with the submission of Tara and Ria that there were good grounds for their expectation that the Kitsilano home would be inherited by them. It had been in the family since it was purchased by their grandparents in 1968. I accept the evidence of Tara and Ria that they had been told by their father than they would inherit the Kitsilano home.

[51] Assets passing outside of the estate are relevant to the moral obligation of Mr. Terins to his daughters. I therefore take account of the small RRIF that passed to them. I also take into account the fact that both Tara and Ria are financially secure.

[52] Turning to the moral obligation owed by Mr. Terins to Ms. Brown, there are a number of factors that tamp down the size of the moral claim that might ordinarily arise out of a 14 year relationship, leaving a moral obligation of fairly slight degree:

a) Ms. Brown did not financially depend on Mr. Terins during their relationship, and because of the way they chose to organize their affairs (including the making of the cohabitation agreement and adhering to its terms) she could not expect an inheritance from Mr. Terins;

b) Ms. Brown's living expenses were defrayed during her relationship with Mr. Terins by living in the Kitsilano home without paying rent or property taxes;

c) Ms. Brown was economically independent before and during her relationship with Mr. Terins;

d) Ms. Brown does not make a strong case for need, although I accept that without some provision from Mr. Terins' estate her lifestyle may not measure up to what it was during their relationship; and

e) Ms. Brown did not contribute to the accumulation of Mr. Terins' modest wealth — his property was acquired before the beginning of the relationship.

[53] Ms. Brown urges that the court should not lose sight of the fact that if Mr. Terins had died

without leaving a will, she would have received approximately $1,100,000. Although not directly referred to in *Tataryn*, the legislated outcome on intestacy has been held to be some indication of community standards: *Picketts v. Hall (Estate)*, 2009 BCCA 329 at para. 56. However, the default position when there is no will cannot directly affect the considerations that govern applications under s. 60 of the *WESA* when the will-maker's intentions are clearly set out: *Hall v. Korejwo*, 2011 BCCA 355 at para. 46. This must be especially so in the case at bar where each spouse has executed a will that is in accordance with their cohabitation agreement to leave their respective property to their own issue.

[54] In summary, I conclude that in this case the moral obligation owed by Mr. Terins to his daughters was significant, and of a much greater magnitude than the moral obligation owed to Ms. Brown.

Was Adequate Provision Made?

[55] Recall that despite a substantial reapportionment in the notional hypothetical property allocation, there remains a significant legal responsibility owed by Mr. Terins to Ms. Brown in the approximate sum of $300,000. Mr. Terins also owed a moral obligation to his daughters and a moral obligation of lesser weight to Ms. Brown. *Tataryn* mandates that all conflicting claims should be met where the size of the estate permits (p. 823). Mr. Terins' estate is large enough to meet all legal and moral claims.

[56] The dispositions in Mr. Terins' will clearly met his obligation to his daughters but did not meet the legal and moral obligation to Ms. Brown. In the language of s. 60 of the *WESA*, I conclude that Mr. Terins did not make adequate provision for the proper maintenance and support of his spouse. By making no provision for her, he acted outside of the range of testamentary autonomy entitled to deference.

[57] My conclusion is at odds with two somewhat similar cases cited by the defendants: *Howard v. Howard Estate* (1997), 32 B.C.L.R. (3d) 1 (C.A.); and *Lobe v. Lobe Estate* (1997), 37 B.C.L.R. (3d) 138 (C.A.), aff'g (1996), 13 E.T.R. (2d) 126 (B.C.S.C.). In each of these cases, the disinherited second spouse's application to vary the will was unsuccessful. The outcome of wills variation cases are fact driven, and in my opinion these two cases differ on their facts from the case at bar in important ways.

[58] In *Howard*, the testator left his $214,000 estate in equal shares to his two adult children from a previous marriage. At the date of death, the testator and his new spouse had been married for five years. When they married, he was 67 and she was 65. They had a pre-nuptial agreement in which each agreed not to make claims against the other with respect to assets acquired prior to the

marriage. There was little or no merging of their finances during the marriage. Each prepared a will leaving nothing to the other. At the date of death, the testator's spouse had assets of $273,000, and had income that allowed her to live "comfortably but not extravagantly."

[59] At para. 7 of her reasons for a unanimous panel, Madam Justice Newbury referred to several factors which made the *Howard* case unusual: the late age at which the parties married and the resulting shortness of the marriage; the parties did not become an economic unit; her estate was larger than his; and the pre-nuptial agreement and the wills meant that neither party could have had an expectation that on death the other's estate would "be there." The *Howard* case is significantly different than the case at bar. First, having met earlier in life, Mr. Terins and Ms. Brown enjoyed a much longer relationship than the Howards. Second, the value of Mr. Terins' estate is many times larger than the value of Ms. Brown's remaining assets. Third, after making allowance for inflation over the 20 years that passed between Mr. Howard's death and Mr. Terins' death, the estate in the case at bar is much larger than the *Howard* estate.

[60] In the *Lobe* case, the plaintiff wife and the deceased husband each had children from previous marriages. Each had substantial wealth when they married, he at 50, she at 37. They signed a marriage agreement that provided that their property was to remain separate and each was to have the privilege of disposing of their property unencumbered by wills variation legislation. When the testator died, Ms. Lobe received no benefit from his estate valued at approximately $8,000,000. Outside of the estate, however, she acquired controlling shares in a valuable company they owned together, and a life estate in the family home and certain property. The Court of Appeal upheld the conclusion of Lowry J. (as he then was) that the testator had no obligation to arrange his affairs differently given Ms. Lobe's substantial wealth and the marriage agreement from which she benefitted. Unlike Ms. Lobe, Ms. Brown is not wealthy. And, while their cohabitation agreement is important to the analysis of the legal and moral obligations owed by Mr. Terins to Ms. Brown, it was not an agreement that benefited Ms. Brown. These facts distinguish the *Lobe* case.

