Date: 19970527
Docket: A933305
Registry: Vancouver

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

RAYMOND JOHN MARSH

PLAINTIFF

AND:

NATIONAL TRUST COMPANY and ANNE MacDONALD MARSH, executors of the Estate of GEORGE ERNEST TERRY MARSH, ANIMAL WELFARE FOUNDATION OF CANADA and ASSOCIATION FOR THE PROTECTION OF FUR-BEARING ANIMALS and the said ANNE MacDONALD MARSH

DEFENDANT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE DROSSOS

Counsel for the Plaintiff:	F.G. Potts R. Mondin
Counsel for the Defendants: - Animal Welfare Foundation of Canada and the Association for the Protection of Fur-Bearing Animals	R.H. Davies L. Blake-Borrell
- National Trust Company and Anne MacDonald Marsh	R.A. Porszt
Place and Date of Hearing:	Vancouver, B.C. September 9 - 13, 1997

[1] The plaintiff, Dr. Raymond Marsh, seeks a variation under the Wills Variation Act R.S.B.C., 1979, c. 435, and amendments thereto, of the Last Will and Testament, dated September 25, 1992, of his father, George Ernest Terry Marsh, who died on March 14, 1993, at Victoria, British Columbia, at age 83. The Will provides for a $10,000.00 legacy to the Association for the Protection of Fur-Bearing Animals, and a life interest in the net monthly income of the residue to the defendant, Anne MacDonald Marsh, the wife of the testator. On her death, $50,000.00 is first payable to the Association for the Protection of Fur-Bearing Animals (A.P. Assoc.) with the remainder of the residue to the Animal Welfare Foundation of Canada (A.W. Foundation). There was no provision for Dr. Marsh, the only child of the testator, George Marsh and his wife, Anne Marsh. In effect, Dr. Marsh was disinherited by his father.

[2] His father's estate had a gross value at date of death, March 14, 1993, of $612,310.55 with debts listed at $2,753.35 for a net value of $609,557.20. It has since accrued to a market value of $684,707.00 as at September 6, 1996.

[3] Mrs. Anne Marsh is now 80 years of age having been born on April 26, 1917. As a result of failing capacity a certificate of incapability issued on March 14, 1995, whereby the Public Trustee was appointed Committee of her financial affairs under s. 6(3) of the Patients Property Act, 1979, R.S.B.C. c. 313.

[4] Mrs. Anne Marsh's separate estate on the March 14, 1993, date of her husband's death shows total assets of approximately $428,444.69. Her separate estate as at August 22, 1996, shows an approximate total net value of $560,374.04 with a monthly income of $3,664.84 with an expected reduction on the termination of a $590.86 annuity payment on July 28, 1997 to $3,073,98 which amount is exclusive of her monthly income of $3,000.00 from her husband's estate under her life interest thereto. At the time of Mrs. Marsh's assessment and the certificate of incapability of March 14, 1995, she was living with her son and his family at Sechelt, British Columbia, but pursuant thereto she moved into the Sechelt Care Facility where she is now residing at a monthly expense of approximately $2,100.00. Her present and expected living expenses in the future are substantially more than adequately met from the income of her separate estate and that of her deceased husband.

[5] Dr. Marsh's total assets were approximately $686,000.00 in August, 1994, of which $100,000.00 consisted of his vehicles, and his 50 percent equity of $93,500.00 in the matrimonial home and $247,800.00 in R.R.S.P's, subject to ultimate tax deferral reduction. There has since been little change in his asset position, and together with his wife, Reiko Marsh, their assets would likely range around $850,000.00. They have little in the way of any debts other than the usual ongoing family expenses. Dr. Marsh's present annual income is about $90,000.00.

[6] Dr. Marsh now asks the Court to vary the Will of his father to provide that one half of the estate go to his mother and $100,000.00 of the remainder equally to the two charitable organizations with the balance to Dr. Marsh. In the alternative, on the death of Mrs. Anne Marsh, $100,000.00 of the remainder equally to the two charities with the balance to Dr. Marsh.

[7] The Public Trustee takes the position that the life interest in the net income of the estate is adequate for Anne Marsh and takes no position on the disposition of the remainder of the estate on her death. However, if the life interest of Mrs. Marsh must be disturbed then at least half of the estate of her husband should be set aside for her.

[8] The two animal charities submit that there is no justification for interfering with the wishes of the deceased testator as expressed by his Will.

