IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Damgaard v. Damgaard Estate,* 2025 BCSC 208

Date: 20250210
Docket: S140843
Registry: Kelowna

Between:

Kathryn Elizabeth Damgaard

Plaintiff

And

Michael Scott Greene, executor of the Will of Elizabeth Jean Damgaard, deceased, Neils Edward Damgaard, Michael John Damgaard, Stephanie Christina Damgaard, and Michael Christopher Damgaard

Defendants

Before: The Honourable Justice Wilson

Reasons for Judgment

Counsel for the Plaintiff:	G.W. White
Counsel for the Defendants:	No one appearing
Place and Date of Hearing:	Kelowna, B.C. January 7, 2025
Place and Date of Judgment:	Kelowna, B.C. February 10, 2025

[1] This is a summary trial application in which the plaintiff, Kathryn Elizabeth Damgaard, seeks to vary her mother's will. Kathryn is one of three adult children of the deceased, Elizabeth Jean Damgaard.

[2] In general terms, the deceased's will provides for modest bequests to her two grandchildren, with the remainder of the estate divided with each of her children receiving a one-third interest.

[3] The estate is significant. Each of the three children will receive more than $1.8 million.

[4] Kathryn receives disability benefits from the provincial government. She presently resides in social housing operated by More Than a Roof Mennonite Housing Society (the "Housing Society"). Eligibility is based upon BC Housing guidelines. It has previously been determined that the plaintiff is unable to work, and she receives disability assistance through the Ministry of Social Development and Poverty Reduction.

[5] Kathryn is 63 years of age. Her disability benefits, which are considered taxable, were $16,986 in 2023. I infer from the evidence that her shelter benefit of $445, which the Ministry pays directly to the Housing Society, is well below what would be the market rate of rent for her accommodations.

[6] Kathryn seeks to vary the deceased's will to add terms that would place her share of the estate in a fully discretionary trust. The intended impact of the discretionary trust is to ensure that Kathryn does not lose her entitlement to disability benefits, and therefore her housing with the Housing Society. Such a trust is referred to as a "*Henson* trust".

***Henson* Trust**

[7] The *Henson* trust is so named from the Ontario decision in *Ontario (Director of Income Ministry of Community & Social Services) v. Henson*, 26 O.A.C. 332,1987 CarswellOnt 654 (Div. Ct.), aff'd (1989) 36 E.T.R. 192 (Ont. C.A.), where the Court

held that in cases where the trustees are given absolute and unfettered discretion and the beneficiary cannot compel the trustee to make payments to them, the beneficiary's interest in the trust property is nil.

[8] In *S.A. v. Metro Vancouver Housing Corp*., 2019 SCC 4 at para. 39, the Supreme Court of Canada considered *Henson* trusts and their use in supplementing disability benefits:

> [39] The foregoing analysis makes two things clear. First, the terms of the Trust provide the Trustees with exclusive discretion as to whether payments should be made to S.A. While the Trustees must periodically consider whether distributions should be made, they are not obliged to exercise this discretion in any particular manner. Second, the structure of the Trust prevents S.A. from terminating the Trust on her own under the rule in *Saunders v. Vautier.* As a result, S.A. has no enforceable right to receive any of the Trust's income or capital: unless and until the Trustees exercise their discretion in her favour, S.A.'s interest in the Trust is akin to a *mere hope* that some or all of its property will be distributed to her at some point in the future.

