Wills Variation: The Evolution of Contemporary Community Standards[1]

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## I. Introduction

Every couple of years, a paper is presented at CLE with an update on recent wills variation jurisprudence.[2] This has provided the estate bar with an invaluable resource as these papers combined contain a comprehensive survey of the case law that has developed post-*Tataryn v. Tataryn Estate* [1994] 2 S.C.R. 807 ("*Tataryn*") . This paper seeks to continue that tradition, but also to pull back the lens somewhat, and to discern the trends that have emerged more broadly in recent years.

In *Tataryn*, McLachlin J. (as she then was) emphasized that a court considering a wills variation claim must be guided by contemporary community standards. This means that the law of wills variation, like our Constitution, is a "living tree," and will by necessity change as society changes. Much has changed in our society since 1994. One of the questions that this paper seeks to explore is whether wills variation jurisprudence has kept up with those changes.

## II. History and Policy

### A. The Legislative Purpose of Wills Variation

Part 4, Division 6 of the *Wills Estates and Succession Act*, S.B.C. 2009, ch. 13 ("*WESA*"), sections 60-72, differs only slightly from the prior legislation, the *Wills Variation Act*, RSBC 1996, ch, 490 (the "*WVA*"). The roots of the legislation go back to the 1920 *Testator's Family Maintenance Act.* At the time that act was passed, the then Attorney General described the act as part of the social safety net of the time. The BCLI Report[3] quotes the AG of the time as describing the *Testator's Family Maintenance Act* as "one of the links in the government's chain of social welfare legislation" that would "tend towards the amelioration of social conditions within the province".

If the purpose of wills variation legislation was initially to keep people "off the dole", this limited application of the statute did not last long. As early as the *Walker v. McDermott* case in 1931,[4] the courts were interpreting wills variation in a much more expansive fashion.

The roots of wills variation have been the subject of some debate at the judicial level. In *Tataryn*, McLachlin J. famously linked the ameliorative purposes of wills variation legislation as

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[2] There are many of these papers and many of them include helpful tables of recent cases, including Kimberly Kuntz "Wills Variation Claims and Related Issues" (CLEBC Estate Litigation Basics 2016), Hugh McLellan "Wills Variation Update 2014"(CLEBC Estate Litigation 2014 Update), and Andrew Mackay "The Wills Variation Act – Update of Reported Decisions" (CLEBC Estate Litigation Update 2011)

[3] "Wills, Estates and Succession: A Modern Legal Framework", 2006 BC Law Institute (the "BCLI Report"), available on the BCLI Website

[4] *Walker v. McDermott* [1931] S.C.R. 94

social welfare with a more modern notion of equality and suggested that wills variation was never just about financial need:

> The desire of the legislators who conceived and passed it was to "ameliorat[e] ... social conditions within the Province". At a minimum this meant preventing those left behind from becoming a charge on the state. But the debates may also be seen as foreshadowing more modern concepts of equality. The Act was passed at a time when men held most property. It was passed, we are told, as "the direct result of lobbying by women's organizations with the final power given to them through women's enfranchisement in 1916". There is no reason to suppose that the concerns of the women's groups who fought for this reform were confined to keeping people off the state dole. It is equally reasonable to suppose that they were concerned that women and children receive an "adequate, just and equitable" share of the family wealth on the death of the person who held it, even in the absence of demonstrated need.[5]

In her dissenting reasons for judgment in *Bridger v. Bridger*,[6] Southin J.A. took issue with McLachlin J.s' description of the legislative intent behind wills variation legislation:

> I do not recall ever seeing any pronouncement in the Supreme Court of Canada on whether a judge of a provincial court of appeal is bound to accept the Supreme Court of Canada's exposition of the history of that judge's province. That being so, I consider it is not improper to decline to accept that a statement of that history from the Supreme Court of Canada is binding on a lower court. With the greatest of respect, this paragraph does not accurately reflect the legislative history. It is doubtful if there was lobbying for this Act. The better view, in my opinion, is that there was indeed lobbying for a *Mothers' Pensions Act* and the Act now in question was an adjunct to it.