OVERVIEW OF FAMILY HISTORY AND RELATIONSHIP:

[9] George and Anne Marsh were married in 1936 and resided in Toronto, Ontario. Their only child, Raymond Marsh, was born in Toronto in 1937, and for part of his early years was raised by his parents and paternal grandparents. When he was about 10 years old, the family moved, in 1947, to Australia, and then in 1951, to New Zealand, where his father acquired an interest in and worked for Christchurch Starch Company. Around 1955, Raymond completed high school and then worked for his father with the starch company for about two years, all the while living at home.

[10] In 1958, at about age 21, Raymond married Margaret Marsh, and moved from his parents home in 1959. He started a six year program in medical school towards a medical degree which he completed. He paid his own way for the first few years with the help of his wife who was working. He then received some financial assistance from his parents approximating 20 percent of the cost on the overall. In 1963, the first child of the marriage, Paul Gregory Marsh, was born, and in 1964, a second child, Sandra Diane Marsh was born. At the time of the trial, Paul Marsh was 33 years of age, single, a truck driver by occupation and unemployed. Sandra was 32 years of age, a single mother, and gainfully employed as a secretary. Dr. Marsh has a good relationship with Paul and, although he gets along with Sandra, it is a more difficult relationship.

[11] In 1965, since Dr. Marsh declined to go into the starch business and chose to pursue a medical career, his father, who had been the Managing Director of the Starch Company, decided to retire and sell his shares in the Company . In that same year George and Anne Marsh moved, initially to Vancouver, and after about five years, to Victoria, British Columbia. Mr. Marsh was about 55 years old when he returned to Canada and,

after his retirement, he invested most of the proceeds of the sale of his interest in the Starch Company into gold. He did very well with his investment, since the price of gold increased from $32.00 an ounce to approximately $500.00 an ounce and represents most of the increase in the value of his estate.

[12] In 1966, Dr. Marsh and his wife, Margaret, together with their children, moved to Victoria. It was understood before his parents left New Zealand that he and his family would be following.

[13] In 1967, Dr. Marsh completed a one year internship in Victoria and entered into private practice as a general practitioner in Victoria for approximately an eleven year period. During that time, his parents moved to Victoria, around 1970, pursuant to which Dr. Marsh would see his parents about once or twice a week, and his wife more frequently, until he moved to Vancouver to complete a one year residency at the University of British Columbia in internal medicine. Since his relationship with his wife was at this time deteriorating, she and the children, who were then 15 and 16 years of age, remained in Victoria. On Dr. Marsh's return to Victoria, around 1980, his relationship with his wife had deteriorated to the point where they separated and she left the matrimonial home and the children with their father. Dr. Marsh then met Reiko Ono Marsh (Reiko) in August, 1980, and he and his wife, Margaret, divorce. Dr. Marsh obtains employment as a field Medical Health Officer with the Federal Government and is posted to Prince Rupert where he is joined by Reiko.

[14] In 1982, Margaret Marsh, at Anne Marsh's request, commenced weekly visits with Anne and George Marsh, which visits continued until December of 1992. During many of her visits over this period, Mr. George Marsh would not participate in the social exchange and would absent himself by going to his bedroom.

[15] On April 18, 1984, Dr. Marsh and Reiko marry and move to Vancouver where he is employed for approximately six months by the Vancouver Health Department. Reiko Marsh is 15 and a half years younger than Raymond. She has a good formal education, holding a B.Sc., B.Ed. and Ph.D. in chemistry.

[16] In 1985, Raymond is hired by the British Columbia Provincial Government. Under his contract with the government, it pays his expenses to obtain a Master's degree in Health Sciences in return for which he must work for the government for a period of time as a Medical Officer. He completes his Masters Degree at the University of British Columbia in 1986.

[17] From 1984 to 1986 Mrs. Reiko Marsh worked part time as an English teacher at a college, but has not been gainfully employed outside the home since the birth of their first child, David, in 1986, pursuant to which she has devoted her time to homemaking and the education of the children.

[18] On April 3, 1986, Mr. George Marsh completes his first Will, a simple one page Will which appoints his wife Anne Marsh executrix and, in the alternative, Raymond Marsh as executor, and provides for a legacy of $100,000.00 to Raymond Marsh absolutely with the residue to Anne Marsh for her own use absolutely.

[19] On December 4, 1986, Dr. Marsh's first child, David, by his second marriage is born and his second child, Elizabeth, is born on February 3, 1990. At the time of the trial, the children were nine and six years of age respectively. The oldest child is showing special academic ability and indications are that the youngest will similarly follow. Their early school education has been largely attended to by their mother.

[20] In July, 1987, Raymond was diagnosed with colon cancer and underwent surgery with a prognosis of an 80 percent probability of death in five years and a 20 percent chance of survival. In that same month, his father executed a codicil to his Will to reduce Raymond's legacy from $100,000.00 to $25,000.00. In all other respects, the Will remained the same.