Provision that is Adequate, Just and Equitable

[61] Having found that Mr. Terins failed to make adequate provision for Ms. Brown, the task becomes to achieve "the justice that the testator failed to achieve." However, I instruct myself that the will, as an expression of Mr. Terins' freedom to dispose of his property as he wished, is to be varied only in so far as the statute requires — that is, to the extent necessary to result in a provision that is adequate, just and equitable to Ms. Brown.

[62] The statute provides a wide discretion in fashioning an adequate provision, and there is precedent for an order that a spouse remain in the family home for a relatively short fixed-term: see, for instance, *McBride*, at para. 179. I think it is just and equitable that Ms. Brown be afforded a

period of time after Mr. Terins' death to live in the Kitsilano home that they lived in together for 14 years. I conclude that two years from Mr. Terins' death is appropriate. Mr. Terins did not charge Ms. Brown rent when they lived together and I do not view it as just or equitable that occupational rent be paid by her to the estate for the two year period from Mr. Terins' death to 31 March 2016.

[63] I conclude that in addition to Ms. Brown's continuing residence in the Kitsilano home for two years, a payment of $500,000 to Ms. Brown is necessary in order that the legal and moral obligations to Ms. Brown are attended to. In my opinion, the combination of her continuing residence in the Kitsilano home and the $500,000 payment is adequate, just and equitable provision in accordance with the requirements of s. 60 of the *WESA*.

[64] I have reached this conclusion after reading the various cases cited by Ms. Brown in support of her submission that she ought to receive as much as half of Mr. Terins' estate. As I have already said, the outcomes of these wills variation cases turn on their facts. Of the cases cited by her, only *Mazur v. Berg*, 2009 BCSC 1770, is sufficiently similar to potentially lend assistance to Ms. Brown's argument. In the *Mazur* case, the testator left his $300,000 estate to his adult son and left nothing to his common law wife of six years. Madam Justice Adair was persuaded that the will did not make adequate provision for the claimant spouse and varied it such that the estate was split 55/45 percent in her favour. The first important distinguishing fact in *Mazur* is the modest size of the estate. Further, as I read the case, the *Mazur* result was driven by findings of stronger legal and moral obligations to the common law spouse than I find to be present in the case at bar. In short, I conclude that the cases cited by Ms. Brown, including *Mazur*, do not support the contention that she should receive half of the estate.

[65] I have also considered whether the conclusion I have reached is at odds with the reasoning or the conclusions of our Court of Appeal in the *Picketts* case. In that case, the 96 year old deceased left the vast majority of his $18 million estate to his two sons and very little to his common law wife of 21 years. The order on appeal provided that the common law wife would receive just less than a third of the estate. In the course of his reasons for the panel, Mr. Justice Low said that it was not a viable option to approve a testamentary disposition that substantially prefers the moral claims of adult independent children to those of a long-term, caring and dedicated spouse (para. 62). This statement is made in the context of a dependent spouse that provided dedicated care for 41 months of serious illness, and immediately after consideration of *Bridger v. Bridger Estate*, 2006 BCCA 230, where the claimant was the deceased's second wife, of a 38 year marriage, and she had provided care for her husband over years of debilitating decline. Other important facts in *Picketts* lent substantial weight to the moral claim including the common law wife's agreement to give up her career thereby depriving her of the opportunity to accumulate an estate of her own, and the promise that the deceased made that he would take care of her as though she were his wife (after reneging on a promise to marry her early in their relationship). In my

view, the very different facts in *Picketts* should make it unsurprising that the provision for Ms. Brown is a lesser percentage of the estate than achieved by the claimant in *Picketts*.

The Application to Re-open the Plaintiff's Case

[66] Argument in this case began in June 2015, following upon the close of the defendants' case, but was not completed. When counsel attended on 4 September 2015 to conclude argument, Ms. Brown applied to re-open her case to tender an updated appraisal report on the Kitsilano home — to update the appraisal from 2 May 2015 to 29 August 2015. The expert's opinion is that the fair market value as of 29 August 2015 was $2,650,000, an increase from $2,600,000 as of 2 May 2015.

[67] The onus is on the party seeking to re-open to show that a miscarriage of justice would probably occur if the trial is not re-opened and that the new evidence would probably change the result; the wide discretion ought to be exercised sparingly and with great care: *Hodgkinson v. Hodgkinson*, 2006 BCCA 158 at para. 36. The application in this case is to re-open to introduce further expert evidence of doubtful consequence. The application to re-open is refused. In the result, the updated appraisal report is not admissible.

Order

[68] In the result, I make the following orders:

1. Ms. Brown is entitled to reside in the Kitsilano home, without payment of any rent to the estate, until 31 March 2016 — Ms. Brown shall yield possession of the Kitsilano home to the estate on or before that date.

2. There shall be a payment to Ms. Brown of $500,000 from the residue of the estate, prior to its distribution to Tara Terins and Ria Terins.

3. Ms. Brown's application to re-open her case to introduce a further appraisal of the Kitsilano home is dismissed.

[69] If the parties are unable to reach agreement on the appropriate costs order, any party may contact Supreme Court Scheduling to arrange a hearing date.

"Thompson J."