Southin J.A. went on to devote over 40 paragraphs of her dissenting reasons for judgment to the legislative history of the *Wills Variation Act* and its legislative purpose. She noted that there was no "state dole" in BC before 1920. In 1920, the same day that the *Testator's Family Maintenance Act* was introduced in the legislature, so too was the *Mother's Pensions Act*, which provided a state pension to any woman who was indigent, had children under 16 and either didn't have a husband or had a husband who couldn't support his family. As such, Southin J.A. concluded that:

> In my opinion, ensuring that, when possible, the support of a widow with children should fall upon her husband's estate and not upon the public purse was a prime, if not indeed the only, legislative purpose of the *Testator's Family Maintenance Act*.

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[5] *Tatatryn*, at 815
[6] 2006 BCCA 230 ("*Bridger*") at para 67

The fact that Southin J.A. and McLachlin J. expressed such different views about the legislative history and purpose of wills variation is more than just a judicial curiosity. It is emblematic of a strain that still exists in wills variation jurisprudence. This tension, between an approach that focuses on broad notions of equity and fairness and a narrower approach that seeks to adhere as much as possible to a testator's wishes, still exists to this day. One way in which this tension manifests itself is in the attempts of some judges to fix the limited circumstances in which a testamentary plan will be interfered with. These cases can be contrasted with cases demonstrating a broad evolving notion of fairness that is prepared to sacrifice certainty for compliance with contemporary standards.

B. Law Reform History

Two major law reform projects have considered the future of wills variation legislation in BC. In 1983, the Law Reform Commission of BC published a *Report on Statutory Succession Rights.*[7] The conclusion from that report was that wills variation legislation should be expanded to grant a right to intestate heirs to vary the distribution of an intestate estate on the same basis that wills could be varied. Other than this proposed amendment (which never came to fruition) the 1983 law reform commission was content to leave wills variation legislation as it was.

The next major succession law reform project was of course the BCLI project which culminated in the 2006 BCLI Report. The Report itself suggests that the matter of reforming wills variation law was quite contentious, where one side of the debate argued for the "clear need for such legislation" and others called it "a diluted and whimsical form of forced heirship".

The BCLI Report summarizes the debates as follows:[8]

> Intense and lengthy debate took place in both the Intestate Succession, *Wills Variation Act* and *Family Relations Act* Subcommittee and the Project Committee on the question of whether British Columbia should harmonize its dependents relief legislation with prevailing standards in the rest of Canada by excluding self-sufficient adults other than a spouse from the class of eligible claimants. The Subcommittee was ultimately divided. A majority favoured confining eligible adult non-spousal claimants to those unable to be self-supporting because of physical or mental incapacity or special need. A minority of the Subcommittee members favoured no change in the eligibility of adult claimants.
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> The Project Committee unanimously favoured restricting adult non-spousal claimants to those unable to become self-supporting because of illness, mental or physical disability, or other special circumstances. These criteria comport with those found in the dependent's relief statutes of most other Canadian jurisdictions.

[7] Available on the BCLI Website
[8] BCLI Report, pages 58-59

At the subcommittee level, the same divide that can be discerned in the two views of legislative history expressed by McLachlin J. and Southin J.A. appears to have animated two sides of the debate. On the one hand, there were practitioners arguing for maintaining expansive variation rights in this province, on the basis of notions of equality, fairness and contemporary justice. On the other hand, there were practitioners who argued that not only does wills variation infringe on testamentary autonomy, but it leaves the disposition of an estate to the discretion of a judge, creating an impermissible level of uncertainty in the law.

The project committee ultimately unanimously recommended that BC harmonize our legislation with the dependent's relief legislation in most other provinces by eliminating the right of independent adult children to seek to vary a will. This recommendation was one of the only recommendations that the government did not adopt and that did not find its way into *WESA*.

## III. Contemporary Community Standards and Adult Children

To the extent that there is a lack of uniformity in the judicial treatment of wills variation claims, nowhere is this more so than in the claims of adult children. In *Tataryn*, McLachlin J. identified the susceptibility of claims by adult children to being viewed in different ways by different people. If the cases are any indication, this is most certainly true. Admirable attempts have been made by certain judges to synthesize and enumerate the relevant factors that will influence a variation claim by an adult child.[9] At the same time, the very breadth of potential relevant factors makes it extremely difficult to predict with certainly how any case is likely to be decided. However there are two developing trends in the cases involving adult children that merit some attention.