[21] On September 25, 1987, Mr. George Marsh writes to the A.P.

Assoc. asking for information concerning it and other similar societies. Although he has shown an earlier interest in animals, this is his first contact with a group or society representing animals. He subsequently has a discussion with George Clements, a director of the A.P. Assoc., where he states that he wants to make provision for the A.P. Assoc. in his Will, "because my whole family has cancer". In November 1987, he makes his first donation to the A.P. Assoc. of $5,000.00, followed by a series of donations in each year varying from $2,500.00 to $6,500.00 for a total of $30,500.00 up to and including April 1992, before his death on March 14, 1993.

[22] In 1987, Dr. Marsh and his wife and family moved to Victoria when he was transferred there by the Government. They remained in Victoria for about one and a half years until they moved in January, 1989, to Sechelt, British Columbia.

[23] From 1987 to 1992, Mr. George Marsh executed in addition to his earlier Will of April 3, 1986, and codicil thereto of July 24, 1987, a series of six Wills which provided as follows:

(i) In the second Will of December 17, 1987, Anne Marsh, Raymond Marsh, and the National Trust Company are appointed joint executors.

Anne Marsh to receive all personal and real property and all gold and silver bullion and certificates, plus such funds as are necessary, after taking into account her personal earnings and income, to maintain a personal income for her of $40,000.00 per annum. Any surplus income, after allowing for the other bequests, to Anne Marsh.

Raymond Marsh to receive a $25,000.00 legacy plus $12,000.00 a year for life, plus such funds as are necessary, after taking into account his personal earnings and income, to maintain a minimum personal income for him of $40,000.00 per annum. If Anne predeceases, then the $12,000.00 per annum for life for Raymond shall increase to $20,000.00 per annum and the $40,000.00 minimum personal income amount provided for shall be increased to $60,000.00 per annum.

All payments to be adjusted in accordance with changes to the Consumer Price Index.

Margaret Marsh to receive a $25,000.00 annuity.

Notwithstanding anything contained in the Will, the trustees are authorized during the life of Anne Marsh and Raymond Marsh to pay or apply whatever they deem advisable or necessary for the benefit and the well-being of Anne Marsh or any of the testator's family from the capital of the residue of the estate. Family is defined to include the following:

Son: Raymond John Marsh
Ex-wife of son: Margaret Marsh
Daughter-in-law: Reiko Ono Marsh
Grandchildren: Paul Gregory Marsh
Sandra Diane Marsh
David Takahiro Marsh

(the Notwithstanding Clause)

On the death of the later of Anne Marsh or Raymond Marsh, the estate to be divided equally between A.P. Assoc. and A.W. Foundation.

(ii) In George Marsh's third Will of August 12, 1988, Anne Marsh and the National Trust Company remain as joint executors, but Raymond Marsh is removed.

The provisions for Anne Marsh and Margaret Marsh remain the same, but Raymond Marsh is no longer in the Will at all, except for the "Notwithstanding Clause", which remains the same and continues to apply to him.

Also, the previous provision that on the death of Anne Marsh and Raymond Marsh, the estate is to be divided equally between the A.P. Assoc. and A.W. Foundation is changed by deleting Raymond Marsh.

By this time, Dr. Marsh is back at work after his cancer

operation, and by early 1989 he is working on the Sunshine Coast at Sechelt, British Columbia.

(iii) A month later on September 9, 1988, Mr. George Marsh, the day after his second donation to the A.P. Assoc. of $3,000.00, makes a fourth Will. It is identical to the August 12, 1988, Will except for the correction of an error or omission by adding the underlined words to the phrase "at any time during the lifetime of my wife and or my son", and "at the death of the later of my wife and my son" which relates to when the estate residue passes to the A.P. Assoc. and A.W. Foundation.

(iv) Almost two years later, on June 15, 1990, George Marsh makes a fifth Will.

The bequest of all the gold and silver bullion and certificates therefore is deleted.

The annuity to Margaret Marsh is reduced from $25,000.00 to $20,000.00.

The bequest to the A.P. Assoc. is reduced from one half of the residue of the estate to $50,000.00 with the remaining balance of the residue to the A.W. Foundation with payment on the death of Anne Marsh.

The "Notwithstanding Clause" for the family trust remains, but Elizabeth Marsh, the second child of Dr. Marsh and Reiko Marsh is added as a beneficiary and the phrase "advisable and necessary for the well-being" is supplemented by adding the word "urgently" before "necessary".

