



Sharma v. Sharma Estate, 2016 BCSC 1397 (CanLII)

Date: 2016-07-26

Docket: S133484

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Sharma v. Sharma Estate*,
2016 BCSC 1397

Date: 20160726
Docket: S133484
Registry: Vancouver

Between:

Rani Raakhee Sharma and Ranjan Sharma

Plaintiffs

And

**Solus Trust Company Limited, as Administrator
of the Estate of Tara Devi Sharma, deceased, and
Ritu Bhanjan Sharma also known as Victor Rudi Sharma**

Defendants

Before: The Honourable Madam Justice S. Griffin

Reasons for Judgment

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Kieran A.G. Bridge (June 24, 2016)

Place and Dates of Trial:

Vancouver, B.C.
February 9-12, 15-17
and 24-25, April 19, June 24, 2016

Place and Date of Judgment:

Vancouver, B.C.
July 26, 2016

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SUMMARY

INTRODUCTION

[1] When Tara Sharma (the “Testatrix”) died on November 9, 2012 her last will dated May 9, 2007 (the “2007 Will”) left the entire residue of her estate to her youngest son, Ritu Bhanjan Sharma, known as “Victor”, less \$4,000 in specific bequests to entities other than her other children. She owned a residential property in Vancouver, plus two pieces of real estate in Fiji (the “Fijian Properties”), as well as some sizeable investments in a bank account with the Bank of Montreal (“BMO”).

[2] Victor was then approximately 53 years old. He had no known significant assets.

[3] The Testatrix’s other two living children, her daughter Rani and her son Ranjan, were left nothing in the 2007 Will. Rani was then approximately 61 years old, a single mother on a disability pension, living in Toronto but owning two houses. Ranjan at the time was approximately 66 years old, a diabetic who had both of his legs amputated, but who had been successful in real estate and so had more assets.

[4] Rani and Ranjan have brought this action to vary their mother’s will, pursuant to the *Wills Variation Act, R.S.B.C. 1996, c. 490 [WVA]*.

[5] At the time she made her 2007 Will, the Testatrix had four children: the three parties, plus a son Chit who went by the name “Bill”. Bill died in 2011. The Testatrix’s husband and father of the children, Dukh Sharma, had died earlier in January 2004.

[6] The stated reason by the Testatrix for disinheriting her other children was set out at Clause 2 of the 2007 Will:

2. I HAVE to CLARIFY and comment herein that I am not very happy with my Will dated March 2, 2004, made at a Notary Public Office, taken to by my daughter, RANI RAAKHEE SHARMA. During my life I have so far already given to my daughter, RANI RAAKHEE SHARMA, and to my other two sons, RANJAN SHARMA and CHIT RANJAN SHARMA, plenty of monies and other things and therefore I do not wish to give to my aforesaid three children, any share of my Estate after my death. However, my youngest son, RITU BHANJAN SHARMA, also known as

VICTOR SHARMA, has not received much monies or other things from me and I am making this my Will accordingly.

[7] The plaintiffs say that the above clause was factually incorrect. It was incorrect that the Testatrix gave them “plenty of monies and other things” in her life and that Victor had not received monies and other things from her.

[8] They seek to explain this mistaken statement in the 2007 Will by pointing to Victor as having influenced their mother; and pointing to the Testatrix’s mind as being confused and unsophisticated.

[9] Victor lived with his mother for many years in the family home when he was not incarcerated due to criminal activity. He was usually unemployed, but his mother provided him with a monthly stipend of \$600 and paid some of his other expenses from time to time. Victor and the Testatrix last lived in the family home in June 2012, when police shut down a marihuana grow operation being run by Victor out of the basement. The Testatrix was taken to St. Paul’s Hospital at that time and was eventually transferred to a long-term care facility where she passed away in November 2012.

[10] Victor seeks to justify his mother’s intentions in the 2007 Will by asserting that his siblings did receive monies in their lifetimes from the Testatrix or from Dukh Sharma. Victor also describes his role as that of a devoted, caring son, and he asserts that his siblings were estranged from their mother and that they had engaged in misconduct.

[11] Because of the common last name of the parties, their deceased brother Bill, their father Dukh, and other relevant family members, I will refer to them by their first names, intending no disrespect.

CHRONOLOGY

[12] Certain facts are well-established on the evidence and I will set them out in an outline, chronologically.

DATE:	EVENT:
1924	The Testatrix is born in Fiji. She later marries Dukh Sharma.
1946	Ranjan, oldest son of the Testatrix and a plaintiff in this proceeding, is born in Fiji.
1950	“Bill” (Chit), son of the Testatrix, is born in Fiji.
1951	Rani, daughter of the Testatrix and a plaintiff in this proceeding, is born in Fiji.
1959	Victor, son of the Testatrix and a defendant in this proceeding, is born in Fiji.
1960s	Sharma family immigrates to Canada.
1971	Sharma family moves into a duplex on Malkin Ave., Vancouver (the “Malkin Property”). Ranjan does not live there.
1973	Victor leaves home at the age of 14. At the age of 15 he is found guilty of shoplifting and theft and serves approximately one year’s time in a juvenile detention center.
June 29, 1979	Reasons for Judgment released by Judge Fisher, finding Victor guilty of attempted murder and other rel

	ated crimes. Victor receives 15 year global sentence and ends up serving 17 years in total. He is released on parole in 1988 for approximately 4 years, then re turns to prison to serve the rest of his term, and is re leased in approximately 1995. Victor lives at the Ma lkin Property when not incarcerated.
1985	Rani moves from Vancouver to Toronto.
1996 or 1997	Victor is charged with assaulting his father. The cha rges are stayed.
April 14, 1997	Dukh gives Ranjan power of attorney, after Dukh be gins suffering from strokes.
Dec. 19, 1996	The Testatrix executes an earlier will leaving 90% o f residue of estate to Rani; 10% to Victor; and \$1,00 0 to Ranjan and \$500 to Bill (the “1996 Will”).
1998-2000	Victor commits a number of offences including utter ing threats and assault. He is convicted and sentence d to 8 months in 2000.
2002	Dukh moves into long-term care at Mount Saint Jos eph’s Hospital.
Dec. 2002	Ranjan signs as power of attorney for Dukh on trans fer of title of Malkin Property from Dukh to the Test atrix.
Jan. 2004	Dukh dies.
Jan. to Mar. 2004	Following Dukh’s death, Rani comes to Vancouver and stays with the Testatrix.
Mar. 2, 2004	The Testatrix executes another will giving Rani and Victor joint tenancy in all real estate properties; 9 0% of residue to Rani; and gifts of \$1,000 to Ranjan and \$500 to Bill (the “2004 Will”). The Testatrix als o executes a letter to the court setting out her intenti ons, explaining that Rani had been providing emotio nal support to her, and that Ranjan had received mor e than his entitlement from his father’s estate.
July 22, 2004	The Testatrix files a lawsuit against Ranjan for an al leged theft of \$108,000 amongst other things. Her la wyer is Mr. Fowle.
November 2004	Ranjan’s left leg is amputated.
February 8, 2006	Victor is convicted of possessing an unauthorized w eapon.
February 2006	A statement from HSBC regarding a joint bank acco unt of the Testatrix and Victor shows holdings worth an approximate market value of \$102,000. There is no evidence as to what happened with this money, which is not part of the Testatrix’s assets at death.
September 2006	The Testatrix complains to Rani and to her bankers at BMO that she is missing money from her HSBC account. BMO is unable to assist her because it is a separate bank. The Testatrix then accuses Rani of ta king the money from her.
September 2006	Ranjan’s right leg is amputated.

Apr. 17, 2007	A lawyer, Mr. Jussa, meets with the Testatrix and takes instructions for the 2007 Will.
May 9, 2007	The Testatrix executes the 2007 Will, prepared by Mr. Jussa, at his office. This is the will at issue in this proceeding, disinheriting the plaintiffs.
Sept. 2007	Police shut down a marihuana grow-operation being run out of the Malkin Property by Victor. Victor is not criminally charged.
March 2008	The Testatrix is referred to the Public Guardian and Trustee (“PGT”) by Mr. Fowle (who had been acting as the Testatrix’s lawyer) at Rani’s request.
July 4, 2008	Mr. Fowle withdraws from representing the Testatrix.
Oct. 2008	Rani returns to Vancouver for an uncle’s funeral, and visits her mother at the Malkin Property.
2011	Victor is convicted of assault and uttering threats to cause death or bodily harm.
April 2011	The Testatrix’s son Bill dies.
June 20, 2012	The Malkin Property is raided by the police and the Testatrix is transported by ambulance to St. Paul’s Hospital to be admitted because she has no place to stay. A 659-plant sophisticated marihuana grow operation is discovered in the basement of the Malkin Property (the “2012 Grow-Op”). It is Victor’s operation. He is also found to possess firearms and ammunition. He is not taken into custody immediately.
June 25, 2012	The Testatrix is invoiced \$11,657.54 by BC Hydro in relation to electrical energy that had been diverted for the 2012 Grow-Op.
Aug. 9, 2012	\$112,000 is taken out of the Testatrix’s CIBC bank account. It is never accounted for.
Aug. 10, 2012	The Testatrix is discharged from St. Paul’s Hospital to the home of Mr. Prasad, a friend of Victor’s.
Aug. 28, 2012	Crown lays charges in relation to the 2012 Grow-Op and weapons, and arrests Victor. Victor is then incarcerated.
Sept. 11, 2012	Alex Prasad calls the PGT to report that the Testatrix cannot stay with him much longer.
Sept. 12, 2012	The Testatrix is brought to a meeting with Mr. Jussa to discuss a yet another new will.
Appx. Oct. 1, 2012	The Testatrix is admitted into Suncreek, a care home for seniors.
Oct. 15, 2012	The Testatrix instructs Ranjan to list the Malkin Property for sale for \$1,100,000.
Oct. 28, 2012	Mr. Jussa meets with the Testatrix at Suncreek.
Nov. 9, 2012	Testatrix passes away.
Apr. 9, 2013	Victor pleads guilty to: production of marihuana and a related charge of theft of electricity; three counts of possession of a restricted weapon, two of those co

	unts concerning guns which were found together with ammunition; and possession of a firearm while subject to a previous prohibition order. Judge Kitchen in <i>R. v. Sharma</i> , 2013 BCPC 86 (CanLII), sentences him to a global sentence of 7 years, less credit of 344 days for time served of 229 days.
May 14, 2013	Notice of Civil Claim is filed by plaintiffs in this matter.
Nov. 20, 2015	Victor is released on parole.

LEGAL PRINCIPLES APPLICABLE TO CLAIMS UNDER THE WVA

[13] The *WVA* applies to the issues although it has since been repealed by the *Wills, Estates and Succession Act, S.B.C. 2009, c. 13, s. 194*, effective March 31, 2014.

[14] The *WVA* allows a spouse or child of a deceased to bring an action to vary a will of a parent, on the basis that the will did not make adequate provision for that spouse or child. Section 2 provides:

Despite any law or statute to the contrary, if a testator dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's spouse or children, the court may, in its discretion, in an action 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 testator's estate for the spouse or children.

[15] Section 5 of the *WVA* makes it clear that in determining the issues, the court may have regard to a statement of the deceased's reasons for her bequests and non-bequests. It provides:

(1) In an action under section 2 the court may accept the evidence it considers proper of the testator's reasons, so far as ascertainable,

- (a) for making the dispositions made in the will, or
- (b) for not making adequate provision for the spouse or children,

including any written statement signed by the testator.

(2) In estimating the weight to be given to a statement referred to in subsection (1), the court must have regard to all the circumstances from which an inference may reasonably be drawn about the accuracy or otherwise of the statement.

[16] The leading authority on the interpretation of the *WVA* is *Tataryn v. Tataryn Estate*, 1994 CanLII 51 (SCC), [1994] 2 S.C.R. 807 [*Tataryn*].

[17] More recently, Ballance J. summarized the principles in *Dunsdon v. Dunsdon*, 2012 BCSC 1274 (CanLII) at paras. 130-137:

[130] *Tataryn v. Tataryn*, 1994 CanLII 51 (SCC), [1994] 2 S.C.R. 807 is the leading authority in British Columbia on wills variation. In *Tataryn*, the Supreme Court of Canada identified the two fundamental interests protected by the *WVA*. The main statutory objective is the adequate, just and equitable provision for a testator's spouse and children; the other is the testator's testamentary autonomy. The conceptual essence of the statute is to permit judicial interference with testamentary freedom where adequate provision has not been made in respect of a narrow protected class. Testamentary freedom is, therefore, subordinate to the main objective of the *WVA* and must yield to the extent required to achieve adequate, just and equitable provision for the

applicant spouse and/or children. That said, the judicial approach is not to start with a “blank slate and write a will designed to right all the perceived wrongs of the past, nor interfere only to improve upon the degree of fairness of a will, if the testator has met his obligations under the [WVA]”: *Chan v. Lee (Estate)*, 2004 BCCA 644 (CanLII) at para. 43.

[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.

[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 CanLII 5519 (BC SC), [1999] B.C.J. No. 436; *McBride v. McBride Estate*, 2010 BCSC 443 (CanLII); *Yee v. Yu*, 2010 BCSC 1464 (CanLII); *Wilson v. Lougheed*, 2010 BCSC 1868 (CanLII)).

[135] These considerations tend to overlap and are not approached in isolation as independent, air-tight categories.

[136] The law imposes no requirement that children be treated equally by a testator: *Re Lukie*

et al. and Helgason et al., 1976 CanLII 237 (BC CA), 72 D.L.R. (3d) 395, [1976] B.C.J. No. 1393 (C.A.); *Price v. Lypchuk Estate* (1987), 1987 CanLII 165 (BC CA), 37 D.L.R. (4th) 6, [1987] 4 W.W.R. 128 (B.C.C.A.). Therefore, the mere fact that an independent child has not been given the same provision under a will as the testator's other children will not necessarily establish a moral claim. In a variety of situations, the courts have accepted an unequal distribution of an estate as being fair and adequate. *Tataryn* itself is an example of an unequal distribution even after the court varied the terms of the will.

[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.

[18] In the present case the plaintiffs do not assert a legal claim to part of their mother's estate, they assert a moral claim.

[19] In considering an adult independent child's moral claim to a parent's estate, it is not necessary for that child to prove he or she is in need of a portion of the estate. The court will consider whether the reasons for disinheritance were based on valid and rational reasons: *Kelly v. Baker et al.* (1996), 1996 CanLII 1596 (BC CA), 82 B.C.A.C. 150 (C.A.) [*Kelly*]. However, the burden is on the plaintiff to show that the testator's reasons for disinheritance were false or unwarranted: *Hancock v. Hancock*, 2014 BCSC 2398 (CanLII) at para. 52.

[20] Before I review the relevant facts, I will comment on hearsay evidence and credibility.

HEARSAY EVIDENCE

[21] All parties appeared to treat hearsay evidence as largely admissible for the truth of its contents, so long as relevant.

[22] The parties rely on s. 5 of the *WVA*, which provides for the admissibility of evidence the court "considers proper of the testator's reasons", subject to what weight the court considers appropriate based on indicators of accuracy.

[23] To repeat, s. 5 provides:

(1) In an action under section 2 the court may accept the evidence it considers proper of the testator's reasons, so far as ascertainable,

(a) for making the dispositions made in the will, or

(b) for not making adequate provision for the spouse or children,

including any written statement signed by the testator.

(2) In estimating the weight to be given to a statement referred to in subsection (1), the court must have regard to all the circumstances from which an inference may reasonably be drawn about the accuracy or otherwise of the statement.

[24] The authorities give a liberal interpretation to s. 5, interpreting it as allowing a wide variety of hearsay evidence, including, for example, evidence of out-of-court statements made to others by a deceased's spouse who is also deceased, or by a deceased's former daughter-in-law (the living ex-wife of the plaintiff), as in *Kelly* at paras. 29-33.

[25] Some of the hearsay evidence called in the present case included testimony from witnesses as

to things the Testatrix said to them and as to things said by the Testatrix's husband Dukh, who predeceased her. The plaintiffs also called evidence regarding things said by the Testatrix to medical staff, as recorded in hospital records. Under the approach in *Kelly*, all of this evidence is admissible for the truth of it but subject to the weight I might give it in the circumstances.

[26] The hospital records were admitted under a document agreement as properly recorded statements that were made by the Testatrix or other parties about her condition, but only for the fact that the statements were made and not for the truth of their contents. However, beyond this, the plaintiffs also rely on some of the hospital records for the truth of their contents, pursuant to [s. 5](#) of the [WVA](#).