### A. Valid, Rational…and Justifiable?

One particular area where a discernable trend may be evident is in the doctrine of "valid and rational reasons". Since the decision of the Court of Appeal in *Bell v. Roy*,[10] the courts have held that a will maker will have discharged their moral obligation to provide for an adult child if the reasons for disinheritance are "valid and rational". The doctrine of valid and rational reasons was most clearly articulated in the Court of Appeal's decision in *Kelly v. Baker:*[11]

> In deciding a claim under s.2(1) of the Act, the task of the court is to decide whether, at the date of the testator's death, her will was consistent with the discharge by a good parent of her duties to her family: Landy v. Landy Estate (1991), 60 B.C.L.R. (2d) 282 (C.A.), Morris v. Morris (1982), 41 B.C.L.R. 239 (C.A.), and Lukie v. Helgason (1976), 1 B.C.L.R. 1 (C.A.). The law does not require that the reason expressed by the testator in her will, or elsewhere, for disinheriting the appellant be justifiable. It is sufficient if there were valid and rational reasons at the time of her death - valid in the sense of being based on fact; rational in the

[9] For example, see *McBride v. Voth*, 2010 BCSC 443, *Dunsdon v. Dunsdon*, 2012 BCSC 1274 and *Clucas v. Clucas Estate*, (1999) 22 ETR (2d) 175.
[10] *Bell v. Roy* (1993), 75 B.C.L.R. (2d) 213 ("*Bell*")
[11] *Kelly v. Baker* (1996), 15 ETR (2d) 219 ("*Kelly*") at para. 58

> sense that there is a logical connection between the reasons and the act of disinheritance.

The notion that the reasons for disinheritance need not be justifiable, but must only be valid and rational in the strictest sense, may appear to fly in the face of the search for contemporary justice described by McLachlin J. in *Tataryn*. Indeed, this inconsistency has been noted by a number of judges. In *J.R. v. J.D.M*, 2016 BCSC 2265, Dardi J. stated at paras 109 and112:

> In *McBride*, Madam Justice Ballance observed that it is difficult to reconcile the analytical framework endorsed in *Bell* and *Kelly* with the fundamental principles of *Tataryn*, that a testator's moral duty must be assessed objectively from a standpoint of what a judicious parent would do in the circumstances, by reference to contemporary community standards. Notably, McLachlin J., as she then was, cited *Bell* as an example of a case where a testator's moral duty was seen to be negated, but she did not clarify whether the propositions formulated by Goldie J.A. were sound.
> […]
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> In my respectful view, there are sound reasons for raising the question of whether the analytical approach endorsed in *Kelly* is reconcilable with *Tataryn*. This is particularly apparent in the absence of the clear culpability of a claimant for his or her estrangement from a testator. However, in the final analysis, this Court, in accordance with the principle of *stare decisis*, must continue to apply the analytical framework articulated in *Kelly* and *Bell*.

Some very recent cases appear to signal a departure from the "valid and rational reasons" test set out in *Bell* and *Kelly* and a movement towards an analysis that requires the reasons for disinheritance to be not just valid and rational but also justifiable. For example, in the recent case of *Enns v. Gordon,* 2018 BCSC 705, Branch J. noted as follows with respect to the valid and rational test:

> But what seems to be missing in a bare application of a "logical connection" test is at least some degree of proportionality. For example, if an adult child <u>on one occasion</u> insulted the testator's character, that could be argued to create a "logical connection" to a subsequent decision to disinherit. However, complete disinheritance would seem to be a vast overreaction to a single act of defiance.