(v) About two months later, George Marsh executes a sixth Will on August 14, 1990, that provides for a $10,000.00 immediate gift to the A.P. Assoc. with the monthly income from the remainder to Anne Marsh during her life. The previous provision of such sums as are necessary to maintain a personal income of $40,000.00 per annum is deleted together with the power to encroach.

Ms. Margaret Marsh's $20,000.00 annuity remains.

Upon Anne Marsh's death, $50,000.00 to the A.P. Assoc. and the remainder to the A.W. Foundation.

The previous Notwithstanding Clause in favour of Dr. Marsh and his wife and four children and of Margaret Marsh is omitted resulting in there no longer being an encroachment on capital clause for the well-being of the family if deemed advisable and urgently necessary by the trustees.

In other respects this Will remained the same as the earlier June 15, 1990, Will.

[24] This was the point at which George Marsh completely disinherited his son and his wife and family. It was three years after Dr. Marsh's cancer operation, but two years short of the five year prognosis of a 20 percent chance of survival, with an 80 percent probability of death. However, it is reasonable to infer that as time went on his chances improved, but some risk of recurrence remains.

[25] Why George Marsh disinherited his son and his wife and family at this juncture is difficult to understand or appreciate because of the paucity of evidence on the question. None of the witnesses called by the plaintiff could testify to a reason why or as to the basis for this decision. To the contrary, their evidence was to the effect that Raymond Marsh and his wife and family had done nothing untoward to warrant the displeasure or censure of Mr.George Marsh. If anything, they had passively accepted and endured uncalled for remarks and bad behaviour on his part. However, when George Marsh made his decision in August, 1990, he responded to his lawyer's question of why as reflected in his lawyer's notes thus:

"He replied quite emphatically that he had no intention of leaving his son anything regardless of

the consequences, as he was considerably displeased with him. He did not wish to discuss the matter any further but said that he would leave it to his wife, who is apparently financially well off, to provide for him as she thinks it is necessary. He said that his son is very well provided for, having a very good job and no need of his assistance. He believes that the organizations to which he is leaving his money are far more in need of the financial help he can give.

(vi) George Marsh made his seventh and last Will on September 25, 1992. This Will is identical to the previous Will of August 14, 1990, except that the $20,000.00 annuity for Margaret Marsh is omitted. In this respect, arrangements were made that September outside the Will for a modest annuity of $300.00 a month to commence when she reached age 63.

[26] On turning to the relationship of Mr. George Marsh to his wife, son and family, and his daughters-in-law, he emerges from the evidence as a man who could be superficially charming, but was essentially a domineering, and opinionated man with little or no consideration for the feelings of other people and would brook no challenge to his views.

[27] He was very critical of the whole family and never said anything good about them. As he approached the end of his life span, he became more irritable, impatient and riled over whatever was discussed. He could not demonstrate affection or loving emotions to his wife or his son. He was an irascible man and not a loving man. He was at times rude, especially to his wife. He completely dominated and controlled his wife and made the decisions and constantly put her down when she expressed an opinion which did not meet with his own. Regardless, she apparently adored him. She was much more sociable, especially when he was not present, but as time went on towards the end the socializing decreased, in particular that of Mr. George Marsh, who would frequently retire to his bedroom when family or others would visit. He was becoming more reclusive. In fairness, however, he suffered from arthritis, contributing to his periodic bouts of heavy drinking, for which he took medication. Dr. Marsh did what he could to help his father with these problems.

[28] From about 1989 onwards, Mr. George Marsh began to make racist remarks against orientals, in particular the Japanese, in the presence of Dr. Marsh and his wife, Reiko Marsh, who was of Japanese origin, and, on one occasion, reduced her to tears. Although Dr. Marsh occasionally disagreed with his father, he never seriously challenged or disputed his father or was critical of him. Dr. Marsh had long ago learned, as his wife Reiko Marsh and her predecessor Ms. Anne Marsh soon did, that it was fruitless to argue with Mr. Marsh, senior, and much easier to avoid or ignore certain sensitive issues or to take issue with him on whatever views he expressed.

[29] Dr. Marsh understandably was not outgoing or given to demonstrative affection and presented a conservative and reserved person.

[30] During the latter part of his life, Mr. George Marsh expressed views that although Dr. Marsh was his son, he disliked him, and, as already mentioned, was considerably displeased with his son, offering no reasons or explanations for his views. The evidence demonstrates that there was an ongoing friction and tension between the father and his son which is understandable in the face of the father's attitude and behaviour towards his son and wife. I am satisfied, however, from the testimony of Dr. Marsh and his wife and the witnesses called on his behalf that there is very little evidence, if any, to justify such views and behaviour of Mr. Marsh, senior, or that Dr. Marsh and his wife and family were other than considerate and reasonable in their dealings, socializing and conduct towards his parents, and were there to assist them and did so when able and needed, or that Dr. Marsh was other than a dutiful son to both his parents.