[27] The parties also rely on the principled approach to the admission of hearsay evidence, arguing that the hearsay evidence of deceased persons is both necessary (because the Testatrix is deceased as is her husband) and reliable.

[28] The case of *Gutierrez v. Gutierrez*, [2015 BCSC 185 \(CanLII\)](#) dealt with the evidence of what was said by a deceased person in the context of competing claims to property, although it was not a [WVA](#) case. Mr. Justice Voith accepted that the necessity for hearsay evidence was established. In analyzing the reliability of the hearsay evidence, he set out the following principles at paras. 33-35:

[33] Here, the Testatrix did not leave a sworn or taped statement, nor were there early opportunities to cross examine him under oath, and so the first *Khelawon* circumstance, the presence of adequate substitutes, does not apply; *Khelawon* at para. 106. Turning to the second circumstance, inherent trustworthiness, I must consider whether there are “indicia of trustworthiness sufficient to displace the general exclusionary rule”; *Blackman* at para. 38.

[34] A number of factors can be considered when assessing the threshold reliability of a hearsay statement, including:

- 1) the presence or absence of a motive to lie (*Blackman* at para. 42; *Khelawon* at para. 67);
- 2) independent corroborative evidence that “goes to the trustworthiness of the statement” (*Blackman* at para. 55; *Khelawon* at para. 67; *R. v. Couture*, [2007 SCC 28 \(CanLII\)](#) at para. 83);
- 3) timing of the statement relevant to the event, contemporaneity (*Khelawon* at para. 67);
- 4) the declarant’s mental capacity at the time of making the statement (*Khelawon* at para. 107);
- 5) solemnity of the occasion and whether the declarant’s statement was made “in circumstances that could arguably be akin to the taking of an oath where the importance of telling the truth and the consequences of making a false statement were properly emphasized” (*Couture* at para. 89; *Khelawon* at para. 86).

[35] Applied to this case, any evidence of what Mr. Gutierrez told the defendant, the plaintiff, and others, including Ms. Ewan, is hearsay and presumptively inadmissible. Thus, while such alleged statements meet the necessity requirement, I am also required to address and consider the reliability of such statements to determine whether the statements should be admitted for the truth of their contents. With this in mind, I have addressed the reliability of particular pieces of hearsay evidence in my analysis below.

[29] The factors identified by Voith J. related to the reliability of a purported statement of a deceased person. However, in my view they are also useful to keep in mind in considering the accuracy of and weight to give hearsay evidence admitted under [s. 5](#) of the [WVA](#).

[30] In my view the parties were too lax in their calling of evidence, calling hearsay evidence which was not necessary at all, such as a party calling a witness to give evidence as to what that witness learned from that very party. Since the parties were able to testify, I did not consider hearsay evidence in the nature of oath-helping to be of any assistance to the factual issues nor was it entitled to any weight, unless there was a suggestion of recent fabrication.

[31] Some hearsay evidence was admitted not for the truth of it, but as going to the state of mind of the witness. If, for example, one plaintiff was told by another witness that Victor had made a threat, this evidence could be admitted for the state of mind of the recipient, as it could explain in part the recipient's reluctance to engage with Victor.

[32] I have been very cautious about giving much weight to the evidence of the parties or of witnesses closely allied with the parties, such as family or friends, as to what the Testatrix told them about the reasons for her dispositions in the 2007 Will. This is because:

- a) Each of the parties was self-serving in their recollections as to what the Testatrix told them.
- b) The Testatrix may have had reasons to tell different things to her children, or their friends, or other family members, seeking to align with or against one or the other for any variety of possible reasons, including emotional reasons that had little to do with the truth. The Testatrix may also have been mistaken about her understanding of the facts.
- c) There is better evidence of the Testatrix's intentions when she wrote her 2007 Will than evidence of the people now making competing claims under it and their allies. The best evidence is the language of the 2007 Will and the evidence of the Testatrix's instructions to the lawyer who prepared the 2007 Will, Mr. Jussa, who testified at trial. This evidence is internally consistent and the solemnity of the occasion and independent and neutral role of the lawyer are circumstances which provide more objective indicators of reliability.

[33] That leads me to comment generally on credibility.

CREDIBILITY

[34] There are very different stories from the three children of the Testatrix as to their respective relationships with her and actions involving her, and as to the actions of their siblings. I do not see the need to further damage the already fractured relationships in this family by commenting at length on credibility and by making one side feel morally superior to the other.

[35] I had difficulty accepting everything said by any one of the three adult children. This is not to say that I found them to be deliberately misstating the facts.

[36] Rather, I found each of the personal parties' perspectives to be clouded by self-interest and by resentment of the other sibling or siblings opposite them in this case.

[37] Generally the evidence unfolded along the lines of each sibling claiming they had been a dutiful child to their mother, probably overstating the generosity of their actions towards her; and at the same time each sibling claiming that the sibling or siblings opposite in the case had not been so, again probably overstating the absence of good deeds and presence of bad deeds towards their mother by their opposite sibling or siblings.

[38] A family relationship cannot truly be said to be impartial or objective. These three siblings were understandably not impartial witnesses.

[39] Likewise, close relatives or friends of each of the three siblings were also not impartial witnesses. I found their evidence was also clouded by the perspective of and their feelings of loyalty to the sibling with whom they were aligned. There are intense emotions underlying a claim of this nature, often fuelling a sense of moral outrage and moral superiority on the part of those aligned with one side or the other. Truth can be a casualty of such sanctimoniousness.

[40] Some witnesses had several inconsistencies in their evidence or were obviously influenced by what they had been told by one of the parties in the case, such that their evidence was of little value. I will not comment on all of the evidence of these witnesses where I did not find the evidence to add materially to the rest of the body of evidence or to contribute to the issues I need to decide.

[41] There were many gaps in the evidence, leaving me with many unanswered questions. I do not know whether this was because some of the evidence was untrue, and therefore the witnesses could not supply necessary details; or was because the parties were never fully informed of the financial affairs of Dukh or the Testatrix; or for some other reason such as the passage of time.

[42] I am not required to believe all or nothing of what a witness says; rather, I can determine that some of what a witness says is in accord with the balance of probabilities, and some is not. There were so many inconsistencies in the evidence that it is impossible to wholly prefer one party's evidence over the other.

[43] What I have attempted to do is to consider the whole of the body of evidence, and to determine what has been proven on a balance of probabilities as more likely than not.

ISSUES

[44] I considered the following factual issues as necessary to determine:

- a) What is the size of the estate;
- b) What were the Testatrix's reasons for disinheriting Rani and Ranjan, and were those reasons valid;
- c) Were there other reasons for the Testatrix to disinherit Rani and Ranjan;
- d) What were the Testatrix's reasons for giving the bulk of her estate to Victor, and were those reasons valid; and
- e) What are the circumstances of each of the three siblings, particularly relative to each other?

[45] The answers to the above findings lead to the following broader issues:

- a) Did the Testatrix make adequate provision in her 2007 Will for Rani and Ranjan;
- b) If not, what would be an adequate, just and equitable provision;
 - i. In this respect, how do the Fijian Properties factor in?
- c) In this respect, how do the circumstances of the children factor in?

FACTS

Size of the Estate

[46] In considering the size of the estate, I will round figures to the nearest \$100.

[47] A trust company, the defendant Solus Trust, was assigned administrator of the estate of the Testatrix by court order on March 7, 2014 (the “Administrator”). Other than appearing briefly, the Administrator has not taken any role in this proceeding. When I refer to “the defendant” I am referring to Victor only.

[48] The estate holds three pieces of real property: the Malkin Property, a residential property in Vancouver which houses a duplex and was the family home of the Testatrix, and the two Fijian Properties.

The Malkin Property

[49] The 2016 assessment for property tax purposes values the property as \$1,363,000 as at July 1, 2015, of which \$1,245,000 is the land value and \$118,000 is the value assigned to the duplex.

[50] An appraisal of the Malkin Property was obtained as of December 2013. No value was attributed to the dwelling because of its poor condition, due to it being used as a grow-operation and requiring substantial repair. It was considered uninhabitable. The Malkin Property cannot be insured and does not have BC Hydro service, due to the grow-operation. The building’s value is likely nil.

[51] It was assumed by the appraiser that the most economic and best use of the property would be to demolish the dwelling and redevelop the site. The lot is a double lot in the Strathcona area of Vancouver, suitable for building four residential units. The appraiser estimated the market value of the Malkin Property as of December 13, 2013 to be \$1,000,000.

[52] At the time of the appraisal, the 2013 property assessment valued the property at \$1,094,000, with land assessed at \$982,000 and the dwelling assessed at \$112,000.

[53] The appraiser noted that the Malkin Property had been listed for a couple of months in October 2012 with an asking price of \$1,100,000 but did not sell. That was when the Testatrix requested Ranjan list the property, approximately one month before she passed away.

[54] The appraiser was not called as a witness at trial but the report was put into evidence.

[55] On the evidence available I conclude that the Malkin Property is worth at least \$1 million. It may be worth as much as \$200,000 or \$300,000 more than this based on a more recent property assessment, but I cannot determine this on the evidence.

Fijian Properties

[56] As for the two properties in Fiji, they are of undetermined value. The evidence is that there are two significant issues that could affect their value, including squatters on one of the properties, and an encroachment by the Fijian Electricity Authority.

[57] The Fijian Properties were assessed for property tax purposes as worth \$100,400 and \$49,700 respectively (converted to Canadian dollars as of January 29, 2016).

[58] Appraisals have been obtained of the Fijian Properties as of December 2014. These appraisals estimate the values as 1,300,000 FJD and 2,100,000 FJD. At conversion rates applicable on January 29, 2016, this equates roughly to \$849,500 and \$1,372,200 respectively. These appraisals make a number of assumptions, including a stable government, and do not take into account the issue of squatters or encroachment by the Fijian Electricity Authority.

[59] The parties initially consented to the Administrator selling the properties but so far this has not happened. Attempts to sell the Fijian Properties have been impacted by the latter two issues.

[60] The Fijian Properties are therefore of unknown value.

[61] I note that initially the parties presented their cases and submissions on the basis that this Court has jurisdiction to make orders regarding division of the residue of the estate without consideration of the fact that the assets include foreign property. After the trial ended, I wrote a memorandum to the parties asking them to address conflict of laws issues.

[62] Victor then changed his position. His then counsel, Mr. Farber, wrote to the Administrator by letter dated April 19, 2016 stating that the bequest of the Fijian Properties was a specific bequest to Victor and:

He does not consent to the administrator selling those lands, and hereby advises the administrator that they are not to be sold without his express written consent, which he has not given.

[63] It appears that Mr. Farber had forgotten that he had written to the Administrator by letter dated October 3, 2014, advising on behalf of his client that he did not object to the Administrator selling the estate's two pieces of real property in Fiji.

[64] In any event, the Fijian Properties were not sold in the two years that the Administrator had all parties' consent to do so, due to the various problems affecting the properties. Victor has now revoked his previous consent. He also has new counsel due to the retirement of his previous counsel. Victor is now taking the position that this Court has no jurisdiction over the Fijian Properties or to consider them as part of the estate if varying the 2007 Will. I will return to this issue.

Other Assets

[65] As well as real estate, the estate holds approximately \$765,000 in a BMO investment account and \$10,000 cash.

[66] The contents of a bank safety deposit box are not included in the Administrator's estimate of value of the estate, including gold jewellery, gold coins, and a gold bar. The safety deposit box was held jointly in the name of the Testatrix and Victor, and so the contents have been treated by the Administrator as having passed to Victor.

Liabilities

[67] There are a few liabilities of the Testatrix's estate, such as contingent taxes if the real estate is sold, and future legal and accounting expenses and property taxes. A BC Hydro liability of approximately \$11,600 on the Malkin Property was paid by the Administrator. This expense was due to the 2012 Grow-Op.

Net Value of Estate

[68] Rounding the numbers, I conclude that the estate value is therefore at a minimum approximately \$1.75 million; however it could be \$200,000 or \$300,000 higher depending on the value of the Malkin Property. This total does not take into account the value of the Fijian Properties.

Source of Estate

[69] According to Rani and Ranjan, the source of the real estate and financial assets owned by the Testatrix at the time of her death was Dukh, her late husband. Before he died, all of his remaining assets were put in the Testatrix's name.

[70] None of the children inherited from their father upon his death.

[71] Rani and Ranjan testified that they had an expectation that they would inherit assets upon their mother's death.

[72] Victor testified that his mother ran a boarding house for a time when he was a child. It seems he may have been asserting that this was the source of her assets. However, he also claimed to know little about her finances other than he thought she was knowledgeable about financial matters. Victor's own knowledge about financial matters was presented as negligible.

Reasons for Disinheritance: Testatrix's Lawyer

[73] Mr. Jussa is a lawyer who was called to the Bar in Tanzania in 1968, later moved to British Columbia, and was called to the BC Bar in 1978. He has been practicing in BC since then. He speaks both English and Hindi.

[74] Mr. Jussa is the lawyer who prepared the 2007 Will for the Testatrix. He did not know who brought her to his office, but Victor testified that he took her there. Mr. Jussa met with her alone. He conversed with the Testatrix in both English and Hindi and felt she was capable of giving him instructions. He met with her once to take instructions, and then again when she executed the will.

[75] According to Mr. Jussa, the Testatrix told him that she gave the other children lots of funds and money, and they had enough, and she had not given anything to Victor, and so wanted to give her estate to him. She also indicated that the other children were well-established, and that Victor was not. She did not otherwise give specifics about the other children or suggest that they had been stealing from her or that they were estranged.

[76] Mr. Jussa cautioned her about the *WVA* and the fact that her disinherited children might wish to challenge the will. The Testatrix had apparently had already received similar advice that if she left the bulk of her estate to one child, the other children might seek to challenge the will, as she brought notes to this effect to her first meeting with Mr. Jussa.

[77] It is important to note that even after receiving this advice, the Testatrix told Mr. Jussa that her reason for giving everything to Victor was that she had not given much to him and she had already given enough to the other children who were very well-placed.

[78] This is strong evidence that in the Testatrix's mind there were no other reasons for disinheriting Ranjan and Rani.

[79] Mr. Jussa made a handwritten will consistent with the Testatrix's instructions at their first meeting on April 17, 2007. He then had a typed document prepared to much the same effect, which the Testatrix came and signed on May 9, 2007. This is the will contested in this action.

[80] Later, in September 2012, the Testatrix was brought to a meeting with Mr. Jussa again, and gave him instructions for a new will. He thought she was brought by her grandson, Raj Sharma (son of Ranjan, who had been associating with Victor). Mr. Jussa understood that the main reason for her coming in was that her executor under her old will had passed away and she wanted to change executors.

[81] It was Mr. Jussa's evidence that there were some slight changes in specific small charitable bequests in the proposed new will and in the named executor, and that the Testatrix gave directions regarding the majority of the estate, with 90% going to Victor and 10% to Raj. However the reasons for disinheriting Ranjan and Rani were said to be the same as the earlier 2007 Will. Also, the Testatrix gave instructions for preparation of a power of attorney in favour of Raj.

[82] Mr. Jussa's evidence was that he subsequently learned that the Testatrix was at a care facility, known as Suncreek. He took a draft will and power of attorney to the Suncreek facility, meeting with Raj outside the facility. When Mr. Jussa met with the Testatrix, she told him that she had been instructed by her son Ranjan not to sign anything that Mr. Jussa brought to her, because Mr. Jussa would ask for donations. Mr. Jussa had made a request for donations in 2007, when the Testatrix gave him \$1,000 towards a cause he supports.

[83] Mr. Jussa's documents prepared in 2012 were not signed by the Testatrix.

[84] Raj did not testify at trial.

[85] There is insufficient evidence available to determine the Testatrix's intentions in 2012.

[86] Regardless, Mr. Jussa's evidence as to the Testatrix's intentions in 2007 is consistent with what was written in the 2007 Will.

Reasons for Disinheritance of Rani

[87] I turn then to the stated reasons in the 2007 Will for disinheriting Rani and Ranjan, and making the large bequest to Victor. Did Rani and Ranjan already receive gifts of "plenty of monies and other things" from the Testatrix, during her lifetime; and did Victor not receive "much monies or other things" from her during her lifetime?

Gifts to Rani From Her Mother

[88] Rani testified that her mother was extremely frugal. She testified that she received no gifts from her mother during her lifetime.

[89] Logically consistent with this evidence is the fact that in two earlier wills, the Testatrix gave major bequests to Rani. This would seem to indicate that at the time of those earlier wills, the Testatrix had not previously given significant gifts to Rani.