[9] The Supreme Court of Canada provided the following description of *Henson* trusts:

> [2] Resolving this issue requires this Court to consider, for the first time, the nature of a specific type of trust —- commonly known as the "*Henson* trust" settled for the benefit of a person with disabilities who relies on publicly funded social assistance benefits (see*: Ontario (Director of Income Maintenance, Ministry of Community & Social Services) v. Henson* (1987), 26 O.A.C. 332 (Ont. Div. Ct.), affd in (1989), 36 E.T.R. 192 (Ont. C.A.)). The central feature of the *Henson* trust is that the trustee is given ultimate discretion with respect to payments out of the trust to the person with disabilities for whom the trust was settled, the effect being that the latter (a) cannot compel the former to make payments to him or her, and (b) is prevented from unilaterally collapsing the trust under the rule in *Saunders v. Vautier* (1841), 1 Cr. & Ph. 240, 41 E.R. 482 (Eng. Ch. Div.). Because the person with disabilities has no enforceable right to receive any property from the trustee of a Henson trust unless and until the trustee exercises his or her discretion in that person's favour, the interest he or she has therein is not generally treated as an "asset" for the purposes of means-tested social assistance programs (D. W. M. Waters, M. R. Gillen and L. D. Smith, eds.. Waters' Law of Trusts in Canada (4th ed. 2012), at pp. 572-73). The *Henson* trust therefore makes it possible to set aside money or other valuable property for the benefit of a person with disabilities in a manner that jeopardizes that person's entitlement to receive social benefits as little as possible.

[10] Because Kathryn does not seek to vary the distribution under the deceased's will, the defendants have all taken no position. As such, the court does not have the benefit of contrary submissions.

This application

[11] Kathyrn brings this application pursuant to s. 60 of the *Wills, Estates and Succession Act*, S.B.C. 2009, c. 13 [*WESA*]. Section 60 provides as follows:

> **60** Despite any law or enactment to the contrary, if a will-maker dies leaving a will that does not, in the court's opinion, make adequate provision for the proper maintenance and support of the will-maker's spouse or children, the court may, in a proceeding by or on behalf of the spouse or children, order that the provision that it thinks adequate, just and equitable in the circumstances be made out of the will-maker's estate for the spouse or children.

[12] In order to vary the will, the court must therefore be satisfied that the deceased did not make adequate provision for the maintenance or support of Kathryn.

[13] Kathryn argues that by failing to put her interest into a *Henson* trust to preserve her benefits, the deceased did not make adequate provision for her maintenance and support.

[14] In *Tataryn v. Tataryn Estate*, [1994] 2 S.C.R. 807), the Supreme Court of Canada held that a proper determination of quantum has two distinct components: the will maker's "legal obligations" and "moral obligations" to the claimant. The court must assess the competing claims to the estate regarding the fact that not all claimants have claims of equal moral strength and that legal obligations take precedence over moral obligations. Legal obligations are those which the law would impose on a person, during their life, were the question of provision for the claimant to arise. Moral obligations are based on society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards.

[15] The test for “adequate provision for the proper maintenance and support” is an objective test, assessed in light of current societal legal and moral norms: see *Mawdsley v. Meshen,* 2010 BCSC 1099 at para. 316.

[16] In *Dunsdon v. Dunsdon*, 2012 BCSC 1274, Justice Ballance described “adequate provision” as follows:

> [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.

[17] In *Mawdsley*, Ballance J. provided the following interpretation of the testator’s moral duty as set out by Justice McLachlin (as she then was) in *Tataryn*:

> [316] … McLachlin J. indicated that a testator's moral duties are found in "society's reasonable expectations of what a judicious person would do in the circumstances, by reference to contemporary community standards" (p. 821). She acknowledged that because there is no clear legal standard to assess moral duties, obligations falling under that rubric are more susceptible to being differently interpreted by different individuals (p. 822).
>
> *Tataryn* recognized that there is no single way for a testator to divide the estate in order to discharge the legal and moral duties. In this regard, McLachlin J. reminded that it is only where the testator has chosen an option which falls below his or her obligation defined by reference to the contemporary sense of legal and moral norms, that a court will make an order "which achieves the justice the testator failed to achieve" (p. 824).

[18] In *Chung v. Chung*, 2024 BCSC 1939, at para. 184, citing *Dunsdon* at para. 134, the Court held that the factors the court should consider when determining the testator’s moral duty to independent children include:

- reasonably held expectations of the claimant;
- standard of living of the testator and claimant; and
- financial need and other personal circumstances, including disability, of the claimant.