[31] The death of her husband had major effect on Mrs. Anne Marsh which, from his domination and control of her and her

dependency on him, is understandable. She found it difficult to cope and became more and more forgetful, confused, erratic and difficult. She accused her grandson, Paul Marsh, of stealing his grandfather's car and so informed the police, when in fact it had been transferred to him and she had been so informed, but persisted. She also by her declining behaviour drove her daughter-in-law, Marjorie Marsh, who was attempting to assist her, away from her. She was initially in favour of challenging, together with her son, Dr. Marsh, the provisions of her husband's Will and to pay legal costs, but then became variable and changed her mind stating that her husband could do whatever he wants. Apparently, his controlling hand still extends from the grave. The condition of Mrs. Anne Marsh continued to deteriorate to where she was ultimately certified and committed on March 14, 1995.

[32] Dr. Marsh was aware of an earlier Will of his mother where she gave one third of the residue to him and divided the remainder amongst the children, Paul and Sandra, by his first marriage. He has, however, no knowledge of whether this Will was subsequently varied or replaced by others, in other words, of the current situation, and the Public Trustee has taken the position that such is subject to solicitor/client privilege and not producible to the plaintiff. The court is left to speculate.

[33] On dealing with what transpired between Mr. Marsh, senior, and his son and wife concerning his estate and their circumstances, I accept the following evidence.

[34] When Mrs. Reiko Marsh was employed part-time as an English instructor at the University of British Columbia and contemplated in 1985, taking a full-time teaching position, she refused because Mr. Marsh, senior, told her she would be foolish to do so since they were going to inherit and were well provided for. I accept her testimony that this was a major factor in her decision not to take a full-time position and in 1986 to give up her employment and to attend full-time to homemaking and the needs and education of the children. In this respect, the children are largely being taught at home by their mother. At the present time, after such a long absence from employment, it would be difficult for her to obtain employment in her field of endeavour without upgrading her qualifications and then at a lower entry level.

[35] In 1987, Mr. Marsh, senior, showed Mrs. Reiko Marsh some blue prints of an apartment that he was building and stated that he was going to live in it and then it was theirs.

[36] About six months before his death, Mr. George Marsh had a discussion with his son about his financial situation and estate telling him that it consisted of an apartment, annuities, and liquid assets with each valued at approximately $250,000.00 for a total of $750,000.00. He said, "One of these days the apartment is going to be yours." This was the first and only time that George Marsh ever discussed his financial situation with his son. At about the same time, he offered to put up $100,000.00 for an annuity for his son if he matched that amount, but he did not do so since he had become ill and it was not an opportune time for him nor did he see any need for haste. Mrs. Reiko Marsh indicated, except for her husband's illness, she would have put up the $100,000.00. From Mr. George Marsh's diary entry of January 4, 1993, he was continuing to show an intention to benefit his son by seeking information about annuities in general for Ray. In any event, no annuity was established. Lastly, I accept Dr. Marsh's testimony that his father had told him on many occasions that he would never want for financial security and that both parents had said this on several occasions to him. Further, that his father had said he would like to see him retire at age 60 and that Dr. Marsh assumed that his mother and he would inherit the estate and the two of them would manage it with most of the task on his shoulders.

[37] Dr. Marsh's health is a matter of concern. As mentioned, in July of 1987, he underwent surgery for colon cancer with an 80 percent chance death within five years and a 20 percent of survival. The five years has past, but the spectre of a reoccurrence enhanced by the stress of his work continues. In 1992, Dr. Marsh developed a heart condition of an erratic heart beat and chest pain which has become an increasing problem and

requires medication. In August 1992, he told his mother that he had a heart condition and that it was getting worse. His father, from his diary entry of August 15, 1992, about a month before his last Will of September 27, 1992, was aware of it.

[38] I accept Dr. Marsh's testimony that his principle concern because of his health is to retire as soon as possible to avoid the stresses of his medical practice on his health. However, to give up his yearly income from his medical services and practice of approximately $90,000.00 a year would, on the basis of the income that he would likely realize from his and his wife's exigible assets, result in a marked decline in their lifestyle and standard of living and that of their two young children. There is the added expense of providing for gifted children to realize their potential. Dr. Marsh's capital, as well as that of his wife, would be at marked risk of substantial encroachment in order to maintain the family's standard and also to secure an appropriate standard for their old age after the children had completed their education and became self supporting. Accordingly, in order to maintain the family's standard Dr. Marsh is confronted with the dilemma of continuing to work with the added risk that stress places on his health or, to retire and face a reduced standard of living and security for the family and for his wife and himself when raising the children and during old age with possible hardships. There is also the risk implicit in the present condition of his health, let alone the recurrence of cancer, that regardless of a desire or decision to continue on with his work so as to maintain the family standard, he may be forced to give it up, and absent any outside assistance, to have a lower standard and security imposed upon him and his family.