[90] In the 1996 Will, the Testatrix provided for gifts of \$1,000 to Ranjan and \$500 to Bill with the residual being divided 10% to Victor and 90% to Rani.

[91] The Testatrix's husband Dukh passed away in January 2004. Before he passed away he made arrangements to have his assets transferred in advance to the Testatrix and so there were no assets passing under a will on his death to her or their children.

[92] After Dukh passed away, the Testatrix made a new will, dated March 2, 2004, the 2004 Will. It provided for gifts of \$1,000 to Ranjan and \$500 to Bill; and gifts of all the real estate (the Malkin Property and Fijian Properties) in joint tenancy to Victor and Rani, with the residual of the estate being divided 10% to Victor and 90% to Rani.

[93] The Testatrix must have been advised to set out her intentions as to why she divided her estate unequally between her children, so as to avoid claims under the *WVA*, because she signed a letter to the court dated March 2, 2004 setting out her intentions. In that letter she stated that Rani "...has

been providing emotional support, love and affection to me”.

[94] The above statement of intention regarding Rani is in direct contrast to what the Testatrix said in her March 2, 2004 letter regarding Bill and Ranjan, namely:

3. My son, Ranjan Sharma, has received more than his entitlement, from his father’s estate, during my lifetime.
4. My son, Chit Ranjan Sharma, has been unkind to me for the last thirty years. He has not spoken to me for the last thirty years.

[95] Leaving aside the truthfulness or not of the above two assertions, when contrasted to what the same letter said about Rani, at the very least they support the inference that in March 2004 the Testatrix did not think that Rani had already received assets through Dukh’s estate; and did not think that Rani had been unkind to her.

[96] What happened then between March 2004 until the Testatrix’s death in 2012, to make the Testatrix conclude that Rani had already received plenty of monies and other things from her?

[97] There is no credible evidence to contradict Rani’s evidence that her mother did not give her any gifts in that time period or before. There were no documents indicating gifts and no witnesses to any gifts being given.

[98] There was some very thin hearsay evidence of gifts to Rani.

[99] The younger sister of the Testatrix, Mrs. Chopra, was called as a witness for Victor.

[100] Mrs. Chopra testified that her sister told her that she had given \$300,000 to Rani to use to give money to Victor, little by little, and instead of giving that money to Victor, Rani bought a second property in Toronto. Mrs. Chopra’s husband, Mr. Chopra, testified to much the same effect.

[101] I do not accept this evidence as reliable for the truth of it for a number of reasons.

[102] First, Mrs. Chopra’s evidence showed that she has a strong bias in favour of Victor and against Rani and Ranjan.

[103] As an example, Mrs. Chopra testified that she talked to the Testatrix on the phone when she was living at Mr. Prasad’s following the declaration of the Malkin Property as uninhabitable. She admitted that had Ranjan or Rani asked her if she knew where the Testatrix was, she might not have given them the phone number.

[104] As another example, Mrs. Chopra gave exaggerated evidence that the Malkin Property was “beautiful” the last time she visited it before the Testatrix died, which was in March 2012. She also gave exaggerated evidence that the Testatrix was “very healthy” at the time. This evidence was belied by other more credible evidence, including evidence that the home was run-down and condemned soon after; and hospital records of the many visits that the Testatrix made to the hospital by ambulance around that time.

[105] Second, Mrs. Chopra said that her sister told her about this \$300,000 gift to Rani before Dukh died. This was therefore before the March 2004 letter written by the Testatrix in support of her 2004 Will. It is not credible that the Testatrix had already given Rani \$300,000, wanted her to take care of Victor, and had been disappointed by Rani’s use of the money by that time. If the Testatrix was angry with Rani before the execution of the 2004 Will, it seems unlikely that she would have given

Rani and Victor joint tenancy in the real estate properties, and given Rani 90% of the residue of the estate.

[106] Indeed, in addition to the large bequests and the statement regarding Rani's emotional support, the 2004 Will makes Rani the executrix of the Testatrix's estate, with Rani's daughter, Ms. Nayar, the alternate executrix. All of this is inconsistent with the notion that Rani had earlier received then misused a large gift from her mother.

[107] Mr. Chopra testified in the trial some days after Mrs. Chopra. He gave evidence that also suggested that Rani must have received money from her mother because she was able to buy a second house in Ontario, arguing in his evidence "where did she get the money from".

[108] Rani testified that she owns two residential properties in Toronto.

[109] One property is her home, and her father gave her \$50,000 toward the purchase in 1991. The purchase price was \$251,000. I will come back to the \$50,000 shortly.

[110] The second property was purchased in approximately 1998. Rani uses this as a rental property. Rani's evidence was that she used her savings and a line of credit to purchase this property, and it remains encumbered.

[111] It is true that Rani's evidence did not explain in any detail the source of her funds to purchase the properties she owns in Toronto. But this was so many years ago that she may no longer have records and so I am unable to draw the inference from this that it must have been purchased with funds from her mother.

[112] The fact is that Rani owned the two Toronto properties well before her father died and her mother drafted her 2004 Will. Clearly it was not thought that she had received an unfair share of gifts then.

[113] I therefore find the evidence of Mr. and Mrs. Chopra to the effect that Rani received gifts from her mother in the amount of \$300,000 to be unreliable.

[114] I prefer Rani's evidence that she did not receive gifts from her mother.

Other Possible Reasons for Disinheriting Rani

[115] Victor suggests there were other reasons for the Testatrix to disinherit Rani, namely, that Rani had received money from Dukh during his lifetime; that Rani stole things from her mother; and that Rani was estranged from her mother.

[116] I find these theories as to the Testatrix's reasons for disinheriting Rani unsupportable on the evidence.

Prior Gifts to Rani

[117] I will first consider whether Rani received gifts from Dukh that could have been a reason for the Testatrix's disinheritance of her.

[118] As mentioned above, Rani testified that she received from Dukh approximately \$50,000 towards her Toronto home when she purchased it in 1991.

[119] It appeared in cross-examination that Rani did not understand the difference between an offer

to purchase and a deed registered in the land title office. As I interpret her evidence, she made the offer to purchase in her own name, but then the deed was registered in her and her father's names jointly. She said this was because she was going through a divorce at the time.

[120] Rani testified that when she first began working in Vancouver, she gave her regular paycheque to her father to invest. He was known as a good investor, and she simply entrusted him with the money. She did this for approximately 10 years, beginning in 1975, until she moved from Vancouver to Toronto in 1985. She could not estimate how much she gave him to invest. She never asked her father to account for it.

[121] Rani said she got the money back when she purchased her home in 1991. This was not adequately explored or explained but the sense of the evidence was that she considered the \$50,000 from her father toward the purchase of her Toronto home to be the return on her investment given to him over time.

[122] The defendant suggests that Rani received other monies from her father.

[123] Certain documents were put to Rani in cross-examination, including statements from a Wood Gundy investment account in her name in 1991, with the address for the account being the Malkin Property. She was not living at the Malkin Property at that time, but in Toronto. Having the statements sent to the Malkin Property is consistent with Rani's evidence that her father was making these investments for her. Also consistent is handwriting on the statements which she identified as her father's (no witness contradicted this), and which appeared to be evidence of her father doing sums regarding the investments.

[124] These statements appeared to show investments worth \$148,000 in October 1990, and out of this a treasury bill came due in January 1991 worth \$85,000. In February 1991 a Wood Gundy cheque appeared to be issued to Rani in the amount of \$2,414.11. Rani testified that these were investments that her father made with money she had given him. There is handwriting on the statements that she identified as his.

[125] At one point the statements for the same account number were in the name of Rani and her daughter, Ms. Nayar, as evidenced by the October and November 1990 statements. However the January 1991 account statement appears to be in Rani's name alone. In cross-examination it was not clear that the questioner or witness knew about this being the same account or why there were changes.

[126] Asked if she received back the money that her father invested for her, Rani testified that she did when she purchased her home in 1991. This was not adequately explained. Was this the \$50,000 only, or was more given to her?

[127] Rani was also taken in cross-examination to a Nesbitt Thomson "statement of income" in 1991, identifying \$8,100 in income from various investments worth over \$500,000 which appeared to be in her name. Again the statement was addressed to the Malkin Property. Rani testified to the effect that she did not know about it because her father invested money for her. There is no evidence that she received these investments from her father.

[128] The second property owned by Rani, also in Toronto, is an investment which she uses as a rental property. Rani testified that she used her savings and a line of credit to purchase it in 1998.

[129] Rani testified that she used to invite her parents to stay with her in her home in Toronto, which they regularly did. Her father would stay longer, sometimes for several months, and had his

own room in Rani's home where he kept personal belongings, old photos, and papers.

[130] As for gifts, Rani testified that her father also gave her approximately \$10,000 once towards the purchase of a vehicle; and sometimes he gave her gold jewellery, the total value of which she would estimate at \$5,000.

[131] She said that her father distinguished gifts from him as gifts from him alone, and not from him and the Testatrix as a couple.

[132] While the evidence has gaps in it, I find that on the evidence, it is more likely than not that Rani received only approximately \$50,000 from her father, which she considered a return of investment money she had previously given him, plus approximately \$15,000 worth of gifts. These are not significant in the context of the value of the Testatrix's estate.

[133] It is important to emphasize that if Rani received gifts from Dukh during his lifetime that were considered to be significant, it is more than likely that the Testatrix knew this when she made her 2004 Will (Dukh no longer being alive), and she said nothing to that effect in that will, despite largely disinheriting Ranjan for that reason.

[134] I find that gifts made to Rani by Dukh were not a valid or rational reason for the Testatrix to disinherit her.

Theft

[135] Another suggestion raised by some evidence as a possible reason for Rani's disinheritance in the 2007 Will is that Rani had stolen from her mother.

[136] The idea that Rani stole from her mother, to her mother's knowledge, would have to be based on facts that occurred sometime between the 2004 Will and the Testatrix's final will in 2007, to logically justify the change in the 2007 Will.

[137] There are two rumours of theft in the evidence.

[138] The first rumour is that Rani went into a safety deposit box that was registered in her, her mother's, and Victor's names and took all the gold. This rumour was stated by Mr. and Mrs. Chopra. They say the Testatrix told them this. Mr. Prasad also said that the Testatrix told him this.

[139] Rani denies that she took items from her mother's safety deposit box.

[140] Safety deposit boxes have ledgers to indicate who has signed in or out. There is no documentary evidence to suggest that Rani went on her own to a safety deposit box belonging in part to her mother during that time period.

[141] Mrs. Chopra did not put a date on this alleged event. Mr. Chopra said it happened in 2007. Mr. Chopra said that the Testatrix told him that she and Rani went to the safety deposit box together and that Rani took a lot of gold out of it. This is not credible.

[142] By all of the Testatrix's children's accounts, the Testatrix was a very strong-willed and independent person, some would say even stubborn. I find it very difficult to accept on this thin evidence that she would have simply allowed Rani to take from her a number of items from the safety deposit box without complaint or action. The fact that she did not mention it when she met with the lawyer who prepared the 2007 Will is inconsistent with the suggestion that this alleged theft happened.

[143] I accept Rani's evidence that this alleged taking of items from a safety deposit box did not happen. Either the Testatrix made up this story for some reason (it could be emotional manipulation or the Testatrix was confused and mistaken or imagined it) or Mr. and Mrs. Chopra made up the story to help Victor for whom they have strong affection and Mr. Prasad heard it from Victor and repeated it to help his friend.

[144] The second rumour is that Rani conspired with the Testatrix's investment advisor to take a sum of money from the Testatrix's account.

[145] The investment advisor, Mr. Brough, worked at HSBC or HSBC Securities. As Rani understood it, he had opened an investment account for the Testatrix, but the Testatrix wanted the investment liquidated and returned to her. As Rani appeared to understand it, when the steps were taken to cash out the investment, the return was somewhat smaller than had been invested.

[146] Because the Testatrix did not receive back all the money she had invested with HSBC, the Testatrix was convinced that the HSBC investment advisor had stolen money from her. Rani tried to explain what she thought to be a misunderstanding on her mother's part. The Testatrix became convinced that the investment advisor and Rani together had stolen money from her. Rani denied this allegation but her mother had difficulty accepting her denial.

[147] The suspicion about HSBC's investment advisor taking money arose in 2006. A letter from HSBC to the Testatrix dated September 13, 2006 was introduced into evidence. HSBC denied any wrongdoing on the part of Mr. Brough or HSBC Securities. Internal email messages of BMO also in September 2006 indicate that BMO told the Testatrix there was nothing they could do about it.

[148] Rani's explanation of this misunderstanding was uncontradicted on the evidence, and I accept it.

[149] I find that Rani did not steal from her mother.

Estrangement between Rani and the Testatrix

[150] There was also a suggestion in the submissions and evidence called by the defendant that Rani was not sufficiently close to her mother, perhaps even estranged from her in the Testatrix's later years.

[151] Rani disputes this.

[152] Rani moved to Toronto from Vancouver in 1985. Despite the long distance, there was no evidence that Rani was ever called upon to help the Testatrix and that she refused this request. There is abundant evidence that on many occasions she did kind and helpful things for the Testatrix.

[153] Rani's evidence is that after her move she spoke to her parents often on the telephone. Her parents visited her in Toronto approximately two times a year for about five or six years. Many times they would visit her separately. Her father would often stay for extended periods with her in Toronto, between two to six months.

[154] Rani also took her parents on trips from Toronto. One time they went to the "upper states" of the United States and another time she took them to Prince Edward Island.

[155] Rani regularly sent gifts from Toronto to her parents in Vancouver.

[156] Rani arranged for a friend in Vancouver, Mr. Bhullar, to drop off groceries at the Malkin

Property for her parents.

[157] Mr. Bhullar testified that at Rani's request, he took groceries to her parents at the Malkin Property about 30 or 40 times, in the years from 2000 to 2007. The latter three years would have been deliveries to the Testatrix alone. Rani would pay for the groceries. Mr. Bhullar did not say why he stopped delivering groceries other than to say that he stopped when he moved from his residence in New Westminster in 2007.

[158] I accept Mr. Bhullar's evidence in this regard. Unlike many other witnesses, he did not appear to try to embellish.

[159] Rani also from time to time prepared and packaged meals and arranged to have them delivered to her parents at the Malkin Property. They would be delivered the next day by a person they knew who was flying from Toronto to Vancouver, or by a courier.

[160] Rani once sent a walker to her mother through a friend that was travelling by bus from Toronto to Vancouver.

[161] Rani treated both her parents well. She arranged for and paid for her father's teeth to be fixed and to obtain dentures for him; she also arranged for her father to go on short seniors' trips with other seniors when he was staying with her in Toronto.

[162] Rani visited her parents from time to time in Vancouver.

[163] Rani testified as to loving Victor and trying to assist him with money on occasion, but also fearing him. This fear was due to many incidents, including one involving Dukh in approximately 1996 or 1997. Dukh suffered considerable bruising and was taken to hospital. The police were called and took photographs which Dukh gave to Rani. Dukh told Rani that Victor had assaulted him. Rani believed this.

[164] Rani also believed that when Victor faced serious criminal charges in 1978, Victor asked their brother Bill to provide a false alibi; that Bill refused; and Victor thereafter was threatening towards Bill and caused that relationship to become estranged.

[165] After her father died in January 2004, the evidence is that Rani became more and more wary of Victor and feared that he could be unpredictably violent.

[166] Rani's daughter, Ms. Nayar, testified by video deposition taken before trial. Her evidence corroborated Rani's evidence regarding Rani's relationship with her parents and Rani's fear of Victor.

[167] Ms. Nayar was 14 years old when she moved to Toronto from Vancouver in 1985. She said her mother continued to have regular phone contact with her grandmother after that time.

[168] Ms. Nayar said the Testatrix liked big flowery hair clips and bracelets and Rani used to send these to her. Ms. Nayar testified that her mother would also send to the Testatrix a style of dress that the Testatrix favoured, sometimes involving Ms. Nayar to help shop for them.

[169] Ms. Nayar recalled her mother preparing and packaging food which she would send to her parents, either via courier, or via family or friends flying to Vancouver. Ms. Nayar recalled this was a common thing for her mother to do.

[170] Ms. Nayar came across as a credible witness. While she cannot be considered independent,

given that she is the daughter of Rani, she seemed careful and confined in her evidence. She did not appear as though she wished to gratuitously cast aspersions on others or to overstate her mother's relationship with the Testatrix.

[171] In addition to giving evidence of her mother's actions in Toronto, Ms. Nayar testified to several visits she made to Vancouver over the years. For the first couple of visits, in approximately 1987 and 1990 she came with her mother and they stayed at the Malkin Property. Victor was not living at the property then.