In *Williams v. Williams Estate,* 2018 BCSC 711, counsel for the plaintiff argued that the strict valid and rational reasons test from *Kelly* ought not be applied, citing Madam Justice Ballance's decision in *McBride* wherein she suggested that if the decision in *Kelly* means that the applicable test is whether a testator has valid (i.e. factually true) and rational (i.e. logically connected to the disinheritance) reasons for disinheriting a child, even where the reasons are unworthy of an objectively judicious parent based on contemporary standards, then it is difficult to reconcile with the fundamental precepts of *Tataryn* and the search for contemporary justice in the

circumstances. Ballance J. observed a growing trend in cases wherein objectively insufficient reasons are rejected on the pretence that they are simply not rational. In *Williams*, Marzari J. did not need to resolve this issue, but it is notable that this tension in the case law has been referred to in two cases in 2018 alone. This may suggest that the tension between *Bell* and *Kelly* on the one hand, and *Tataryn* on the other, is coming to the fore and it is just a matter of time before our Court of Appeal is asked to resolve it.

B. Sometimes disinheritance is upheld

At the same time that there appears to be a growing trend towards requiring reasons for disinheritance to be objectively justifiable, and not just valid and rational, there is a countervailing trend in the case law, in favour of disallowing claims altogether, on the basis that any moral duty the will maker had to the claimant was discharged. There may have been a time when comparatively weak claims by adult children would have some level of "nuisance value" such that even a weak claim would receive some modest award.[12] It appears that the pendulum may now be swinging in a different direction. Perhaps the trend began with the decision of the Court of Appeal in *Hall v. Hall Estate*,[13] but there are a number of recent adult children cases where the court has been unwilling to make even a modest variation in favour of a marginally deserving claimant and indeed has refused any variation at all. This means that, while ten years ago one could say with some degree of confidence that most disinherited adult children would be likely to get something on a variation claim, cases like *Brown v. Pearce* 2014 BCSC 1402 ("*Brown*") and *Kaufman v. Kaufman* 2017 BCSC 1347 ("*Kaufman*") suggest that this may no longer be the case.

In *Brown*, a lengthy estrangement between the plaintiff and his deceased parent was held to be entirely the fault of the plaintiff and as such his action for a variation of the will was dismissed.

In *Kaufman*, an adult son brought a wills variation claim with respect to his father's estate. The will in question disposed of the Deceased's $718,000 estate as follows: $20,000 to the plaintiff, $3,000 in specific bequests to others, and the residue of the estate to the Deceased's spouse from whom, at the time of death, he was separated. The plaintiff had no assets, lived on disability benefits and had a history of addiction. He had a difficult relationship with his father but was not estranged and indeed moved in with his father in his later years. In many ways, the plaintiff in *Kaufman* was a person who faced difficulty in "fighting the battle of life"[14] a characteristic which in previous cases may have enhanced rather than detracted from a plaintiff's claim. His claim for variation of the will was dismissed.

It may be questionable whether there are enough cases of this nature to constitute a discernable trend, but there is no question that a number of variation claims brought by adult children in the last two years or so have been rejected in their entirety.[15] Should such a trend continue, one

[12] Examples of cases where the adult child plaintiff's claim was held to be reasonably weak, but a small variation was made in their favour, would include *Waldman v. Blumes*, 2009 BCSC 1012 and *Hutchison v. Weidman Estate*, 2010 BCSC 1356.
[13] 2011 BCCA 354.
[14] *Lukie v. Helgason*, 1976 CanLII 237 (BC CA).
[15] For further examples see also *Peterson v. Welwood*, 2018 BCSC 1379 and *Sim v. Sim* 2016 BCSC 1222, although both of these cases are more consistent with prior cases in their approach than *Brown* or *Kaufman*.

might argue that it is suggestive of a countervailing trend to the direction in which the courts appear to be moving on the valid and rational reasons test. Such cases may signal a shift in focus away from the testator, and an analysis of whether his or her reasons for disinheritance were sufficient to justify disinheritance, and towards the claimant, and whether he or she is a deserving candidate for an inheritance in the first place. At this point, it is difficult to discern as between these two apparently conflicting trends whether the pendulum is swinging in one direction or another.