[19] In *Deutschmann (Guardian ad litem of) v. Fallis*, 2010 BCSC 2031 at para. 45, the Court held that the will-maker's moral obligation to a child with a disability is higher than to adult independent children.

[20] The *British Columbia Estate Planning and Wealth Preservation Manual*, Vancouver, BC: The Continuing Legal Education Society of British Columbia, 2024, pp. 17-1 and 17-2, includes a chapter called "Trusts for Persons with Disabilities". The chapter opens with the following statement:

> Special considerations are necessary when creating a plan for the benefit of a person with disabilities, regardless of who undertakes the plan. First, the abilities of the person for whom the planning is done must be considered. For someone with reduced mental capacity or physical challenges that prevent the person from managing their own affairs, there is the practical challenge of how to give the benefit of funds without an outright gift. For a person receiving provincial disability benefits, there is the issue of designing the gift to ensure the maximum amount of those benefits remains available, as well as the services that accompany entitlement to benefits.

[21] The Ministry of Social Development and Poverty Reduction (the "Ministry") has published a guidebook entitled "Disability Assistance and Trusts" which states at p. 2:

> Many people with disabilities have extra costs because of their disability. These costs might include changes to their home, mobility aids or home support workers. People who have these or other disability related costs, and their families, may want to create resources to pay for them now and in the future, while maintaining their eligibility for disability assistance. BC Employment and Assistance (BCEA) legislation provides that a person receiving disability assistance may have assets held in a trust, if certain conditions are met. In that case, those assets will not affect their eligibility for assistance.

[22] The Ministry's policy, at p. 11, is that a trust is a legitimate method for allowing people with disabilities to pay for expenses not covered by their benefits:

> The amount the person can spend on disability related costs from a trust is meant to pay for things that are not covered by the ministry, or for fees that exceed the covered amount.

[23] It follows that the Ministry agrees that creating a trust to supplement disability benefits may be appropriate.

[24] There is no question that the court has the authority to create a trust in the context of a wills variation claim. The authority is found both in the legislation *WESA*, at s. 64(b) and in some of the authorities to which I was referred.

[25] In *Barnsley v. Barnsley*, 142 D.L.R. (4th) 335, 1996 CanLII 1110 (BCSC), the testator left a surviving wife and four children. He left substantial bequests to the three children from his first marriage, but nothing to his youngest child from a subsequent marriage. The youngest child, the testator's only daughter, was born with Down's syndrome and had other significant medical issues. She was placed in foster care at an early age and continued to reside with the foster parents even into adulthood.

[26] Because the daughter was an adult, the Court held that the testator had no legal duty to her, but nonetheless had a moral duty to provide for her. The Court concluded there was no legitimate basis for the deceased to disentitle his youngest child, and she was given a portion of the estate. Because she was unable to manage her own affairs, the Court directed that the money be put into a trust.

[27] In *Willott v. Willott Estate,* 42 B.C.L.R. (3d) 223, 1997 CanLII 3439 (BCSC), the deceased left her only son out of the will. He had mental health and other issues. He also had difficulties with substance use and had been involuntarily hospitalized. The Court concluded that there was no legitimate basis for the deceased to disinherit her only son and that his circumstances were such that she had a moral obligation to provide for him.

[28] In *Willott*, the Court awarded the son a portion of the estate and put it into a trust that would serve to supplement the benefits he received from the state.

Discussion

[29] Because this is an action under s. 60 of *WESA*, the threshold question is whether the testator made adequate provision for Kathryn's proper maintenance and support.

[30] In the circumstances, there can be little doubt that the deceased could have put Kathryn's inheritance into a *Henson* trust. However, this is not the question I must decide. The question is whether she breached her moral obligation by not doing so.