[172] Ms. Nayar testified that she came back to the Malkin Property in 2003, when Dukh was ill and in the hospital. Victor was living in the downstairs portion of the house and she stayed with him. On approximately the second day of her visit, Victor got aggressive with her when she refused to take part in smoking marihuana. He also pulled out guns that were hidden underneath mattresses, pointed a gun at her, and threatened to kill her. She made a telephone call to her mother on her cell phone and Rani tried to calm the situation down. Ms. Nayar then made the decision to go back to Toronto.

[173] Ms. Nayar testified that she did not visit her grandmother on that visit. She said that at the beginning Victor told her not to because the Testatrix was a little bit crazy. Ms. Nayar planned to visit her because she had planned a two-week trip, but did not do so before the incident with Victor, and after the incident she just wanted to return to Toronto.

[174] Ms. Nayar came back to Vancouver from time to time after this, and did not visit her grandmother because she knew Victor was staying at the Malkin Property. She was frightened of him and did not want to expose her own husband or children to him.

[175] Victor denied threatening Ms. Nayar or other relatives, including Rani and Ranjan, but this denial was accompanied by his testimony to the effect that if he had threatened his relatives they would have phoned the police immediately. I did not find this logic compelling. There could be good reasons why Victor's family members would not want to report him to the police, including that they could not be assured he would not retaliate against them. It is also plausible that they may have been concerned that the consequences to Victor if the police got involved would be disproportionately grave in light of Victor's criminal past.

[176] Victor added the assertion that he never brought his criminal activities to his family or anywhere around them. Yet Victor did bring his criminal activities to his family — he had guns and ammunition at the Malkin Property and twice had marihuana grow-operations there.

[177] Victor called evidence from friends and some relatives to suggest he was a loveable person. I have no doubt that Victor can be a loveable person to people if he chooses to do so. That does not make him so to everyone and does not refute the fact that Ms. Nayar and Rani were afraid of him.

[178] It was realistic and objectively reasonable for Ms. Nayar and Rani to fear that Victor could be irrational. His criminal history, which I will get to, showed a lack of self-control with very negative consequences for others.

[179] When Dukh Sharma died in January 2004, Rani came for the service. She felt that the condition of the interior of the Malkin Property was extremely dirty. She decided to take a leave from work to stay and help her mother, returning to Toronto in March 2004. There is evidence corroborating the fact that Rani took leave from her job from January to March 2004, and I accept her evidence that she did so to assist the Testatrix after Dukh's death.

[180] During this period in 2004, both Rani and Ranjan helped clean and repair the interior of the Malkin Property, with Ranjan paying for any costs. Rani recalled that food would be prepared at Ranjan's house and brought to the Malkin Property. Rani testified that Ranjan would also bring groceries over. Rani testified that Victor did not help in these efforts.

[181] After Rani left to return to Toronto in March 2004, she continued to speak often to her mother.

[182] Rani also assisted in making appointments with an eye doctor for the Testatrix to have cataract surgery. One appointment was in early March 2004, and the second one in July 2004. Since Rani was back in Toronto by the time of the second appointment, she flew to Vancouver to take her mother to it.

[183] In 2004, following Dukh Sharma's death, Rani felt that her mother would be better off in some kind of assisted living situation. Rani made some inquiries and obtained information about an assisted living program that she passed on to the Testatrix in May 2004. The Testatrix did not want to pursue this. Rani reports that the Testatrix told her that Victor did not want her to move.

[184] Soon after, in early 2004, the Testatrix came to believe that Ranjan had wrongly taken money from her out of a bank account in both their names; and that because Dukh had left no estate, this had something to do with Ranjan and Ranjan must have taken unaccounted-for money from Dukh.

[185] I will shortly deal with the issue of whether Ranjan took money wrongfully. Suffice it to say that, at least initially, the Testatrix enlisted Rani to help her deal with the Testatrix's suspicions against Ranjan. It would be fair to interpret the evidence as indicating that Rani was initially swayed by her mother's strongly held opinions; but later came to believe that her mother was wrong about this and a number of other allegations she made against Ranjan.

[186] In aid of the Testatrix's wish to pursue her allegations against Ranjan, Rani helped translate documents for her and helped take her to a lawyer, who started a claim on the Testatrix's behalf against Ranjan. Ms. Nayar overheard some of these calls. Again, more on this later but for now the point is that in 2004, Rani was assisting her mother and very much in her "good books".

[187] The Testatrix did hire a lawyer to sue Ranjan over the money she alleged Ranjan had wrongly taken from her. Rani sometimes took her to the appointments with the lawyer, Mr. Fowle. The lawsuit did not progress past the pleadings stage.

[188] Rani's relationship with her mother continued in the same supportive role during 2005.

[189] In 2006 a problem arose in the relationship between Rani and the Testatrix which related to the investments the Testatrix held with HSBC. She blamed Rani as conspiring with the investment advisor at HSBC to take money from her. As I have set out above, this belief was mistaken.

[190] Despite this, Rani did not end her relationship with her mother but the continuing relationship was no doubt negatively affected by the Testatrix's mistaken belief.

[191] Rani visited her mother in Vancouver in 2007. She also invited her mother to live with her in Toronto but her mother declined. According to Rani, the Testatrix told her she was afraid Victor might do something to her house or sell her possessions.

[192] The Testatrix was recorded in hospital records in January 2008 as having concerns about Victor and the violence surrounding grow-ops. This is consistent with the fact that police did shut

down a grow-op being run by Victor out of the Malkin Property in 2007. This is also somewhat consistent with Rani's evidence that when she invited her mother to move, her mother declined and told her she was afraid Victor might do something to her house or sell her possessions.

[193] At some point in 2006 or 2008, Rani arranged for a caretaker to come to the Malkin Property to assist her mother in meeting her daily personal hygiene and housekeeping needs. The worker quit after reporting to Rani that Victor had driven her home and told her not to come back, stating that he was "a lifer". This evidence is not deserving of any weight for the truth of it, but is entitled to some weight that it was said by the worker to Rani, and Rani believed it occurred, reinforcing her sense that Victor was threatening.

[194] In 2008, Rani came to believe that her mother was not answering her telephone calls.

[195] There are care workers' records dated 2010 and 2011 which suggest that the Testatrix was having mobility issues, having difficulty seeing the numbers to dial on her cordless phone, having difficulty hearing, and was on occasion not answering the door at times of appointments or answering calls. Ms. Finden, a banker who dealt with the Testatrix, also had experiences where she wondered if the Testatrix was becoming hard of hearing.

[196] Rani also tried calling Victor often, but he was not returning Rani's calls.

[197] Rani also understood that the Testatrix's lawyer, Mr. Fowle, was having difficulty communicating with the Testatrix in 2008.

[198] The essence of Rani's evidence in part is that she was worried, amongst other things, that the Testatrix was not thinking clearly because of the way the Testatrix was accusing others of taking things from her. She was also worried about Victor having a negative influence on her mother.

[199] Rani did not want to risk any direct confrontation with Victor by making a referral herself, and so asked Mr. Fowle to make a referral to the PGT to have the Testatrix assessed, which he did in March 2008. Apparently nothing came of this referral. By this time the Testatrix had arranged for a banker at BMO to manage her finances and pay her bills regularly.

[200] In October 2008, Rani returned to Vancouver to attend an uncle's funeral. She brought some gifts for her mother and visited her at the Malkin Property. Rani's impression was that the home was in very poor shape.

[201] Rani felt that Victor was unwelcoming towards her. At the funeral, he pushed her away when she went to hug him. Her mother was also very reserved. Victor took the Testatrix away with him after the funeral and did not bring her to the rest of the memorial gatherings.

[202] Rani continued her relationship with the Testatrix, calling her from time to time, although when she did reach her, the Testatrix was reserved on the telephone.

[203] In early 2009, Rani's first grandchild was born, and Rani sent photos to her mother. That year the Testatrix also called her and told her that she did not know where Victor was and that a girl was feeding his dog. Rani left messages on Victor's phone which he did not return. Rani's evidence is that eventually a woman called Rani on the telephone and told her that she was a friend of Victor's and that he was in jail but did not want the Testatrix to know. Rani respected this decision and so told her mother that Victor was away for a little bit but would be back soon.

[204] The timing of this does not accord with Victor's evidence that in the years from 2002 until his

arrest in 2012, the only sentence he received involving imprisonment was a 40-day sentence in 2006 for possession of a weapon.

[205] It does not appear anything significant happened in the relationship between Rani and the Testatrix in 2010.

[206] Rani's brother Bill passed away unexpectedly in April 2011. Rani spoke to her mother about it on the telephone and her mother was angry with her and denied it. Rani testified that her mother said Bill could not have died as he had only just brought groceries to the house the previous Sunday.

[207] While Rani came out to Vancouver for Bill's funeral, Victor and the Testatrix did not attend. Rani visited the Testatrix at the Malkin Property.

[208] In the summer of 2012, Rani learned that her mother had been taken to St. Paul's Hospital because a marihuana grow-operation was discovered at the Malkin Property in June and that the power to the property had been shut off and the home was in poor repair. Rani also learned that her mother had been referred by St. Paul's Hospital to the PGT for assessment. Rani had conversations and correspondence with Ms. Hill at the office of the PGT. Rani also spoke to a social worker at St. Paul's Hospital, Mr. Ferreira.

[209] Ms. Hill testified at trial as a witness called by the plaintiffs. She was not involved in the PGT's 2008 assessment of the Testatrix, but was involved in the investigation of the Testatrix's circumstances in the summer of 2012, after the referral from St. Paul's Hospital. Ms. Hill was aware that medical professionals at St. Paul's Hospital had raised concerns about the Testatrix's capability to manage her financial and legal affairs. The PGT was not asked to investigate the Testatrix's ability to provide consent to health care treatment.

[210] Ms. Hill explained that the PGT investigated and found out that the Testatrix had a bank manager at the BMO overseeing her account. There were preauthorized debits and credits coming out of the account which seemed appropriate. A caution was added to the account to ensure that the PGT was notified if something out of the ordinary happened. The PGT investigation stayed open but Ms. Hill did not make a decision that immediate action was required. The Testatrix passed away before the investigation was concluded.

[211] Ms. Hill gave evidence that Rani requested to be kept informed of the PGT investigation in August 2012, but shared with her a fear of Victor, asking that her name and her children's names be kept out of it because Victor had guns and had once threatened her daughter.

[212] This hearsay evidence is not admissible for the truth of it. However, it does serve to rebut any inference that Rani only recently fabricated the spectre of fear of Victor and of his owning guns after the death of the Testatrix and the discovery of the 2007 Will. The evidence does not reveal any motive Rani would have had in the summer of 2012 to fabricate a fear of Victor.

[213] Rani later learned that her mother was moved out of St. Paul's Hospital but was not told where. At this point there was some kind of dispute between Ranjan and Rani and they were not talking. Victor was taken into custody in late August 2012.

[214] Rani did not speak to her mother again before she passed away in November 2012.

[215] The defendant suggests that Rani was not sufficiently supportive of her mother, because she did not visit her more often in the years before her death. In my view Rani was supportive of the Testatrix throughout her life.

[216] In the later years, Rani had few options open to her other than what she did, which was to try to encourage the Testatrix to move into an assisted living facility and to try to encourage the office of the PGT to investigate her circumstances.

[217] It is entirely understandable that Rani would not want to spend much time visiting her mother at the Malkin Property, knowing Victor was willing to have guns in the Malkin Property and willing to have an operation growing marihuana there.

[218] I find that Rani's attempts to involve the PGT in 2008 were based on good faith concerns about her mother's welfare. Her actions in doing so were not based on self-interest. The same can be said about Rani's further communications with the PGT in 2012.

[219] This conduct in my view is consistent with Rani's evidence to the effect that she was worried about her mother and to put it mildly, lacked confidence in Victor's willingness or ability to take good care of the Testatrix. At the same time, Rani wanted to avoid any confrontation with Victor because of her fear of Victor's sometimes aggressive and unpredictable personality.

[220] I find that Rani was a loyal daughter who had tried to be supportive of and connected to the Testatrix over the years, despite Rani living in Toronto and her mother living in Vancouver. The frequency of Rani's contact with her mother had decreased in the years prior to her death, but the context of this also included: the Testatrix's false accusations of Rani having taken money from her; the Testatrix's failure to answer the phone and Victor's failure to return calls; and Victor's personality and criminal conduct of which understandably Rani felt wary.

[221] At no time did Rani sever the relationship nor did Rani every turn down a request for assistance from the Testatrix. Rather the Testatrix was strong-willed and insisted on remaining in the Malkin Property rather than moving out to more suitable assisted living arrangements.

[222] I conclude that Rani was not estranged from her mother nor did she abandon her relationship with her mother and so this could not be a valid reason for the Testatrix's disinheritance of her.

Conclusion Regarding Disinheritance of Rani

[223] Leaving aside the respective needs of the three adult children which I will address later, I conclude that the Testatrix did not have any reason to disinherit Rani when she wrote her 2007 Will, or afterwards.

[224] The stated reason in the 2007 Will was factually incorrect, as Rani had not received any gifts of substance from the Testatrix, nor was the reference to gifts a reference to anything Dukh had given Rani.

[225] Further, Rani did not engage in any kind of misconduct towards, was not estranged from, and did not abandon her mother.

Reasons for Disinheritance of Ranjan

Gifts to Ranjan From Parents

[226] I now turn to the reason given in the Testatrix's 2007 Will for disinheriting Ranjan, that she had already given him "plenty of monies and other things". By way of contrast, in a letter accompanying the 2004 Will, the Testatrix said that Ranjan had received more than his entitlement from Dukh. The defendant argues that gifts from Dukh have to be considered gifts from both the

Testatrix and Dukh since they were married, and so presumably, the defendant argues, the two wills expressed similar intentions.

[227] I do not accept the assumption that gifts from Dukh would necessarily be considered by the Testatrix to be gifts from her, as even the Testatrix made a distinction in her wills. Regardless, Ranjan disputes that he received gifts from his parents.

[228] Ranjan was born in 1946, and is now 70 years old. He is the oldest son of the Testatrix.

[229] Ranjan was a realtor for over 40 years, owning two real estate firms. The office of his business is located in a building owned by a company in which his wife, Asha Sharma, is the sole shareholder.

[230] Ranjan testified that Dukh did give him money from time to time during the start-up of Ranjan's business. Ranjan testified that the monies from his father were treated as loans, all of which Ranjan paid back. Asha gave evidence to the same effect.

[231] The evidence was that Dukh made his living as an investor, investing in the stock market and in bonds as well as in real estate.

[232] Ranjan would give his father money to invest on his behalf. Ranjan's money came from his real estate earnings. Ranjan said that this started in approximately 1976 and continued for approximately 30 years. I note that since Dukh died in 2004 it was probably less than 30 years.

[233] Asha testified that it was both her and Ranjan's money that Ranjan gave to Dukh to invest, and that this lasted until Dukh was sick or getting older, when he was in his 70s, which was also when Ranjan and Asha had children and less money to invest.

[234] Ranjan said that the funds he gave Dukh to invest were not transferred back to him by Dukh. Ranjan did not need the money because his business was doing well. Ranjan expected that the money Dukh was investing for him would be for Ranjan's retirement.

[235] Ranjan's evidence in direct was that when Dukh began transferring his assets into the Testatrix's name, which was in the late 1990s after Dukh began to suffer strokes, Ranjan asked him what would happen to the money he had given Dukh. Dukh said words to the effect that he had discussed it with the Testatrix and told her, you had better transfer \$100,000 to Ranjan, and I'll instruct Ranjan to transfer the Malkin Property into your name. Ranjan understood that the Testatrix agreed.

[236] Ranjan was the person, acting under Dukh's power of attorney, who signed the documents to ensure title to the Malkin Property was transferred from Dukh's name into the Testatrix's name in December 2002.

[237] Ranjan testified that he did not receive gifts from the Testatrix during her lifetime. The Testatrix was extremely frugal, reflected in the fact she did not give gifts and also did not spend money on herself.

[238] Asha confirmed that the Testatrix did not give gifts to Ranjan and Asha's children, who were the Testatrix's grandchildren, not even for birthdays or weddings, as she did not believe in gifts. Ms. Nayar, Rani's daughter, gave similar evidence.

[239] The Testatrix started a lawsuit against Ranjan in July 2004 in relation to \$108,000 that was in

a BMO bank account that was in their joint names, which she alleged he had taken and refused to reimburse her. I will address this in more detail below.

[240] Ranjan admitted taking the \$108,000 but suggested it was a return on money he had given his father Dukh to invest on his behalf.