## III. Spouses and Contemporary Community Standards

In *Tataryn*, McLachlin J. held that we have to look to contemporary norms in determining spousal wills variation claims. *Tataryn* involved a "traditional" family (not even a blended family) with a long term home maker wife and a husband who held all the assets. Statistics tell us that such a family is no longer the norm. Most families in Canada have two parents working outside the home creating less economic dependency between spouses. People are living longer and later in life marriages have become more common. Meanwhile the legal recognition of marriages between same sex partners and, more recently, the vast expansion of family law rights to common law couples means that "contemporary norms" for a family look quite different than they did in 1994.

So assuming that it is time to take a fresh look at *Tataryn*, what do recent cases tell us in terms of how the courts are recognizing changing contemporary norms when it comes to spousal claims?

One of the most significant changes to contemporary marriage from a legislative perspective is the inclusion of common law spouses for the purposes of property division under the Family Law Act [SBC 2011], chapter 25 (the "*FLA*"). The legal obligation component of the wills variation analysis involves considering a spouse's notional entitlement to property under family law[16], and under the *FLA*, that entitlement is now the same for married and common law spouses.

Another change in contemporary norms that impacts spousal variation claims is the holistic approach to spousal status and the manner in which the common law spousal status test has developed in recent years. This is a topic unto itself, and outside the scope of this paper, but it is relevant in the context of wills variation and changing contemporary norms to note that recent cases have taken an extremely expansive approach to the question of who qualifies as a spouse.[17]

In terms of jurisprudence, the most significant case in recent years to discuss changing societal norms in the context of spousal claims is *Kish v. Sobchak*, 2016 BCCA 65 ("*Kish*"). In that case, a five judge panel, in addition to revisiting the standard of review from a wills variation decision, considered how the legal and moral obligations discussed in *Tataryn* apply to "less traditional" relationships. The facts involved a couple who had met late in life, each with a child from a prior marriage. They were together for 22 years. There was considerable evidence that neither party wanted to be treated as a spouse during the relationship. The estate was small ($186,000) and

[16] This statement is presently the subject of some debate which is discussed later in this paper.
[17] See *Re Richardson Estate*, 2013 BCSC 2162, *Re Connor Estate*, 2017 BCSC 978 and *Robledano v. Jacinto*, 2018 BCSC 152.

under the will it went to the Deceased's only daughter. The trial judge had varied the will to provide the plaintiff spouse with $100,000 from the estate. The Court of Appeal reduced the provision to the plaintiff under the will to $30,000.

There are at least two points from *Kish* that warrant further attention and could signal some form of departure from earlier jurisprudence in terms of contemporary norms. The first is fact that the Court of Appeal cited with approval the words of Finch J. (as he then was) in *Frolek v. Frolek* [1986] B.C.J. No. 1869 stating:

> it is not the purpose of the *Wills Variation Act* … to enable an applicant to build up an estate of her own, but rather to ensure that she is appropriately maintained and supported during her lifetime.[18]

By endorsing this statement, the Court of Appeal appears to have departed from its earlier decision in *Erlichman v. Erlichman*, 2002 BCCA 160 ("*Erlichman*") that suggested that a relevant consideration in the moral obligation analysis should be the right of a spouse to have an estate of their own to give away on their death. Both Saunders J.A. for the majority and Braidwood J.A. in dissent agreed that the spouse in that case ought to have a portion of capital rather than an entitlement under a spousal trust:

> Morally, weight should be given both to the fact that Rose Erlichman desires to own a capital asset in the form of a condominium, and to the fact that she desires some of this money should go to her own son, Sydney, who has no claim at law. [19]

> In reaching my conclusion as to a fit disposition, I have considered Mrs. Erlichman's entitlement to provide for her issue and their offspring from her life's labours as she sees fit, not as the testator saw fit. In this, the case differs substantially from *Crerar*, in which all children in the family unit were children of the testator and surviving spouse and shared equally under the Court's decision. [20]

In 2006, in *Bridger*, Mackenzie J.A. expressed a similar sentiment with respect to an argument made by the defendant children that the claimant spouse was merely amassing an estate to pass on to her children:

> The trial judge essentially treated Mrs. Bridger's apparent intention to continue to live frugally and pass her assets to her children as irrelevant. In my view, there was no error in that respect. In the circumstances of this case, where need is not a factor, I do not think that the use or disposition Mrs. Bridger has made or intends to make with respect to her assets affects her moral entitlement. That is entirely her choice and beyond the purview of the *Act*. While the prospect that Mrs.