[39] Ms. Margaret Marsh testified that several years before the death of Mr. Marsh, senior, he came into the living room of his home while she was visiting and abruptly, in an outburst fashion, stated, "That's it. You're all out of the Will. I am leaving it to the animals. People are not worth it."

[40] There is little doubt that Mr. Marsh, senior, had a genuine interest in the well-being and humane treatment of animals and from 1987 to April 1992, he became actively involved and gave generous, periodic donations to the A.P. Assoc. He drew satisfaction from his relationship with this Association, but since it had largely reached its goal of the humane trapping of animals, Mr. Marsh later sought their help in locating and turning to the A.W. Foundation, whose objectives for the humane treatment of animals were broader than those of the A.P. Assoc. His involvement with the A.W. Foundation was much briefer and not as close as that with the A.P. Assoc., but his generosity in his Will to the Foundation was most substantial, and one of the largest contributions ever received by the Foundation. The A.W. Foundation did not directly participate in the advancement of the humane treatment of animals, but raised funds for the purpose of directing donations to those organizations that did so and the Foundation considered worthy of assistance.

LAW:
[41] The Court's jurisdiction to order a variation to a testator's Will to make adequate provision for the proper maintenance and support of his or her surviving spouse and children is governed by section 2(1) of the Wills Variation Act, R.S.B.C.1979, c. 435 and amendments thereto, which reads:

2. (1) Notwithstanding any law or statute to the contrary, if a testator dies leaving a will which does not, in the court's opinion, make adequate provision for the proper maintenance and support of the testator's wife, husband or children, the court may, in its discretion, in an action by or on behalf of the wife, husband or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the estate of the testator for the wife, husband or children.

[42] In the recent leading case of Tataryn v. Tataryn Estate, (1994) 93 B.C.L.R. (2d) 145, S.C.C., McLachlin J. in giving the judgment of the court had the following to say concerning the interpretation application of section 2(1) of the Wills Variation Act at pp. 150, 151, 154, 155, 156 and 157, reading in part:

The language of the Wills Variation Act is very broad. The court must determine whether the testator has made "adequate provision" for his spouse and children. If it concludes he or she has not, the court "may, in its discretion...order...the provision that it thinks adequate, just and equitable in the circumstances".

I do not interpret the section as imposing two different tests. The court must ask itself whether the will makes adequate provision and if not, order what is adequate, just and equitable. These are two sides of the same coin.

The words "adequate, just and equitable" may be interpreted in different ways. At one end of the spectrum, they may be confined to what is "necessary" to keep the dependants off the welfare roles. At the other extreme, they may be interpreted as requiring the court to make an award consistent with the lifestyle and aspirations of the dependants. Again, they may be interpreted as confined to maintenance or they may be interpreted as capable of extending to fair property division. Complicating these questions are the issues of the weight to be placed on the "right" of the testator to dispose of his estate as he chooses - i.e., testamentary autonomy - and the equities as between the beneficiaries: spouses and children. Different courts, applying a variety of approaches to these questions have, over time, arrived at different interpretations of the meaning of "adequate, just and equitable".

...The language of the Act confers a broad discretion on the court. The generosity of the language suggests that the legislature was attempting to craft a formula which would permit the courts to make orders which are just in the specific circumstances and in light of contemporary standards. This, combined with the rule that a statute is always speaking (Interpretation Act, R.S.B.C. 1979, c. 206, s. 7), means that the Act must be read in light of modern values and expectations. What was thought to be adequate, just and equitable in the 1920s may be quite different from what is considered adequate, just and equitable in the 1990s. This narrows the inquiry. Courts are not necessarily bound by the views and awards made in earlier times. The search is for contemporary justice.

...

It has been suggested that this Court ought to replace the "judicious father and husband" test it set out in Walker v. McDermott and return to the needs-based analysis which prevailed in the early years of the Act. With great respect to the arguments to the contrary, I am not persuaded that we should do so.

...