[241] It was put to Ranjan in cross-examination that in his Statement of Defence filed in August 2004, in answer to the lawsuit against him by the Testatrix, Ranjan pleaded in partial answer that the Testatrix transferred the sum of \$100,000 to him “as a gift” for his own use absolutely.

[242] Ranjan did not satisfactorily explain this pleading. His only explanation was that the words in the pleading were not his words.

[243] I do note that the Statement of Defence was not a very well-crafted pleading. It fails to note that the funds in question had been part of a joint account for years, and that as a joint owner of that account, Ranjan was entitled to take the funds. This suggests some lack of diligence or sophistication in the preparation of the pleading.

[244] The notion that Dukh acted as an investor of money given to him by his adult employed children from their earnings is consistent with Rani’s evidence and with documents showing that there were investments in Rani’s name but with the address of the accounts being the Malkin Property.

[245] It is possible that the reason for Ranjan’s inconsistencies are similar to that of Rani, namely, that when it came to money in accounts in their names addressed to the Malkin Property, these were funds invested by their father on their behalf, and they never had a clear understanding from their father of what or where everything was but trusted him to do what was right.

[246] Thus despite some inconsistencies in the evidence, on a balance of probabilities, weighing all the evidence, I am not persuaded that the \$108,000 was a gift to Ranjan from the Testatrix or from Dukh, and I am of the view that it was likely Ranjan’s return on investment from money he had given his father over time.

Other Possible Reasons for Disinheriting Ranjan

Theft

[247] As referred to above, the Testatrix came to believe, sometime after her husband Dukh’s death in January 2004, that Ranjan had stolen money from her in the amount of approximately \$108,000 and had taken some large portion of Dukh’s assets before Dukh died.

[248] The Testatrix commenced a lawsuit in July 2004 against Ranjan, claiming:

- a) that in 2003 he “inveigled” her to permit him to invest the sum of \$108,880 of her money for a greater return than what it was then invested in at BMO, and that he had since refused to reimburse it to her;
- b) that he had approached her in 2003 to execute a number of documents, including one to transfer title of the Malkin Property to her; that at the same time she executed other documents; and that she was concerned they would be used against her;
- c) that Dukh was possessed of a very substantial net worth prior to his death, but following his death, she had been advised by Ranjan that he left no significant estate, and she believed that

Ranjan had used a general power of attorney to strip Dukh of his assets and aggrandize himself.

[249] Ranjan denied these allegations. The lawsuit went nowhere, not even to the discovery stage, and no one including the Administrator of the Testatrix's estate is now asserting that there is any merit to the lawsuit.

[250] When Dukh died, Ranjan and Rani were executors. Ranjan said that the only asset that Dukh left behind was a safety deposit box with \$100 in it in \$1 bills. They decided to simply give the \$100 to their mother. This evidence was uncontradicted.

[251] I find it likely that Dukh did not leave a good record of his dealings and investments, nor did he explain these things to his children or to his wife. For this reason Ranjan is also not able to paint a very clear picture about these matters in his evidence.

[252] I also find that it is likely that after Dukh's death the Testatrix was confused about her husband's dealings with his assets and with the investments he made on behalf of the adult children.

[253] The evidence indicates several possible sources for the Testatrix's confusion:

- a) Ranjan, like Rani, gave his father money to invest on his behalf over the course of Ranjan's working life. His father put some of this in a joint investment account at BMO in Ranjan and the Testatrix's name, with the account statements addressed to the Malkin Property. No one knows why he did things this way. Was it to give Dukh control over the account without having the Canada Revenue Agency ("CRA") attribute it to him or was it for some other reason? One can only speculate. However, the records produced at trial for this joint account include a statement as of June 30, 1998 which indicates that \$50,000 was invested in a money market fund and \$50,000 in a dividend fund in May 1998. By January 2003, the amount in this account had grown to approximately \$108,000. In January or February 2003 Ranjan decided to take the money out, which he was entitled to do because it was a joint account. By that time Dukh had suffered a number of strokes and had been hospitalized. It is possible that the Testatrix knew little or nothing about this account until after Dukh's death in January 2004, and when she did learn about it she then concluded wrongly that Ranjan had taken the money from her.
- b) Ranjan did have power of attorney for his father and was helping him deal with a number of things after his strokes, including transferring assets directly into the Testatrix's name. His father first started having strokes in 1997, the same year that the power of attorney was granted.
- c) One of Dukh's problems before his hospitalization in 2002 and eventual death in 2004, was a large liability he owed to the CRA, in the range of \$4 million. Documents introduced in evidence, including a letter from McCarthy Tétrault LLP to Ranjan dated August 2, 2000, suggest this liability continued to be owed as late as the year 2000 in relation to taxes for the years 1995-1998, and that Ranjan was helping Dukh deal with this liability and with the selling of real estate to satisfy it. Because of this tax liability, and the earlier transferring of assets to the Testatrix, Dukh did not have any assets at his death. The Testatrix likely did not understand this, perhaps because of a lack of sophistication or a personality which was naturally distrusting, or perhaps because of a lack of proper communication by Dukh and/or by Ranjan. This may have led to the Testatrix believing that some of Dukh's assets must have been taken by Ranjan.

[254] Ranjan denies stealing any money from the Testatrix or taking a portion of Dukh's assets before Dukh died. I did not entirely understand Ranjan's explanation of these allegations at trial and his direct evidence could have used more amplification. There were also some internal inconsistencies in his evidence regarding these events.

[255] Despite some gaps and inconsistencies in his evidence, there was no persuasive evidence to the contrary.

[256] The alleged theft by Ranjan of money was not given as a reason for disinheritance in the 2007 Will. Perhaps by 2007 the Testatrix doubted that this alleged misbehaviour occurred. She was not pressing her lawsuit against Ranjan, and had let it languish. But she may just not have had the energy to press the claim and could have remained steadfast in her belief. The evidence of some witnesses was that the Testatrix was very stubborn and fixed in the beliefs that she held.

[257] Regardless of the Testatrix's beliefs in this regard, on a balance of probabilities I am not persuaded that Ranjan took assets or money from either of his parents that he was not entitled to take as his own return on investment, and so this cannot be a valid reason for disinheritance.

Estrangement between Ranjan and the Testatrix

[258] The suggestion was raised by the defence that Ranjan was estranged from the Testatrix, or abandoned her, and was not as dutiful a son as he could have been.

[259] Ranjan disputed this suggestion.

[260] An understanding of Ranjan's personal circumstances is required to appreciate the relationship between him and his mother.

[261] Ranjan is diabetic. He started to have health issues in 1990. These issues progressed to the point where his left leg had to be amputated in December 2004. He was in the hospital for about four months before returning home for further rehabilitation. This was an extremely difficult time, as he had trouble with all his basic care needs. His wife bore the burden of caring for him and running the business.

[262] The Testatrix did not visit Ranjan during this period.

[263] Ranjan progressed to becoming more mobile towards the end of 2005. At the beginning of 2006 he went to the Malkin Property. He testified that Victor threatened him there and told him not to come back and that if he did, he would shoot him. Ranjan testified that he stopped going to the Malkin Property because he was afraid of Victor.

[264] In 2006 Ranjan had further health complications and his second leg required amputation. He spent between four to five months in the hospital trying to learn how to meet his daily care needs.

[265] Ranjan's leg amputations have affected his day-to-day life greatly. He suffers from pain and phantom pain, has blood pressure and cholesterol problems, and continues to have problems managing his diabetes. He is required to take two injections twice per day for diabetes in addition to taking approximately a dozen pills twice per day.

[266] Ranjan did drive by the Malkin Property a few times after he had more fully rehabilitated from his second surgery, perhaps in 2007 or 2008. He never went in, he says because he was afraid of Victor. He also saw pit bulls in the yard, barking in a way which made him frightened of them.

[267] Asha testified that around 2009, after Ranjan felt a little better, they drove to the Malkin Property. She says they did not go in because there was a gate with a padlock on it, and a dog or dogs in the yard that scared her.

[268] I pause to note that Victor described the two pit bulls which lived in his part of the Malkin Property as friendly dogs, and he called other witnesses to say they were lovely dogs. The plaintiffs in turn called an independent witness from the neighbourhood who testified how the dogs used to run to the fence and bark viciously at strangers as they walked by. The BMO banker who used to make annual visits to the Malkin Property experienced the same thing, and so would call ahead to Victor when she was coming so that the dogs were not in the yard.

[269] In my view there was too much time taken up in the evidence about the dogs. The concept that a dog may be seen by its owner and its owner's friends as friendly, and yet the same dog may scare strangers, is hardly novel. I do not expect many intelligent adults would willingly step into the residential yard of a strange unleashed pit bull, or any barking dog for that matter.

[270] Between the end of 2004 until June 2012, when the Testatrix was taken to St. Paul's Hospital following the police shut down of the 2012 Grow-Op, Ranjan had very little interaction if any with his mother.

[271] Yet Ranjan testified in warm, emotional terms about his relationship with his mother. He followed her instructions much of his life. This included breaking up with a woman his mother did not want him to marry, and agreeing to an arranged marriage (which has turned out well). He testified that prior to the end of 2004 when his left leg was amputated due to complications from diabetes, he helped her out in many ways, including bringing her groceries and medication; exterior maintenance of the Malkin Property; and paying the insurance and taxes on the Malkin Property.

[272] Ranjan's evidence was corroborated to some extent by Rani, by his wife Asha, and by a friend of Ranjan's, Mr. Sundar. These witnesses cannot be considered independent. Mr. Sundar had a close relationship with the Sharma family, and knew Ranjan's parents. He used to go on many weekend trips with Ranjan, and recalled witnessing Ranjan bringing groceries to his parents' home at the Malkin Property before they would leave for the weekend.

[273] Mr. Sundar's estimate of the timing of Ranjan bringing groceries was initially that this happened sometime up to the year 2000. He was coaxed in his direct evidence to extend this to the time before Ranjan's first amputation in 2004 or further, but the evidence was led so much and depended in part on what Ranjan told Mr. Sundar that I had no confidence in his evidence as to how long the grocery deliveries continued. Also, he embellished his evidence to add comments to the effect that Victor was controlling the Testatrix when he clearly did not have first-hand knowledge of this.

[274] When the Testatrix made her 2004 Will, she left only \$1,000 to Ranjan and \$500 to Bill. She set out in an accompanying letter her reasons: that Ranjan had received more than his entitlement from his father's estate during her lifetime; and that Bill had been unkind to her and not spoken to her for the last 30 years. While the plaintiffs dispute both of these allegations, the fact remains that the Testatrix did mention estrangement as the reason for disinheriting Bill, but not as a reason for disinheriting Ranjan. This is consistent with Ranjan's evidence that he had a good relationship with his mother up until sometime in 2004.

[275] It was in the summer of 2004 that the Testatrix started a lawsuit against Ranjan, claiming he had improperly taken money from her and from Dukh's estate.

[276] Ranjan suffered an amputation of his first leg in late 2004 and his second leg in 2006. It is understandable that suffering two amputations in a short time period was extremely difficult for Ranjan. He had to focus on his own health and was no longer physically able to do the things he used to do for the Testatrix. Further, his mother had incorrectly accused him of serious misdeeds, which would have made it very difficult to reach out to her, especially when his own health was precarious.

[277] The Testatrix also lived in the upper half of the Malkin Property duplex, making it difficult for Ranjan to visit post-amputations.

[278] Ranjan knew that Victor lived in the bottom half of the Malkin Property duplex. He knew of Victor's criminal record. He witnessed an incident sometime in the 1980s where Victor hit their brother Bill when all the siblings were together for dinner at Ranjan's house; Ranjan told Victor to leave and Victor threatened to blow up the house and shoot everybody. Asha had a similar recollection.

[279] Ranjan believed, as did Rani, from what Bill told them, that Victor had once asked Bill to provide him with a false alibi in relation to the attempted murder offence committed by Victor; that Bill had refused; and that for this reason Victor did not like Bill. According to Ranjan's evidence, Bill told Ranjan that Victor had threatened to shoot Bill if he came to the Malkin Property. I accept Ranjan's evidence as to what Bill told him, not for the truth of it but as affecting Ranjan's state of mind.

[280] Ranjan believed that Victor had beaten their father, Dukh, sometime in the year before Dukh was permanently hospitalized after suffering several strokes, which was in 2002. This is what Dukh told him, and photographs taken at the hospital by police showed him to be quite bruised.

[281] Ranjan therefore had reason to believe that Victor could be unpredictably violent. Once Ranjan was a double-amputee, he understandably would not feel as physically confident as he once did to react if Victor did something unpredictable.

[282] In all the circumstances, it was entirely understandable and reasonable for Ranjan to not want to take the risk of physically entering the Malkin Property while Victor and the dogs were there in the years following his leg amputations.

[283] Given the Testatrix's lawsuit against him, and her own failure to reach out to him when he went through such dire health problems, and her circumstances of living at the Malkin Property with Victor and the dogs, I find that Ranjan cannot be faulted for not actively seeking out contact with the Testatrix for several years. However, he did not ever take steps to terminate their relationship.

[284] Rather, Ranjan reunited with the Testatrix once he learned that she was taken to St. Paul's Hospital in June 2012. He visited her there and was concerned about getting her properly placed.

[285] Counsel for Victor criticizes Ranjan for not offering to take the Testatrix into his own home at that time. This is not a valid criticism. Victor of course did not make this request, as he wanted to continue living in the Malkin Property and would need the Testatrix there to justify repairing it to make it liveable. Further, Ranjan had very serious health issues of his own, and the Testatrix had complex care needs. The best place for the Testatrix was going to be a comfortable institutional setting that could look after her needs, and the hospital was trying to get her into such a setting.

[286] Once the Testatrix went into a supportive rest home environment, and Victor was then in jail, Ranjan continued his efforts to rebuild his relationship with the Testatrix. He and Asha visited with

her at Suncreek and there are photographs of Ranjan and the Testatrix looking happy there together during this time.

[287] Ranjan was concerned about the circumstances of the Malkin Property, being so run down and uninhabitable. He hoped that the Testatrix would sell the Malkin Property rather than go back to it, and in October 2015 she signed a listing agreement to list it for sale with him.

[288] Ranjan was notified by his mother that she was going into surgery in November. He went to the hospital and waited for her, and was the first family member to learn that she passed away during the surgery.

[289] Ranjan was visibly emotionally moved when testifying about his feelings toward his mother.

[290] I conclude that Ranjan was not estranged from nor did he abandon his mother, but loved her and was willing to help her if he could before she passed away. Any distance they had in her later years, including when she prepared her 2007 Will, was not due to anything he did but to her own mistaken views about him; the circumstances of Ranjan's health; and Ranjan's understandable reluctance to enter the Malkin Property while Victor was there.

Conclusion Regarding Disinheritance of Ranjan

[291] I conclude that the stated reasons in the Testatrix's 2007 Will for disinheriting Ranjan were not valid, and that he did not receive gifts of any substance from either parent before their respective deaths.

[292] I also am not persuaded on a balance of probabilities that Ranjan engaged in any kind of misconduct that would justify his mother's disinheritance of him, or that Ranjan neglected, abandoned, or became estranged from his mother before she passed away.

[293] Leaving aside the respective needs of the children, which I will come to, I find there was no valid reason for the Testatrix to disinherit Ranjan.

Reasons for Bequest to Victor

[294] The stated reason in the 2007 Will for the large bequest to Victor was that he had not "received much monies or other things" from the Testatrix, in contrast to his siblings.

[295] In order to analyze the evidence as to whether or not the Testatrix made gifts to Victor, it is necessary to first understand Victor's history.

Victor's History

[296] Victor was born in 1959. His family moved to the Malkin Property in approximately 1971.

[297] Victor testified that he helped his father build the duplex on the Malkin Property. He also said this in an affidavit he swore in this proceeding, claiming that he and his father virtually built the house together. As pointed out in cross-examination, Victor was only 12 years old when the home was completed and so that is hardly likely. This evidence illustrated that Victor was prone to overstate his contributions to his parents.

[298] Victor testified in his direct evidence that he stopped living at the Malkin Property when he was about 14 years old. Since he was born in 1959, this would have been around 1973, a couple of years after his parents and Rani moved into the Malkin Property. He said that he did not return until

the late 1980s.

[299] Victor testified that Ranjan threw him out of the Malkin Property when Victor was young, forcing him to live on the street. This evidence is not of much relevance but was also not reliable. The evidence was given in answer to a leading question by Victor's counsel. It was internally inconsistent with earlier evidence Victor had given, to the effect that Ranjan only lived in the Malkin Property for six months. It was combined with evidence that Ranjan was verbally abusive towards Victor, and that Victor did not engage in criminal behaviour until he got thrown out of the home. None of these suggestions were put to Ranjan in his evidence and so he was not given a fair chance to respond to them. As such it would be unfair to accept this evidence.