[18] *Kish*, at para. 53
[19] at para 35, per Braidwood J.A. in dissent.
[20] at para. 51 per Saunders J.A. for majority.

> Bridger's children may eventually receive a larger share of the assets is no doubt a source of annoyance to the appellants, I think that the trial judge was right to give little weight to that aspect and to weigh the appellants' moral claims against those of Mrs. Bridger alone. It is the length of the marriage and her steadfast support of Mr. Bridger in his declining years that primarily founds Mrs. Bridger's moral claim.[21]

Obviously the facts in *Kish* were much different from the facts in either *Erlichman* or *Bridger,* both of which were cases involving marriages of very long duration and significant contributions on the part of the surviving spouse to the deceased spouse. [22] However, it is a bold statement and arguably inconsistent with not just *Erlichman* and *Bridger,* but with *Tataryn* itself, to say that the purpose of wills variation is simply to ensure that a claimant is "appropriately maintained and supported during her lifetime." It is unfortunate that the case the Court of Appeal relied on for this proposition was a pre-*Tataryn* 1986 decision of the BC Supreme Court. This statement of obiter dicta may have benefitted from a more fulsome discussion from the five judge panel. This question of whether contemporary community standards mandate that a surviving spouse should have an estate of his or her own to give away (in long term marriages or in short term marriages) is an open question post *Kish.*

The second point of interest that has garnered much attention from commentators is the following statement from Newbury J.A. in *Kish*:

> [49] I infer that the analysis of legal obligation need not be a detailed or exact one, given the difficulty of drawing a direct analogy between the consequences of a marriage breakdown – which leaves both spouses with needs and obligations – and the death of a spouse. McLachlin J. stated that "there will be a wide range of options, any of which might be considered appropriate in the circumstances." (*Tataryn* at 824.) An action under the *WVA* should not normally become a proxy for divorce proceedings, complete with the elaborate features and special rules applicable to a family law trial.

It has been suggested that this statement stands for the proposition that the calculation of a notional division of property ought not be undertaken in determining a spouses' legal obligations on death to their surviving spouse for the purposes of wills variation.[23] With the greatest of respect, it is this author's view that this is not what Newbury, J.A. said in *Kish*, and if it were, it would be inconsistent with the binding authority of the Supreme Court of Canada in *Tataryn.*

*Tataryn* requires the court on a variation claim to undertake an analysis of both the legal and the moral obligations that a deceased owed to his or her surviving spouse. The legal obligations,

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[21] *Bridger,* at para. 25

[22] While *Erlichman* technically involved a blended family, the Erlichmans had both lost their respective first spouses in the Holocaust and had met after the war when they were still young and each had a very young child. Their ensuing marriage was over 50 years long. *Bridger* involved a second marriage of almost 40 years.

[23] Amy Mortimore "Recent Trends in Wills Variation – Second Spouses v. Adult Independent Children"(CLEBC Estate Litigation Basics 2018) at 6.1.6.

those obligations that could have been enforced during the lifetime of the will-maker, comprise the minimum entitlement of a surviving spouse, and the only way to quantify those is with reference to family law. McLachlin J. was explicit and unambiguous in her statement that, in order to meet the legal obligation to a spouse on death, those legal responsibilities enforceable during the deceased's lifetimes must be met:

> 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.
>
> 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.[24]

MacLachlin J went on to note that the testator's legal obligations to a spouse while alive may be found in the provisions of family law legislation and potentially the law of unjust enrichment.[25]

In analyzing the particular claim of Mrs. Tataryn, McLachlin J. held:

> I turn first to the legal responsibilities which lay on the testator during his life. His only legal obligations were toward Mrs. Tataryn. While they had not crystallized, since the parties were living together at the time of death, they nevertheless existed. The testator's first obligation was to provide maintenance for Mrs. Tataryn. But his legal obligation did not stop there. The marriage was a long one. Mrs. Tataryn had worked hard and contributed much to the assets she and her husband acquired. There are no factors, such as incompetence, negating her entitlement. Under the *Divorce Act* and the *Family Relations Act* she would have been entitled to maintenance and a share in the family assets had the parties separated. At a minimum, she must be given this much upon the death of her spouse.[26]