[31] The question of whether the testator met her moral obligation is evaluated at the time of death or the time of last testamentary capacity, being the last opportunity she would have had to make changes to her will: *Willott* at para. 54; *Mawdsley* at para. 317.

[32] In *Tataryn* at p. 157, McLachlin J. stated that in many cases there will be various ways of dividing up an estate that will satisfy a testator's moral obligations:

> . . . 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.

[33] Only if the court is of the opinion that there has been inadequate provision may the will be varied. The available remedies include the creation of a trust, which is what happened in *Barnsley* and *Willott*. However, in those cases, the deceased disinherited a disabled adult child. Having concluded that a failure to provide for the

adult child was a breach of the testator's moral duty, it was then open to the court to fashion a remedy. Kathryn must first establish that her mother did not make adequate provision for her proper maintenance and support before the question of remedy is addressed.

[34] In this case, Kathryn has received exactly the same under the will as her two siblings. It is not a case where a child has been disinherited, whether because the testator believed the state would take care of them or otherwise. The only question is whether the testator, by leaving Kathryn a direct distribution, failed to make adequate provision for her because she failed to create a trust.

[35] There are a number of aspects of this application that give me pause.

[36] My first area of concern regarding whether or not the testator made adequate provision is the size of the estate. Unlike in *Willott* and *Barnsley* where the amounts awarded to the disabled adult child were relatively modest, Kathryn's interest in her mother's estate is at least $1.8 million. Indeed, this may not be the final value of the estate. At para. 11 of Kathryn's Affidavit #1, she deposes the following:

> 11. The Interim Accounts list the net assets of my Mother's estate received by Cook Roberts LLP at $5,262,116.92. Her 9,167 Class "A" common shares and 833 Class "B" Common shares in the capital of Vancouver Island Properties Ltd. (incorporation number BC0209151) are not in that list as they have not yet been realized by the Executor.

[37] There is no question that disability benefits from the state provide for a standard of living that is at the subsistence level but no more. Persons with disabilities often have additional expenses that are not covered by their disability benefits. A trust will provide the person with the ability to pay for those necessities, in addition to the ability to pay for other things that may not be strictly necessary but might otherwise improve their quality of life.

[38] However, the evidence regarding Kathryn's expenses beyond what is currently covered through her disability benefits is sparse. She describes her income circumstances at paras. 13 to 18 of her second affidavit:

13. My current monthly expenses are approximately $1,260 and include:

a)	Food and groceries	$700.00
b)	Supplements	$150.00
c)	Medication	$150.00
d)	Cell phone	$70.91
e)	Internet	$75.74
f)	Electricity	$60.00
g)	Streaming services	$50.00

14. My expenses, especially food, have increased at a faster rate than the increases to by BC Benefits.

15. My costs for a physiotherapist, therapist, and personal trainer, and other treatments, are not covered by my benefits. I am not currently able to afford these services.

16. I will be dependent on the funds received from my mother's estate to pay for expenses that exceed the minimal income that I receive from my BC Benefits (and from the Canadian Pension Plan when I turn 65 years old).

17. I am also taking medication that is not covered by my benefits.

18. I am not currently able to afford to pay for all of the care that I need to adequately manage my disabilities.

[39] While I have no doubt that providing for some of the extras in life is an entirely reasonable use of trust funds given the very minimal benefits that a person might receive by way of disability benefits, there is no evidence of either the cost or the usage of these various medications or treatment modalities.

[40] Kathryn makes extensive reference to her current living arrangements with the Housing Society and her wish to maintain her present accommodations in support of her application. Kathryn moved into her current residence after she returned to Vancouver from Vancouver Island when her mother was placed into long-term care. Her evidence is set out at paras. 18 to 21 of her first affidavit:

18. I currently live at City Heights, which is a subsidized housing development operated by More Than a Roof Mennonite Housing Society (the "Society").