[300] Victor had a history of criminal activity from age 15 and on. He went into a juvenile detention facility at age 15 for approximately one year in relation to shoplifting and theft. He suggests the theft was a misunderstanding but does not deny the shoplifting.

[301] Victor's criminal activity continued after his release from juvenile detention.

[302] In 1979, Victor was convicted of attempted murder, kidnapping, and indecent assault, as well as other charges, all in relation to offences that occurred in 1978 against a 21-year-old man. For ease of reference I will refer to these charges as the "attempted murder offences".

[303] The circumstances of the attempted murder offences were quite horrendous. They are described in the unreported Reasons for Judgment of Judge Fisher made June 29, 1979 in the County Court of Vancouver, CC781565 (the "Attempted Murder Reasons"). Three offenders were involved. The victim was viciously assaulted, wounded with a straight razor supplied by Victor, and forced to perform fellatio on the two other offenders while Victor watched and taunted. The incident ended when Victor and one of the other men took the victim who was by then unconscious and threw him off an overpass onto railway tracks 50 feet below, where he was run over by a train. The victim suffered massive and extensive injuries.

[304] As part of Victor's defence at the trial of the attempted murder offences, a witness was called to provide an alibi for Victor who testified that Victor was at his brother's home during part of the evening (Attempted Murder Reasons at 9). The judge did not believe the alibi, in part because of inculpatory statements made by Victor to an undercover officer (Attempted Murder Reasons at 11).

[305] Victor was sentenced to 15 years' imprisonment for the attempted murder offences. His evidence at the current trial was that he served 17 years in prison (which would make his release date sometime in 1995). He said that his attitude in prison was not good and that he fought a lot. He testified that he spent eight years in solitary confinement.

[306] Victor testified that he was let out of prison for approximately four years. The evidence appeared to suggest that this was day parole and occurred in late 1988, and that Victor obtained a job working as a labourer. The evidence was vague but the inference was that he may have then breached parole. He was sent back to prison, getting out just a matter of days before turning 36 years old (which would again make his release date 1995).

[307] Victor lived at the Malkin Property when released from prison.

[308] In 1996 or 1997 Victor was charged with assaulting his father. The charges were stayed.

[309] As mentioned, Rani and Ranjan believed that Victor did assault their father. They were told this by their father, and were given police photographs of bruises on Dukh's body. They believe that

the charges were stayed because the Testatrix was willing to give evidence in Victor's favour.

[310] Victor denies assaulting his father, and says the bruises were because his father fell into a bush at the bottom of the stairs two or three times. There is insufficient evidence at this trial to persuade me on a balance of probabilities that Victor assaulted his father, although I appreciate that his explanation seems odd.

[311] Victor had additional criminal offences, including the following: in 1998, uttering threats to cause death or bodily harm, assault with a weapon, and assault causing bodily harm; in 1999, production of a controlled substance; and in 2000, multiple convictions for theft over \$5,000 and fraud over \$5,000. For these offences Victor was sentenced to a year in jail in 2000, according to a review of his history in the Reasons for Sentence of Kitchen J. made April 9, 2013, [2013 BCPC 86 \(CanLII\)](#) at para. 8. Victor's evidence is that he ended up serving eight months in relation to those offences.

[312] The 1998 assault offences related to Victor assaulting three large men at one time. Victor was sure that his family members were aware of these assault charges.

[313] The 1999 offence had to do with another marihuana grow operation but this one was not located at the Malkin Property. Victor admitted having weapons to guard his marihuana plants at that location.

[314] Victor was convicted of additional offences: in 2006, possession of a weapon (non-firearm); and in 2011, assault and uttering threats to cause death or bodily harm. The latter offence appears to relate to an incident in 2009 but Victor was evasive at trial about the details.

[315] Victor's evidence was that between 2002 and 2012 (when arrested in the summer of 2012), his only sentence involving imprisonment was in 2006 when he went to jail for 40 days, for the possession of a weapon offence, which he described as relating to possession of a pen knife.

[316] Victor admits that in 2007 he had a marihuana grow operation at the Malkin Property. The police shut it down in September but he was not charged.

[317] On June 20, 2012 police searched the Malkin Property and found a marihuana grow operation in the basement. Victor was charged with production of a controlled substance; fraudulently consuming electricity or gas; possession of loaded and unloaded restricted firearms with ammunition; and unauthorized possession of a firearm. Victor was not taken immediately into custody but the property was effectively condemned, resulting in the Testatrix being taken to St. Paul's Hospital because she had nowhere to live.

[318] Victor was taken into custody on August 28, 2012. He eventually pleaded guilty and was sentenced to a global sentence of seven years' imprisonment, for which he served four years. His evidence is that he was released in November 2015 on parole and currently remains on parole.

[319] Victor said the 2012 Grow-Op was run out of the basement and he was the person solely responsible for it.

[320] The Reasons for Sentence of Kitchen J. describe the grow operation as sophisticated and fairly large, involving 659 plants worth about \$220,000, and a hydroelectric bypass. Firearms were found in the home, one a semi-automatic with 13 live rounds in a clip and the serial number obliterated.

Gifts to Victor

[321] I return to review the history of the Testatrix providing financial assistance to Victor.

[322] Victor admitted that his parents financially supported him his entire life, after he finished serving his sentence for the attempted murder offences. He lived in his parents' home, the Malkin Property, rent-free from the time he was out of jail.

[323] Victor admitted at trial that the Testatrix paid him \$600 per month, and if he needed more money, she would give him more. This contradicted earlier affidavit evidence he had given in this proceeding in which he said his mother did not give him money.

[324] Victor agreed that his mother also helped pay for repairs to his car in the amount of approximately \$2,500.

[325] If one estimates that Victor lived rent-free from approximately 1995 to 2012, he lived rent-free for 17 years. Taking off one or two years for short times in jail during this period would leave this rent-free period at 15 years. Assuming very conservatively that reasonable rent for half of a duplex was \$600 per month, that would be worth \$7,200 per year, which multiplied by 15 years, adds up to a benefit worth approximately \$108,000. During that same time frame, his monthly support from his parents, if estimated at a minimum of \$600 per month, would add up to the same amount, another \$108,000.

[326] These very rough estimates do not include other things that Victor's parents paid for, including the Testatrix's purchase of his groceries, clothes, fuel for his car, personal items, and payment of other expenses. When Victor needed extra money or to buy groceries, the Testatrix would call up BMO and instruct them to give him money from her account or she would give him cash that she had on hand.

[327] In addition, Rani testified that her father paid for Victor's legal fees.

[328] Victor denied this in his direct evidence, claiming that his legal fees were funded by legal aid, except for the last occasion. Victor admitted that he received \$3,000 from his mother for his legal fees with respect to his 2012 charges.

[329] In cross-examination Victor admitted that his father paid for some of his legal fees in relation to the attempted murder offences. He said he also had some legal aid in that case. He did not say how much his father paid towards his legal fees, although one document suggests at least \$2,650.

[330] Rani referred to a number of documents found in the room in her home where her father used to stay in a filing cabinet he used. These documents are financial records some of which have Dukh's handwriting on them. None of the parties contested the handwriting as being anyone's other than Dukh's.

[331] One is a copy of a Canada Savings Bond maturing November 1, 2004 in the amount of \$1,000 in Victor's name, with her father's handwritten note on the side "Cashed to lawyer for Victor". Rani testified that this was stapled to a pile of bonds. One underneath it was a copy of a \$500 Canada Savings Bond in Victor's name, maturing November 1, 2004. Another document she found was a Bell Canada \$100,000 debenture, due July 15, 2009, in the name of Victor.

[332] Victor did not suggest that he purchased these investments and he denied receiving these monies.

[333] Rani also testified that she knew that her mother transferred money into Victor's name. She said in 2004, she and her mother met with Mr. Brough and that her mother transferred \$100,000 into Victor's name; and that before that, she had transferred \$100,000 from BMO into Victor's name.

[334] Unfortunately Rani's evidence in direct on this point was not fleshed out and she did not provide any details of circumstances which might provide a reliable foundation for this evidence.

[335] As mentioned, Mr. Brough was the Testatrix's investment advisor at HSBC. Rani understood that the Testatrix believed that the advisor, and/or Rani, stole money from her in respect of that account. The documents at trial reveal a joint HSBC account between the Testatrix and Victor with an account value as of February 28, 2006 in the amount of \$102,384.28. The Testatrix did not transfer funds from that account to BMO, according to the BMO witness, Ms. Finden, and so whatever happened to that money is unknown.

[336] Interestingly, there was another account in the name of the Testatrix at CIBC, of which BMO and Ms. Finden were also unaware. The evidence was unclear as to when the account was opened. However, as of August 1, 2012, when the Testatrix was at St. Paul's Hospital, this joint CIBC account had an opening balance of \$141,125. Then, on August 9, 2012, one day before the Testatrix was moved out of St. Paul's Hospital to live with Mr. Prasad, \$112,202 was mysteriously withdrawn from that account.

[337] Ms. Finden had thought that the Testatrix invested all of her money with BMO. She thought the Testatrix had given her responsibility for paying all of her bills. She had no knowledge of the CIBC account or what was a possible purpose for the large withdrawal on August 9, 2012. Of course the only people who had access to the account would have been the Testatrix and someone accompanying her.

[338] Victor claimed to be spending time with the Testatrix at the hospital and taking her out on occasion. However, Victor denied that he had anything to do with the money taken out of either of these accounts.

[339] Certainly there is some circumstantial evidence to raise a question of whether the money in the joint HSBC account was given to Victor or moved to a CIBC account and then was taken by Victor or given by the Testatrix to Victor. The plaintiffs suggest the obvious inference is that Victor convinced his mother to give the money to him, to assist him with his legal bills given that he was facing new criminal charges in relation to the grow-operation and weapons' charges.

[340] I accept that it is a possible inference that Victor took the \$112,202 from the CIBC account in August 2012. However, that is not the only possibility and the evidence is not sufficiently strong to pass the balance of probabilities test. There were others involved with the Testatrix around the same time, including her grandson Raj.

[341] Other documents were presented at trial of bank account statements jointly in Victor's and the Testatrix's names. Victor denied receiving any of the amounts shown in the statements.

[342] The plaintiffs put into evidence a statement of account from Dominion Securities Ames in the name of Victor, addressed to the Malkin Property, dated September 1981, showing a balance of \$241,434.03. Victor was in prison at the time and in his evidence said he knew nothing about this investment. This would suggest his father put some money in investments in Victor's name, without necessarily telling Victor about it or giving him access to the money.

[343] It seemed to be the evidence of Rani and Ranjan that their father put investments in their

names which they did not always know about or see or ultimately receive. Surely this leaves open the possibility that the same thing happened with respect to Victor, including the possibility of a joint account with the Testatrix. I appreciate, however, that Victor did not provide money to his father to invest on his behalf, unlike Rani and Ranjan.

[344] The evidence is too vague to allow me to conclude that Victor received gifts from his parents of lump sum amounts in the range of \$100,000 as some of the bank account records might suggest.

[345] I do conclude that Victor received financial support from his parents, and then his mother alone, his entire adult life when he was out of jail. This financial support was significant as it included rent-free accommodation; plus a monthly stipend; plus payment of expenses from time to time.

Other Reasons for Bequest to Victor

[346] Victor suggested that he provided extra support and assistance to his mother that the other siblings did not, especially in her later years, and that this is also justification for the bequest to him.

[347] Victor testified that he used to take his mother to a doctor's appointment once per month; at the appointment he would receive a prescription for her for cortisone which he would then get filled and bring it back to the doctor, who would inject it into the Testatrix's knees. The Testatrix would pay for a full tank of gas for Victor when he took her somewhere.

[348] Victor testified that he would shop for his mother, getting her groceries, although his mother would give him the money for them. He said he would also spend time with her because she was lonely.

[349] There was some corroborating evidence that Victor on occasion drove his mother to appointments or purchased groceries for her with her money. He also on occasion cooked her meals, as she did for him. He also did some minor repairs to her kitchen and may have on occasion done some housekeeping chores.

[350] Some friends or relatives of Victor's who observed him interact with the Testatrix thought he was very good to his mother. However, these witnesses only saw a snapshot of the relationship and claimed not to know about Victor's criminal activity at the Malkin Property.

[351] Victor also gave evidence that he helped his father, who suffered from a number of strokes and eventually moved down from the parents' upstairs part of the duplex into Victor's lower level suite. Again, there was evidence at trial that at least one friend of Victor's saw him treat his father gently and kindly.

[352] Nevertheless, this does not mean that Victor's attitude towards his father or his mother was consistent. There was a lot of evidence which contradicted Victor's self-description of the great support he gave his parents.

[353] Several witnesses testified that once Dukh became less able, in the early 2000s, the Malkin Property became more and more dilapidated. The outside was cluttered with old cars or parts of cars and the inside was cluttered and dirty. This would suggest that although Victor was not otherwise employed, he was not taking care of the Malkin Property when his parents could not.

[354] The assistance that Victor provided his mother was relatively modest, as she relied for the most part on external services.

[355] In 2006 the Testatrix set up a system with the BMO estate and trust department for them to take care of her finances, including paying all her bills and managing her investments, and arranging for such things as grocery and pharmacy deliveries.

[356] The Testatrix instructed BMO to invest her funds in fixed income instruments, rather than equities. The BMO representative, Ms. Finden, met with the Testatrix at least annually from 2006 until 2012, other than two years when Ms. Finden was on leave.

[357] Ms. Finden testified that when she initially met with the Testatrix in 2006, the Testatrix believed her previous investment advisor at HSBC had stolen money from her. This is corroborative of Rani's evidence that the Testatrix believed this.

[358] The Testatrix used HandyDART, a public transit service for the disabled. She had meals delivered once per day.

[359] For at least a time, the Testatrix received assistance with laundry and housework, according to what is recorded in hospital records in November 2009 and in 2011.

[360] As opposed to Victor being a conduit for supportive services for his mother, some evidence suggests he posed something of a barrier. The care and hospital records suggest that some community agencies did not consider it safe to send care workers to the home because of Victor running a grow-op and having a pit bull.

[361] The hospital records indicate that sometimes it was difficult for community support workers to get in touch with the Testatrix, as the phone would go unanswered and no one would answer the door. There were also concerns noted about an unleashed pit bull in the yard. This is consistent with Rani's evidence that her telephone calls would often go unanswered.

[362] Hospital records indicate that the Testatrix was having difficulties in her later years. Victor did not notify his siblings or seek out their help.

[363] The hospital records indicate that:

- a) The Testatrix was taken to hospital several times, from 2008 and on, and as much as six times in the first half of 2012.
- b) As early as January 2008 hospital staff were concerned about the Testatrix's home living situation. They recorded that the Testatrix told them she had considered selling her home but Victor wanted her to stay in it. This evidence is consistent with Rani's evidence. The Testatrix also told them that Victor was angry much of the time, and she was afraid of the violence surrounding grow-ops. However, the next day the Testatrix changed her story and said she was not afraid of Victor and wanted to return home.
- c) This happened more than once: the Testatrix telling hospital staff she was frightened of Victor and did not want to return home, and then changing her mind and returning home. It is recorded as happening again in March 2008.
- d) The hospital records as of November 30, 2011 indicate that the Testatrix was taken to hospital four times that year; some of which were for constipation, abdominal and leg pain, weakness, and fatigue.
- e) The Testatrix reported falling frequently at home and having very little mobility. She was

assessed as having signs of memory decline and impairment in judgment in November 2011, with the physician noting that she likely needed to be placed in a long-term care facility but that she refused to leave her home for many reasons, including her son who she claimed she needed to take care of.

- f) When she was assessed on a visit to hospital in March 2012, the Testatrix was noted to be a very poor historian who contradicted herself. It was noted that her son Victor had exhibited threatening behavior towards the care manager and other people who came to the house and had refused to lock up the pit bull, which was also preventing people from coming to the house.
- g) A care worker's record from April 2012 indicates that the care worker had concerns about Victor and the dog in the yard, and noted that Victor had been difficult to engage and had refused to have the dog removed. The care worker tried to reach Victor by phone several times, unsuccessfully.
- h) Another care worker's record in April 2012 notes that the Testatrix wanted to sell the house but her son did not want her to, and she indicated that she provided for him.
- i) An ambulance report noted that the Testatrix was having mobility difficulties and was unable to care for herself on June 2, 2012 when she was taken to hospital. The person who wrote the report noted that the son who lived downstairs was "somewhat obtuse to his mother's needs", because when asked if he was coming to the hospital with his mother, he said he would wait until tomorrow.