[24] *Tataryn*, at 821
[25] *Tataryn*, at 821-822
[26] *Tataryn*, at 824

*Tataryn* (along with the many cases following it)[27], is crystal clear that a notional analysis of legal obligations to a spouse enforceable during lifetime, which includes property and support rights under governing family law legislation, is the sole criteria for determining the legal obligation.

Court must always have recourse to family law legislation because family law is where the legal obligations that one spouse owes to another are grounded. The analysis must be notional because a death is not the same thing as a divorce and some of the relevant considerations for the purposes of family law would be absurd in the context of death. The court is not, and has never been, required to engage in a full family law trial "complete with elaborate features and special rules." Certainly McLachlin J. did not engage in this type of analysis in *Tataryn,* nor have the majority of judges, both trial and appellate, who have determined spousal claims with reference to family law.

*Kish* doesn't depart from this. All *Kish* says is that one needn't get into the technical weeds in undertaking a notional family law analysis. Judges can be assumed to understand that the analysis where one party is deceased will not be identical to a division of property analysis when two living people are divorcing.

It is the author's view that *Kish* does not eliminate or even reduce the role of family law in determining a spousal wills variation claim. It is notable that even the panel in *Kish* considered the legal support obligations Mr. Sobchak would have been subject to as one of two factors that "weigh most heavily" (para 62). It is also notable that later cases have continued to apply some form of notional family law analysis, consistent with what *Tataryn* mandates.[28]

*Kish* tells lower courts they need to be flexible in the family law analysis to account for "modern values and expectations" that arise in relationships different from the long term traditional marriages in cases like *Tataryn* and *Bridger*. But this doesn't abrogate from undertaking a notional family law analysis, in fact it highlights the necessity for it. Because Part 5 of the *FLA* excludes assets acquired prior to a marriage, and only treats the growth in value of those assets as family property to be divided on marriage breakdown, a notional family law analysis under the *FLA* ensures that shorter marriages are not treated in the same way as long term marriage, and the lesser obligation one would have in a marriage of a lesser duration is reflected in the division of property. In other words, *Kish* tells us that the court ought not always treat shorter, late in life marriages the same way as long term marriages; the *FLA* division of property scheme is based on the same policy. Both are grounded in contemporary community standards. As McLachlin J held in *Tataryn*:

> 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.

[27] See *Bridger, Erlichman, Saugestad v. Saugestad,* 2008 BCCA 38, *Picketts v. Hall,* 2009 BCCA 329
[28] See *Ciarniello v. James*, 2016 BCSC 1699, *J.R. v. J.D.M.*, 2016 BCSC 2265, *Unger v. Unger Estate*, 2017 BCSC 1946, *Philp v. Philp Estate,* 2017 BCSC 625

In short, the *FLA* itself is a product of changing community standards and social expectations. Having recourse to the *FLA* division of property is consistent with the court ensuring that contemporary standards are met in analyzing claims to vary wills. If, as some commentators have suggested, the notional *FLA* analysis should be abandoned post-Kish, this could in fact mean a step away from wills variation keeping pace with contemporary norms.

It is unquestionable that the court will continue to be faced with spousal variation claims brought in a variety of family circumstances. *Kish* and the case following it seek to examine nontraditional relationships in the context in which they occur. This means having recourse to family law (as well as common law legal doctrines like unjust enrichment) when determining the legal obligation and considering the broad array of relevant factors in determining the moral obligation.

The tension evident in some of the adult child claims, between testamentary autonomy and fairness, is less evident in spousal claims. However the courts' approach on spousal claims does appear to be adapting to a changing world. This is wholly consistent with the holding in *Tataryn*, and the steady evolution of wills variation law necessary in order for the jurisprudence to keep pace with societal changes in the manner that the Supreme Court of Canada has dictated that it must.