If the phrase "adequate, just and equitable" is viewed in light of current societal norms, much of the uncertainty disappears. Furthermore, two sorts of norms are available and both must be addressed. The first are the obligations which the law would impose on a person during his or her life were the question of provision for the claimant to arise. These might be described as legal obligations. The second type of norms are found in society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards. These might be called moral obligations, following the language traditionally used by the courts. Together, these two norms provide a guide to what is "adequate, just and equitable" in the circumstances of the case.

The first consideration must be the testator's legal

responsibilities during his or her lifetime.

...

The legal obligations on a testator during his or her lifetime reflect a clear and unequivocal social expectation, expressed through society's elected representatives and the judicial doctrine of its courts.

...

The legal obligation of a testator may also extend to dependent children. And in some cases, the principles of unjust enrichment may indicate a legal duty toward a grown, independent child by reason of the child's contribution to the estate. The legal obligations which society imposes on a testator during his lifetime are an important indication of the content of the legal obligation to provide "adequate, just and equitable" maintenance and support which is enforced after death.

For further guidance in determining what is "adequate, just and equitable", the court should next turn to the testator's moral duties toward spouse and children. It is to the determination of these moral duties that the concerns about uncertainty are usually addressed. There being no clear legal standard by which to judge moral duties, these obligations are admittedly more susceptible of being viewed differently by different people. Nevertheless, the uncertainty, even in this area, may not be so great as has been sometimes thought. For example, most people would agree that although the law may not require a supporting spouse to make provision for a dependent spouse after his death, a strong moral obligation to do so exists if the size of the estate permits. Similarly, most people would agree that an adult dependent child is entitled to such consideration as the size of the estate and the testator's other obligations may allow. While the moral claim of independent adult children may be more tenuous, a large body of case law exists suggesting that, if the size of the estate permits and in the absence of circumstances which negate the existence of such an obligation, some provision for such children should be made: Brauer v. Hilton (1979), 15 B.C.L.R. 116 (C.A.); Cowan v. Cowan Estate (1988), 30 E.T.R. 216, affirmed (1990), 37 E.T.R. 308 (B.C.C.A.); Nulty v. Nulty Estate (1989), 41 B.C.L.R. (2d) 343 [[1990] 2 W.W.R. 558] (C.A.). See also Price v. Lypchuk Estate, supra, and Bell v. Roy Estate (1993), 75 B.C.L.R. (2d) 213 [[1993] W.W.R. 40] (C.A.), for cases where the moral duty was seen to be negated.

How are conflicting claims to be balanced against each other? Where the estate permits, all should be met. Where priorities must be considered, it seems to me that claims which would have been recognized during the testator's life - i.e., claims based upon not only moral obligation but legal obligations - should generally take precedence over moral claims. As between moral claims, some may be stronger than others. It falls to the court to weigh the strength of each claim and assign to each its proper priority. In doing this, one should take into account the important changes consequent upon the death of the testator. There is no longer any need to provide for the deceased and reasonable expectations following upon death may not be the same as in the event of a separation during lifetime. A will may provide a framework for the protection of the beneficiaries and future generations and the carrying out of legitimate social purposes. Any moral duty should be assessed in the light of the deceased's legitimate concerns which, where the assets of the estate permit, may go beyond providing for the surviving spouse and children.

I add this. In many cases, there will be a number of

ways of dividing the assets which are adequate, just and equitable. In other words, there will be a wide range of options, any of which might be considered appropriate in the circumstances. Provided that the testator has chosen an option within this range, the will should not be disturbed. Only where the testator has chosen an option which falls below his or her obligations as defined by reference to legal and moral norms, should the court make an order which achieves the justice the testator failed to achieve. In the absence of other evidence a will should be seen as reflecting the means chosen by the testator to meet his legitimate concerns and provide for an ordered administration and distribution of his estate in the best interests of the persons and institutions closest to him. It is the exercise by the testator of his freedom to dispose of his property and is to be interfered with not lightly but only in so far as the statute requires.

RESOLUTION AND DISPOSITION:
[43] I am satisfied on the evidence that the plaintiff has discharged the civil onus of establishing that his father failed in his Will to do what a judicious person would do in the circumstances in the light of contemporary community standards and justice, and to make adequate provision for the proper maintenance and support of his son, Dr. Marsh, according to the provisions of s. 2(1) of the Wills Variation Act as interpreted by the principles expressed by the Supreme Court of Canada in Tataryn v. Tataryn Estate (supra).

[44] The claim of the testator's son, Dr. Marsh, as an independent adult child rests on the more tenuous moral duty of his father towards him. The two animal charities depend on the provisions in the testator's Will and his right of freedom of testamentary disposition as well as moral grounds that the testator was keenly interested in the welfare and humane treatment of animals and those groups that furthered this objective. He also derived comfort and satisfaction from dealing with and financially assisting these groups.