[364] There are some circumstances which give the medical records somewhat greater reliability than the other hearsay statements in this case, and that is that the statements were: made to people that were treating the Testatrix, and so she might have felt it more important to be truthful and may have been more comfortable in being truthful; recorded by professionals in the course of their work as business records; and made by people who had no personal interest in the issues regarding the Testatrix's estate. Nevertheless, medical professionals do make mistakes in recording statements, and sometimes the impression created by one mistaken professional in a record can affect the perception of subsequent treating professionals.

[365] As an example, if the Testatrix said she was scared *for* Victor because of his criminal activity, it would be possible for someone to misunderstand that and to record that the Testatrix was scared *of* Victor.

[366] I find that evidence of what the Testatrix told medical personnel as found in the hospital records is of some limited weight, especially where there is more than one consistent record.

[367] However, these records have to be treated cautiously and cannot be given too much weight. The Testatrix said many inconsistent things. There may also have been a slight language barrier, as according to some of the evidence the Testatrix's language skills were such that she could communicate in English but perhaps not always with precision.

[368] Further there were some statements in the medical records which addressed past financial events, and did not match the other evidence at trial. For example, one record dated November 30, 2011 states that the Testatrix told the physician that at the time of her husband's death and at his earlier request, she had given \$100,000 to each of Ranjan, Victor, and Rani, but continued to financially support Victor. None of the parties made any submission about this entry or put it to a witness. This record was not contemporaneous with Dukh's death and it is difficult to consider it

reliable.

[369] Another medical record entry, in 2010, recorded that the Testatrix reported that she sold her house in Fiji and gave her children each \$100,000; that her children believe her money is ‘their’ money; and they do not use the money wisely. Again, I do not recall this being put to any witness nor is it consistent with the evidence at trial, and cannot be considered reliable.

[370] It is interesting, to be sure, that figures in the range of \$100,000 were apparently mentioned by the Testatrix, and were also in some of the bank account records in the names of one or other of the children addressed to the Malkin Property, or held jointly with the Testatrix, and were also in the CIBC account that went missing in August 2012. No party in this case attempted a tracing and a lot of this remains a mystery to this Court. But no party has proven on a balance of probabilities that a party opposite wrongly took or received money that did not belong to them.

[371] Mr. Ferreira, the social worker who dealt with the Testatrix when she was admitted to St. Paul’s Hospital, was called by the plaintiffs as a witness at trial. He dealt with the Testatrix in 2010 when she was brought to hospital, and in 2012.

[372] Mr. Ferreira saw the Testatrix on June 22, 2012, a couple of days after she was brought to hospital following the discovery of the 2012 Grow-Op. Mr. Ferreira understood that BC Hydro had cut off the supply of electricity to the home, and that the City of Vancouver had decided the home was uninhabitable and had delivered a letter that set out what needed to be done to allow for occupancy. He discussed this with the Testatrix and raised with her the prospect of her moving to some type of care facility. The Testatrix indicated to him that she wanted to go home.

[373] Mr. Ferreira also met with Victor at the time of the Testatrix’s admission to hospital in June 2012. Mr. Ferreira explained that he had made a referral to the PGT. He also explained that it had been determined that the Testatrix needed a higher level of care than assisted living and should be referred to a nursing home for complex care. Victor was initially resistant to the idea, but then, according to Mr. Ferreira, appeared to come around to it.

[374] However, later Victor brought his friends into the hospital including Mr. Prasad, who was put forward as the nephew of the Testatrix. Although plans had already been made to move the Testatrix to an extended care facility, this group together took the position that she should be moved to Mr. Prasad’s home in Surrey. Because of this the Testatrix was discharged and moved to the home of Mr. Prasad on August 10, 2012.

[375] Mr. Prasad was not the nephew of the Testatrix. Mr. Prasad gave video deposition evidence at trial as a witness for Victor.

[376] Mr. Prasad testified that Victor asked him to take his mother in for a couple of weeks while Victor got the Malkin Property back together, because the electricity in the home was lacking. Mr. Prasad’s impression was that Victor did not want his mother to go into a rest home. The two weeks stretched into approximately two months. While at Mr. Prasad’s home, the Testatrix had a care worker come in approximately two or three times per week.

[377] Mr. Prasad ultimately contacted authorities to find the Testatrix other accommodation. He knew that Victor was then in prison, and Mr. Prasad for health reasons goes to a warmer climate in the winter. The Testatrix was then moved to the Suncrest care home.

[378] As mentioned already, both Ranjan and Asha visited the Testatrix at Suncrest and she appeared to be doing well.

[379] The most telling evidence regarding the nature of Victor's relationship with his mother, of course, is the fact that Victor not once but twice ran grow-operations out of the Malkin Property, and had illegal firearms there. This was extremely disrespectful and irresponsible behaviour in his mother's home, and put her at many different types of risk, ultimately leading to her eviction from her own home in June 2012.

[380] There is evidence that rather than Victor taking care of his mother, the Testatrix felt she was taking care of Victor. This was the sense of statements she made to a friend of Victor's who testified at trial, Mr. Wong.

[381] Victor denied much of what the hospital records said about him and his relationship with his mother, including the fact that it was because of him she did not want to sell the home, which was also Rani's evidence. But I found Victor's evidence on this unreliable.

[382] While treating the health records cautiously, I have concluded on the overall body of evidence that the Testatrix had serious mobility and other health issues, and living on the top floor of a two-storey duplex was not in her best interests. The home was not being well maintained. The Testatrix had to make frequent trips by ambulance to hospital. It made no sense for the Testatrix to keep living in that home, other than because of Victor wanting to stay there.

[383] When Victor was asked at trial about what he would like to do with the Malkin Property, his evidence made it clear that he would like to return to it and live there, despite how rundown it is.

[384] The whole of the evidence indicates to me that Victor did not carefully place his mother's needs ahead of his own in her later years of life. The irresistible inference is that he enjoyed living at the Malkin Property because it was rent-free and he could do what he wanted there (including engage in criminal activity), and that as a result he was not interested in assisting his mother to transition to a more appropriate home environment because that might mean she would sell the Malkin Property.

[385] The plaintiffs suggest that Victor was either abusing or unduly influencing his mother in her later years of life and that she was confused and unsophisticated about assets. There is evidence going both ways on this. For example, the Testatrix's banker, Ms. Finden, found her to be capable of understanding her assets and giving instructions about them. The PGT did not conclude otherwise. Yet, the evidence of the Testatrix's suspicions against her own son Ranjan, then her banker at HSBC, and then Rani, is suggestive of her being confused and somewhat irrational.

[386] Regardless, no one has suggested that the Testatrix was not mentally competent when she had her 2007 Will prepared.

[387] The evidence of the Testatrix's generosity towards Victor, in the face of his repeated illegal activities and his seeming refusal to seek out legal, paid employment, might also be seen by some to be somewhat irrational. There was certainly concern expressed in the medical records that Victor was taking advantage of his mother.

[388] One can wonder, but not easily determine, where the line falls between a parent's assistance of a troubled adult child, and manipulation by that child of his elderly parent.

[389] Despite the contradictory evidence, I have concluded that the evidence does not prove on a balance of probabilities that Victor abused or unduly influenced the Testatrix. It is important to recognize that by living in the Malkin property he provided the Testatrix with social interaction and assistance from time to time.

Conclusion Regarding Bequest to Victor

[390] I find that it was factually incorrect for the Testatrix to state in her 2007 Will that she had given Rani and Ranjan plenty of monies and other things, but that Victor had not received much monies or other things from her.

[391] In reality, the Testatrix had been far more financially supportive of Victor than she had been to her other children. She, and her husband while he was alive, financially supported Victor his whole adult life outside of jail. She provided him with rent-free accommodation in one-half of the duplex that was her home. She paid many of his expenses.

[392] I find that Victor had at times a pleasant relationship with his mother and sometimes assisted her. However, this assistance was modest. This assistance has to be balanced by the hardship that Victor must have caused, including by running two marihuana grow-operations out of the Testatrix's home, eventually making it uninhabitable.

[393] Victor's assistance towards his mother did not create any moral obligation on the Testatrix's part to leave him a greater bequest. In my view, the Testatrix's financial assistance to Victor far outweighed anything he did for her.

[394] I turn now to consider the circumstances of the three adult children.

Rani's Circumstances

[395] Rani has rheumatoid and osteo-arthritis, affecting 23 joints in her body. At the time of her diagnosis in approximately 2004 to 2005, the arthritis was mild; but it has progressed since then. She has had one knee replacement and requires another one. She has a torn tendon in her shoulders which causes her severe pain, a problem that first started in approximately 2007. She was diagnosed with glaucoma in around 2010 and has had two eye surgeries to address that problem. She requires additional eye surgery.

[396] Rani has worked in library services for a municipality for several years. In 2005 she took a disability leave; she tried returning to work on a couple of occasions but eventually had to take disability leave again and is now on a disability income. Her annual income since 2007 has been in the low to mid-\$20,000 range, peaking at \$36,000 in 2013 but then declining back to \$25,000 range in 2014. It seems that in 2015 her annualized income was approximately \$31,000.

[397] Rani's evidence is that she expects to retire this year, reliant on CPP and OAS payments, and expects her earnings to decrease further because she will not be receiving the disability income.

[398] Rani has three children, born in 1971, 1987, and 1988 respectively, meaning the youngest is 28 years old.

[399] Rani is divorced. She receives some child support from the father of her two youngest children who are pursuing post-secondary education. One of those two children has ceased her studies temporarily because Rani does not have enough income to pay for her studies. Rani does not receive spousal support.

[400] She owns two pieces of real estate in Toronto, one of which is her home and the other a rental property.

[401] Rani does receive rental income from the rental property she owns. However, she testified

that she has had to repair the property, has had some issues with tenants not paying rent, and that her expenses for the property exceed the rental income. This evidence was very vague. In cross-examination, she said that her expenses on the rental property exceed the income at times when rent is not coming in on a regular basis. That statement suggests that at times she does make net income on the property.

[402] Rani testified that she estimates that the rental property has a value of approximately \$600,000 based on a property tax assessment. Against that value are some liabilities, namely a mortgage debt of approximately \$130,000. As well, there is a line of credit secured against both properties in the amount of \$100,000. She testified that she used this line of credit to pay her children's education fees.

[403] Assuming that one-half of the line of credit debt is attributable to the rental property, for ease of calculation, on Rani's very general numbers the net equity in the rental property would be approximately \$420,000 — i.e. \$600,000 less \$130,000 less \$50,000.

[404] As for her family home, Rani's evidence was that its assessed value is in the range of \$800,000. As mentioned, the line of credit is secured against this property too. Applying one-half of the line of credit, for ease of reference, as against the assessed value, leaves equity of approximately \$750,000 in the property. However, in cross-examination Rani agreed that properties on her street are worth more than \$1 million now and that the property is probably worth more than \$1 million.

[405] No party put in appraisal evidence. The uncertain evidence which was available suggests that Rani's property assets have a net value somewhere in the range of approximately \$1.2 to \$1.7 million. There was no evidence of her having any other assets.

Ranjan's Circumstances

[406] Of the three siblings, Ranjan has had the most financial success in his life.

[407] Ranjan together with his wife Asha built up two successful real estate companies and receive dividends from them.

[408] Since his health deteriorated in 2004, Ranjan has had to cut back on his work. He used to train realtors and show listings, which he can no longer do. His wife now works long hours in the business. Their business used to have over 300 realtors; now according to Ranjan, they have only 120. The "deal fees" from these realtors, of around \$175 to \$250 per deal, have therefore declined over the years.

[409] Ranjan's evidence is that his income has therefore declined as well.

[410] Since Ranjan's amputations, the burden of managing the business has fallen more heavily on Asha's shoulders. She testified that Ranjan does help with some of the paperwork, but some days he is in so much pain he cannot get out of bed.

[411] I conclude that it is mainly Asha's income and efforts supporting the couple.

[412] Nevertheless, it appears that from 2007 to 2012, on average Ranjan earned approximately \$111,000 annually and Asha earned approximately \$143,000 annually.

[413] Ranjan and his wife own real estate, including their home purchased in 2007, on Hoylake Ave in Surrey (the "Hoylake Home"), and two townhouses in Surrey which are used as revenue

properties. There are mortgages on all of the properties.

[414] There was no appraisal of these properties in evidence. The evidence of Asha suggested that the net equity in the Hoylake Home could be in the range of \$1.6 to \$1.7 million; that is a gross value of \$2.6 or \$2.7 million less a mortgage of approximately \$1 million. They make monthly payments in the range of \$8,000 to \$10,000 on the Hoylake Home's mortgage. They rent out part of the house to her father, who pays rent to help them out.

[415] Asha also owns a company known as Sharma Realty, incorporated in 2010. It owns the office building in which her and her husband's realty company is located. It was purchased four or five years ago for approximately \$1 million and the assessed value could be approximately \$1.3 million according to her evidence. Asha and Ranjan's real estate companies pay rent to Sharma Realty, as do two other tenants.

Victor's Circumstances

[416] On occasion over the years Victor has worked in low skilled labour-based employment. Now on parole, he is currently working three days a week for an employer who pays him \$13 per hour.

[417] There is no evidence to suggest that Victor is disabled from employment. He testified that he is in good health and can carry 100-pound rolls of vinyl up and down stairs.

[418] Victor testified that he did not do well in school. He may be academically challenged. However there are other people who do not do well in school who nevertheless earn a living.

[419] Victor has been able to perform work as a warehouseman in the past, and had the ability to set up a sophisticated, fairly large marihuana grow operation at the Malkin Property. He cannot truly be considered a dependent of his mother or her estate despite her choice to financially support him during her lifetime.

[420] Victor admitted in cross-examination that he had used the \$600 per month given to him by his mother for his various marihuana grow-operations, which would include paying for lights, plants, pots and soil, a watering system, and a ventilation system.

[421] Victor currently lives in a halfway house. He testified that he only has approximately \$270 to his name.

[422] I have said the Testatrix had a safety deposit box at CIBC held jointly in her name and Victor's name. There are some items of possible value in the safety deposit box, such as gold jewellery, \$100 in cash, some gold coins, a five-ounce gold bar, and possibly other jewellery of value. The total value of these items has not been appraised and Victor did not call any evidence of their value.

[423] As a result of the shutdown of the 2012 Grow-Op, and the hydro bypass that Victor had rigged, BC Hydro sent an invoice dated June 25, 2012 to the Testatrix in the amount of \$11,647.54, payable immediately. This has been paid out of the estate assets by the Administrator.

[424] Victor testified that he would like to return to the Malkin Property and renovate it to be habitable. He did not offer any plan as to how that would be financially feasible or prudent, as opposed to having the property sold as is.

DID THE TESTATRIX MAKE ADEQUATE PROVISION FOR RANI AND RANJAN?

[425] I have concluded that the reasons for the Testatrix disinheriting Rani and Ranjan were not valid.

[426] The central issue is whether, in leaving the bulk of her estate to Victor, and disinheriting her two other children, Ranjan and Rani, the Testatrix acted as a judicious parent, using an objective standard informed by contemporary moral norms: see *Tataryn* and *Dunsdon*.

[427] There are two factors of general application in this case. First, although the exact upper limit value of the estate is unknown, it is of sufficient magnitude to satisfy all claims being advanced. I reach this conclusion considering the Canadian assets alone and ignoring the Fijian Properties.

[428] Second, none of the children inherited from their father, whose assets were transferred to the Testatrix before he died.

[429] There is no doubt that the three adult children have very different life circumstances. Each contributed to their mother's life in different ways at different times, but none of them abandoned her.

[430] Judging Victor by contemporary standards would mean that he should not necessarily be disinherited simply because of his criminal activity, as he should be given a chance at rehabilitation. Similarly, the fact that there was some distance between Rani, Ranjan and the Testatrix later in her life can be understood by the circumstances which led to that distance, for which Rani and Ranjan ought not to be unduly criticized.

[431] Viewed objectively in light of current societal norms, when I compare and contrast the circumstances of Rani, Ranjan and Victor, I conclude that each sibling is morally deserving of a share of the Testatrix's estate and that a judicious parent would share her estate amongst them.

[432] To put it another way, I am unable to conclude that any one sibling is not morally deserving of a share of the Testatrix's estate.

[433] I conclude that the Testatrix had a moral duty to each of her adult children at the time of her death.