19. One of the conditions of living at City Heights is that I must have an income below the limit of $58,000 annually. This amount includes interest from assets, imputed income based on the value of capital

> assets, Canada Pension Plan, Old Age Security, Guaranteed Income Supplement, and income assistance from government programs.
>
> 20. The Society bases its income and assets limit policies for residents at City Heights on BC Housing's Housing Provider Kit (in particular, the Rent Calculation Guide).
>
> 21. If I receive a direct distribution from my Mother's estate, it will jeopardize my disability benefits and my eligibility for social housing.

[41] She further describes her current living arrangements in paras. 37 to 41 of her second affidavit:

> 37. My current residence at City Heights is the first residence where I have been able to sleep and I feel safe.
>
> 38. City Heights is a senior's building. I live in a corner unit in the building at the end of a hall where sound is minimized. The location of City Heights is also important as it is in a quiet part of Vancouver.
>
> 39. I have looked into non-subsidized senior's housing, but have been informed that because of the housing shortage in British Columbia, the wait for a unit in a senior's building is approximately three years.
>
> 40. I am still only able to sleep approximately three hours per night because of the chronic pain and anxiety. It is critical that I live in a quiet building in a quiet environment.
>
> 41. In addition to City Heights being quiet, I feel supported by the staff and other residents.

[42] This evidence falls short of allowing the court to conclude that Kathryn will lose her housing if she receives her inheritance by way of a direct distribution. The evidence infers that this might happen, but it goes no further. For example, there is no evidence from the Housing Society that would allow the court to draw this conclusion. There is also no evidence that Kathryn would be entitled to keep her room at the Housing Society indefinitely, even if the trust were created. As an aside, I also note that this is an application by way of summary trial, and hearsay evidence is not admissible.

[43] I accept that Kathryn likes her current living arrangements. However, since she was not living there at the time her mother was placed into long-term care, the evidence of the current arrangements is of limited value in determining whether or not the deceased failed to satisfy her moral obligations to provide for Kathryn's

maintenance. It is also difficult to accept that a unit in a subsidized housing facility represents the only “quiet” accommodation in Vancouver.

[44] There are other weaknesses in the evidence. The evidence regarding the nature and extent of Kathryn's disabilities, her summary of the deleterious effects if she is no longer entitled to reside with the Housing Society, and of the potential harms should she receive her inheritance directly is limited to her self-report. There is also no evidence regarding whether the concerns of receiving the inheritance directly could be ameliorated, such as with a professional money manager.

[45] The proposed trust would allow Kathryn to instruct the trustee in writing as to what should happen to the remaining trust monies upon her death. In addition to a concern of potentially rendering Kathryn vulnerable to exploitation by an unscrupulous person aware of the trust, it is likely that absent any instructions from Kathryn, the funds would go to her siblings who will already have received their one-third share, while the taxpayers of the province will have paid for her maintenance and support. In the meantime, the trust may well have appreciated, there being no evidence to suggest that Kathryn’s expenses will exceed the expected return on the trust funds once invested.

[46] I recognize that circumstances would undoubtedly be very different if the estate were modest, such that a direct distribution would disentitle her from receiving benefits and supports in the short term, only to return to needing those supports in relatively short order once the modest distribution had been exhausted.

[47] In all of the circumstances here, based on the uncertainty as to the final value of Kathryn’s inheritance, and the other issues I have identified, I am unable to conclude that the deceased failed to make adequate provision for Kathryn’s proper maintenance and support. If Kathryn’s share of the estate provides her with sufficient funds to meet all of her needs and a great many of her wants, without resort to publicly funded disability benefits, the provisions of the will may be entirely appropriate. As McLachlin J. said in *Tataryn*, there may be more than one way for the testator to satisfy her moral obligations.

Disposition

[48] Kathryn's application to vary the will to include a *Henson* trust on this summary trial is dismissed. However, I give Kathryn leave to reapply pursuant to SCCR 9-7(16).

"Wilson J."