[45] Although Dr. Marsh did not contribute directly towards his father's accumulation of his wealth, he made very little call on his father for financial assistance, even paying for most of his expenses while attending medical school, and received little at his father's expense. Dr. Marsh was a loyal, considerate and dutiful son to his father, visiting and assisting both parents when he could, as did the other members of his family, under the often difficult circumstances of his father's critical attitude and behaviour towards them. Whether a testator is a mean person or a loving and considerate person is of little relevance where he or she meets the standard of a judicious testator under the Will. However, Mr. George Marsh's unacceptable attitude and behaviour towards his son and his family, and stated displeasure and dislike for his son and preference of animals over people, where there is not only no evidence to justify such conduct, but strong evidence to the contrary, does bear on his ability to exercise fair and sound judgment as a judicious testator when considering his moral obligations and duties towards his son. It also relates to whether his decisions are based on considered and sound facts, or are distorted, and skewed and divorced from reality because of his ingrained biases and unfair emotional dislikes. His declaration of making provision in his Will for the A.P. Assoc. because his whole family has cancer when only his son had cancer, and ultimately disinheriting not only his son, but also his son's wife and his four children, where previously he had made provision for them, is not indicative of sound and judicious judgment.

[46] In the present case, Mr. Marsh, senior, failed adequately to weigh and take full account of his son's declining health, of which he was aware, and its potential impact on his ability to earn and consequent effect on him and his family, or chose to ignore it or was blinded by his attitudes. He did not appreciate that if his son ceased work it would, with a young wife and family, impose a financial strain on his resources and consequential reduction in his standard of life and security in his old age with possible relative hardship. Importantly, the statements and promises of Mr. George Marsh that he wanted to

have his son retire at age 60 and that his son would never want for financial security, that the apartment was going to be theirs, and that his wife would be foolish to take a full time teaching position because they were going to inherit and were well provided for, which she accepted at face value by declining full time employment and then ceasing employment to the detriment of her husband and herself and family, in themselves, and together with the other factors mentioned, place a heavy moral duty on George Marsh to make adequate provision. It removes the moral claim of an independent adult child from that of "more tenuous".

[47] Lastly, Mr. George Marsh cannot avoid the moral duties of a judicious testator to an independent adult child by leaving it up to his wife to make such provision, especially where he knows that she is forgetful and variable and does not even leave any of the capital of his estate to her for such purposes.

[48] On considering the foregoing in relation to what is adequate, just and equitable under the circumstances for a testator to meet his legal and moral duties to his spouse and moral duties toward his son as against the claims of the two animal charities, the Marsh Estate, although not of major proportions by today's standards, is a substantial one. The court on exercising its discretion to vary the Will considers the claim of the testator's spouse as having precedence. The court is satisfied that such as well as balancing the conflicting claims and priorities of the testator's moral duty to his son, Dr. Marsh, and those of the two animal charities, including the weighing of the testamentary right of freedom of disposition, will be adequately, justly, and equitably met by an order varying the testator's Last Will and Testament, dated September 25, 1992, as follows:

[49] Subclause (b) of paragraph 4 and paragraph 5 on p. 3 of the Will shall be deleted and, in variation, the following substituted therefor:

(b) My Trustee shall invest the remaining portion of the trust funds and shall pay one half of the net income derived therefrom to my wife, Anne MacDonald Marsh, on a monthly basis for the remainder of her life and shall pay the other one half of the net income to my son, Raymond John Marsh, on a monthly basis for his own use absolutely until the death of my wife.

I expressly authorize my Trustees in their discretion that during the life of my wife to the extent that her income from her separate estate and my estate is not sufficient to meet her proper maintenance and needs, including any expenses for special care or medical attention, to encroach on capital to pay or apply for her use and benefit what they deem is advisable or necessary to meet such proper maintenance and needs from the capital of the residue of my estate.

5. At the death of my Wife, I direct that from the remaining monies in the trust fund, $50,000.00 shall first be paid to the Association for the Protection of Fur-Bearing Animals and the balance of the trust fund, that is the remainder of the residue, shall be paid one half to the Animal Welfare Foundation of Canada, presently having its office at 11 June Avenue, Cobert, Ontario, each of which foregoing bequests may be used in such manner as will best advance the purposes of their respective organizations, in the sole discretion of their Administrators, and the other half of the trust fund shall be paid to my son, Raymond John Marsh, for his own use absolutely.

[50] Unless costs need be spoken to, the parties respective taxable costs shall be payable from the estate.

"N.A. Drossos, J."

N.A. DROSSOS, J.