[434] Considering all of the circumstances, I conclude that the Testatrix did not meet her moral duty and failed to make adequate provision for Rani and Ranjan in her 2007 Will when she disinherited them and gave the majority of her estate to Victor. I will therefore need to determine what would be adequate, just and equitable provision for Rani and Ranjan and make orders for redistribution of the estate accordingly.

WHAT WOULD BE ADEQUATE, JUST AND EQUITABLE PROVISION?

Fijian Properties

[435] Before I can consider the next issue in more depth, it is necessary to address the status of the Fijian Properties.

[436] As mentioned earlier, by the close of trial the parties did not direct their minds to the question of conflict of laws, and appeared to assume that if this Court varied the 2007 Will, any ruling would simply apply to the Fijian Properties. The plaintiffs are seeking a percentage interest in the entire estate including the Fijian Properties.

Facts Regarding Fijian Properties

[437] The facts regarding the Fijian Properties in relation to this action are as follows:

- a) as stated above, on March 7, 2014, by order of this court, the Administrator was granted letters of administration, with the 2007 Will annexed, of all of the estate which by law devolves and vests in the personal representative of the Testatrix;
- b) on April 1, 2014, the Administrator retained a lawyer in Fiji;
- c) on October 8, 2014, the High Court of Fiji probate jurisdiction issued a “Reseal Grant” but there has been no evidence called as to the legal effect of this;
- d) counsel for the Administrator wrote to respective counsel for the parties on October 1, 2014, advising that the grant of probate was expected shortly in Fiji, at which time the Administrator would have authority to sell the property in Fiji; and requesting the parties’ positions as to whether they were in agreement that the properties be sold by the Administrator;
- e) by letter dated October 3, 2014, counsel for Victor wrote to counsel for the Administrator confirming that he did not object to the Administrator selling the two properties in Fiji;
- f) by letter dated October 6, 2014, counsel for Rani and Ranjan wrote to counsel for the Administrator confirming that they are in agreement with the Administrator selling the two properties in Fiji;
- g) steps were then taken by the Administrator to sell the properties in Fiji, including but not limited to obtaining appraisals and hiring legal counsel to deal with the problems encountered with the properties (the occupiers and the encroachment by the Fijian Electricity Authority);
- h) from time to time counsel for the Administrator wrote to counsel for the parties providing updates on the status of the Administrator’s efforts to sell the Fijian Properties;
- i) this trial took place in February 2016, with the Court being advised that the Fijian Properties had not yet been sold but they had been appraised. I have concluded after hearing the evidence, as noted earlier, that the best estimate of value is in the range of \$150,000 to as much as \$2 million or more.
- j) on April 4, 2016, I issued a memorandum to the parties asking for further submissions on conflict of law issues regarding the Fijian Properties;
- k) on April 19, 2016, the parties appeared before me for directions;
- l) on April 19, 2016, then counsel for Victor wrote to counsel for the Administrator, expressing the view that the news that the Fijian Properties were for sale “came as a revelation to us”, and that they had no recollection of earlier consenting to this, and advising that Victor did not consent to sale of the properties; and,
- m) on June 24, 2016, the parties appeared before me to make submissions regarding the Fijian Properties and the conflict of law issues.

Positions of the Parties

[438] This Court does not have jurisdiction over foreign real estate. The succession of foreign real

estate is governed by the law of the place where it is located. The parties seem to agree on this proposition, for which there is ample authority. See *Wills Act, R.S.B.C. 1996, c. 489, s. 43* (applicable as at the time of the death of the Testatrix), and current legislation, *Wills, Estates, and Succession Act, S.B.C. 2009 c. 13, s. 82(1)*; and Jean-Gabriel Castel & Janet Walker, *Canadian Conflict of Laws*, 6th ed., loose-leaf (Markham, Ont.: LexisNexis Canada, 2005) at §23.1.

[439] The plaintiffs' position is that nevertheless, this Court has *in personam* jurisdiction over Victor and can make orders affecting the Fijian Properties. The plaintiffs suggest that the Court can make an order under the *WVA* that the plaintiffs be given a percentage share of the entire estate that takes into account the estate receiving in the future the proceeds of sale of the Fijian Properties.

[440] The plaintiffs also argue that estoppel applies so that Victor should be estopped from "relying on the strict legal entitlement under [his] conflict of laws analysis".

[441] The plaintiffs also argue in the alternative that the Court should reserve judgment until the Fijian Properties are sold.

[442] In the further alternative, the plaintiffs' position is that the Court can take into account the Fijian Properties when varying the 2007 Will under the *WVA*, and in doing so, should consider the parties' relative circumstances as though Victor has received an *inter vivos* gift of the Fijian Properties.

[443] Victor's position is: the Court does not have jurisdiction to make any order that would affect the Fijian Properties or take those properties into account in any variation of the 2007 Will under the *WVA*; estoppel does not apply because the plaintiffs' have not changed their position to their detriment, in reliance on Victor's earlier position; and as the beneficiary of the bequest of the Fijian Properties, Victor can do what he wants with the properties, include change his mind about selling them.

Analysis Regarding the Fijian Properties

[444] I will first dispose of the plaintiffs' argument that the Court ought to reserve judgment until the Fijian Properties are sold and the proceeds brought into the estate's residue. This argument is impractical. Victor has withdrawn his consent to the sale of the Fijian Properties and so the Administrator is not going to proceed with efforts to try to sell them. The plaintiffs advance no argument that this Court can force the sale of the Fijian Properties. The Court cannot keep its judgment in limbo and the plaintiffs have not abandoned their claim to a variation of the 2007 Will.

[445] Let me next deal with the plaintiffs' argument that the Court has an ability to make an *in personam* order against Victor that somehow gets around the problem of the Court being unable to make direct orders concerning the Fijian Properties.

[446] The plaintiffs argue that the *WVA* creates some sort of equitable obligation running between the Testatrix and them and that this creates an equitable obligation between Victor and them, and that based on that equitable relationship the Court has *in personam* jurisdiction over Victor. The plaintiffs rely on *Catania v. Giannattasio et al.* (1999), 1999 CanLII 1930 (ON CA), 118 O.A.C. 330 (C.A) [*Catania*].

[447] The case of *Catania* does not support the plaintiffs' argument. The facts in that case involved a father who in Ontario signed a deed transferring land in Italy to his daughters. When he died, his son brought an action in Ontario to have the deed declared void on the basis of the father's mental incompetence when he signed it. The Ontario Court of Appeal found that the Court did not have any

jurisdiction to deal with the issue because the deed dealt with an interest in foreign land.

[448] The Court in *Catania* rejected the plaintiff's argument that the Court had jurisdiction to deal with the issue because it was really equitable relief he sought against two Ontario residents (the siblings who received the property under the deed). The Court held:

[12] I do not accept this argument. Admittedly, as Smith, J., points out in **Duke v. Andler** [see footnote 3], a long line of authorities has held that Canadian courts have jurisdiction to enforce rights affecting land in foreign countries if these rights are based on contract, trust or equity and the defendant resides in Canada. In exercising this jurisdiction, Canadian courts are enforcing a personal obligation between the parties. In other words, they are exercising an *in personam* jurisdiction. This *in personam* jurisdiction is an exception to the general rule that Canadian courts have no jurisdiction to decide title to foreign land. The exception recognizes that some claims may have both a proprietary aspect and a contractual aspect. Canadian courts, however, will exercise this exceptional *in personam* jurisdiction only if four criteria are met. These four criteria, of which the second is central to this appeal, are discussed by McLeod [see footnote 4]:

"In order to ensure that only effective *in personam* jurisdiction is exercised pursuant to the exception, the courts have insisted on four prerequisites:

- (1) The court must have *in personam* jurisdiction over the defendant. The plaintiff must accordingly be able to serve the defendant with originating process, or the defendant must submit to the jurisdiction of the court.
- (2) There must be some personal obligation running between the parties. The jurisdiction cannot be exercised against strangers to the obligation unless they have become personally affected by it ...

An equity between the parties may arise in various contexts. In all cases, however, the relationship between the parties must be such that the defendant's conscience would be affected if he insisted on his strict legal rights ...

- (3) The jurisdiction cannot be exercised if the local court cannot supervise the execution of the judgment ...
- (4) Finally, the court will not exercise jurisdiction if the order would be of no effect in the *situs* ... The mere fact, however, that the *lex situs* would not recognize the personal obligation upon which jurisdiction is based will not be a bar to the granting of the order."

³ [1932 CanLII 32 (SCC), [1932] S.C.R. 734. at] p. 739

⁴ [See McLeod, **The Conflict of Laws**, (Calgary: Carswell, 1983)] at pp. 323-326.

[449] The Court in *Catania* found that an equitable obligation between a deceased and his children did not create an obligation between siblings. It also noted that the Court ought not to exercise an *in personam* jurisdiction dealing with foreign property if the Court cannot supervise the execution of the judgment.

[450] The plaintiffs submit that:

[Section] 2 of the *Wills Variation Act* reads that the court "may, in its discretion, in an action 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 testator's estate for the spouse or children." This claim is therefore a question of equity that indirectly affects land.

[451] I do not accept the plaintiffs' argument. The *WVA* reference to what is "adequate, just and equitable" does not create an equitable obligation between the siblings of a deceased whose will is

sought to be varied.

[452] The plaintiffs have ignored the problem that the within claim does not advance any *in personam* claim for relief against Victor. This is unlike a family law proceeding, where one spouse has sued the other spouse, and the court has jurisdiction to make an order requiring the liable spouse to pay a judgment, after taking into account the fact that the liable judgment-paying spouse has a foreign asset.

[453] One only needs to look to the Notice of Civil Claim to appreciate that this *WVA* claim seeks statutory relief for adequate provision to be made for the plaintiffs out of the estate of the Testatrix. There is no independent claim for relief against Victor.

[454] Furthermore, a judgment of this Court dealing with the Fijian Properties cannot be supervised by this Court as this Court has no authority in Fiji. It is telling that the plaintiffs were unable to state what would be the wording or form of an order of this Court dealing with the Fijian Properties. The plaintiffs were unable to articulate a form of order that would not require steps be taken in Fiji and thus would not be outside of this Court's ability to supervise enforcement of the order.

[455] I have concluded that this Court has no jurisdiction to make an order affecting the Fijian Properties.

[456] The next question is whether the bequest to Victor of these properties, under the 2007 Will, ought to be taken into account when determine the siblings' circumstances relative to each other and what would be adequate, just and equitable provision for the plaintiffs under the 2007 Will.

[457] Counsel for Victor submits, as a matter of law, the Court cannot take into account the supposed value of the Fijian Properties, given that the Court has no jurisdiction to deal with that property under the *WVA*. Further, counsel for Victor argues that the value of the properties is too uncertain to be given any weight in any event.

[458] Neither party has been able to find an authority on point, that is, whether in determining what would be adequate provision under the *WVA*, the Court can take into account a bequest of foreign real estate within the same will that is being challenged. One can imagine all sorts of variations of problems where this could arise, including cases where a sibling who received a bequest of foreign property applies to vary the will to obtain a greater share of domestic property.

[459] I am going to decline to make a definitive statement of the law on this issue because I am able to decide the issue on the facts. In the circumstances of this case, the bequest of the foreign real estate was not realized by the time of trial, there is no evidence of Fijian successorship laws, and the value of the Fijian Properties is uncertain. I have concluded that the value of the bequest of the Fijian Properties to Victor is so uncertain that it ought not be treated as equivalent to an *inter vivos* gift to Victor, potentially entitling his siblings to a greater proportion of the estate assets located in Canada.

[460] I will however briefly deal with the plaintiffs' estoppel argument. Clearly Victor through his counsel at one time agreed that the Fijian Properties could be sold and the proceeds brought into the Testatrix's estate. Once I raised an issue about this Court's jurisdiction over the properties, he changed his position and revoked his consent.

[461] The plaintiffs cannot point to any step they took to their detriment in reliance on Victor's original position, other than to agree that the Administrator could incur expenses to sell the properties.

[462] The Administrator clearly relied on Victor's consent and incurred expenses on behalf of the estate in relation to the attempts to sell the Fijian Properties, including legal fees (in Fiji and here) and appraiser fees, and there is some evidence of expenses to clean up the properties for sale. There could still be other fees as the Administrator will likely wish to remove itself from involvement in the Fijian Properties.

[463] It is not necessary to rely on an estoppel argument. Given that the Testatrix left the Fijian Properties to Victor, and those properties are in a foreign jurisdiction, under the *WVA* it is just and equitable that all expenses incurred by the Administrator in relation to any successorship of those properties be paid from Victor's share of the Canadian estate solely. It would be manifestly unfair to require the plaintiffs to share the burden of these expenses. I will therefore order that the plaintiffs' share of the estate be calculated without any deduction for these expenses, and that all of the Administrator's expenses in relation to the Fijian Properties be applied to Victor's share of the estate. If the parties cannot agree on what expenses the Administrator incurred in relation to the Fijian Properties, I direct the parties to appear before a Registrar for an assessment, determination and certification of that question pursuant to R. 18-1(1) and (2) of the *Supreme Court Civil Rules, B.C. Reg. 168/2009*.

Circumstances of the Children

[464] In considering the question of adequate, just and equitable provision, I must give weight to the circumstances of the Testatrix's three children.

[465] In my view, the circumstances are such that no one sibling has a greater moral claim than the other to their mother's estate, based purely on their relationship with her. I conclude that the Testatrix more than discharged her moral obligation to Victor for the extra time he spent with her as compared to the other two siblings, by supporting him, which is similar to the conclusion reached in *Robillard v. Robillard Estate, 2015 BCSC 1417 (CanLII)*.

[466] The real difference between the siblings comes down to their financial security.

[467] While Rani has more net assets than Victor, she has worked hard for these and has had a very modest living, raising her children as a single parent, struggling to help fund their higher education, and dealing with her disabilities. A judicious parent would consider these facts, and would take into account the fact that she would benefit greatly from sharing in her mother's estate, to the point where it would likely give her a degree of financial flexibility and security which she does not otherwise have.

[468] While Ranjan has had more financial success in life than his siblings, that success has been a result of his hard work and the hard work of his wife. A judicious parent with a sizeable estate would not take Ranjan's hard work and resultant relative financial success as disentitling him to a share of his mother's estate. A judicious parent would consider the fact that Ranjan has very serious disabilities which diminish the lifestyle he has worked so hard to create for himself; and that a bequest would make his life easier.

[469] Both Rani and Ranjan had good and close relationships with their father. Knowing that Dukh's assets went to the Testatrix, both Rani and Ranjan had reasonable expectations that they would inherit something on their mother's death. A judicious parent would consider it fair that they share in their mother's estate.

[470] Victor has no assets but this is a function in large part of choices he made in not seeking out employment and in spending the money he was given by his parents on funding criminal activity. He

is younger than the other two siblings and of much better health and is physically able to work.

[471] As Ranjan has significant assets and still has a good income generated from the real estate business he owns with his wife, he is relatively more financially secure than his siblings. Rani has some assets but very little income or ability to earn income due to her disability. Victor has the ability to earn income and because he is younger more time to accumulate assets. It should be acknowledged that Victor has already diminished the value of one of the major assets, the Malkin Street Property, by his actions in running a marihuana grow operation there.

[472] I conclude that adequate, just and equitable division of the estate would be to vary the bequest to Victor, other than the bequest of the Fijian Properties which will remain unchanged, and to divide the remaining residue of the estate (that is, all the Canadian assets) by the following percentage shares: Victor 33%; Rani 34% and Ranjan 33% with one modification as noted above: Victor's share will be less all expenses incurred by the Administrator in relation to the Fijian Properties, which expenses will not be borne by the plaintiffs' shares of the estate.

SUMMARY

[473] I have found that the Testatrix's reasons in her 2007 Will for disinheriting Rani and Ranjan were not valid; and that there were no other valid reasons for disinheriting them.

[474] I have found that the Testatrix did not make adequate provision for Rani and Ranjan in her 2007 Will.

[475] I order that the Testatrix's 2007 Will be varied, at Clause 4(d), so that it no longer gives all of the residue of the estate to Victor, but instead, apart from the assets described as "Real Estate Properties situated in Lami Town, Fiji Islands", divides the remaining residue of the estate to the Testatrix's surviving children in the following shares (and understanding that the proper names of the children will be used):

- a) Victor 33%;
- b) Rani 34%;
- c) Ranjan 33%.

[476] If the parties are unable to agree on costs, they are at liberty to seek a further hearing before me on costs after first exchanging and filing with the Court written submissions on the same according to a reasonable timetable that begins with the plaintiffs' submissions being provided first. If the parties are unable to agree on a reasonable timetable they can seek directions by written request.

"The Honourable Madam Justice S. Griffin"

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